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Private law, public landscape: troubling the grid

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Private law, public landscape: troubling the grid

Abstract

Let me tell you a story about the relationship between law and landscape. This story has a protagonist (a lawyer) and a setting (landscape). The lawyer comes to the landscape laden with predispositions, viewpoints, culture. Most importantly, the lawyer stands before the landscape after having made two decisive, albeit difficult decisions. The first decision was to become a lawyer; the second, to orient herself, or to be oriented, before a particular landscape. Would it be a wild, uncultivated scene or an industrial centre? Would it be a slum or an affluent suburb? Would it be a business centre or a rural backwater? These decisions, in combination with the supposedly pre-determined properties of the personal, are understood to set the lawyer upon a particular path.

Private law, public landscape: troubling the grid

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The relation between what we see and what we know is never settled ... Our vision is continually active, continually holding things in a circle around itself, constituting what is present to us as we are ... The eye of the other combines with our own eye to make it fully credible that we are part of the visible world (Berger 1972: 7, 9).

1 Introduction

Let me tell you a story about the relationship between law and landscape. This story has a protagonist (a lawyer) and a setting (landscape). The lawyer comes to the landscape laden with predispositions, viewpoints, culture. Most importantly, the lawyer stands before the landscape after having made two decisive, albeit difficult decisions. The first decision was to become a lawyer; the second, to orient herself, or to be oriented, before a particular landscape. Would it be a wild, uncultivated scene or an industrial centre? Would it be a slum or an affluent suburb? Would it be a business centre or a rural backwater? These decisions, in combination with the supposedly pre-determined properties of the personal, are understood to set the lawyer upon a particular path.

From then on, having selected her landscape, the lawyer's task is to navigate that terrain along her assigned, lawyerly path. The landscape unfolds before her in stages, like a Poussin painting. It is a scene of

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ribald curves and slippery slopes. For the lawyer, it is scarred only by the linear route of the law. Now the law's path turns right, now left (these days, the lawyer steers a course as close to the centre of the path as possible). She wonders occasionally: 'Who built this path?' 'What tectonic shifts, what anonymous human labours shaped this landscape through which I travel?' Distracted, she stumbles, then quickly reminds herself to stay the course.

The path continues. At one point, it falls behind a rise and the lawyer finds herself in a space decreed private. At another point, the path opens into a public square. In each of these spaces, the role of the lawyer is to prune the pathway and gather findings. She must cultivate the opportunities presented by the landscape and respond to its challenges and threats. The path itself — the path of the law — strikes her as relatively narrow. From it, the lawyer gazes longingly at the open planes of the political, the bountiful fields of the economic, the crazed surfaces of the cultural and the serene oases of the natural. It is from these that she draws the inspiration to continue the journey. It is from the landscape that opportunities, questions and resources issue forth. It is the landscape that will decide the allocation of the fruits of her labours, and how bountiful they will be. The landscape tells her who she is and who she should become. The law merely lays out the path: the path between being and becoming.

Now, let me tell a different story about the relationship between law and landscape. Imagine our lawyer protagonist not as a viewer, nor as a pedestrian. Imagine her sodden, embedded, immersed. Picture the lawyer dragging her feet from glutinous mud and struggling to find a foothold — to mark the spot that says 'law'. Think of the building of her path as a sweaty, strenuous, unfinished work on which she labours alongside many. 'This spot,' she says, 'this spot will be sacred and I will call it my own.' 'Here, I will anchor the law.' But then as she places her boot, it touches not field but flesh: she stands on moving ground, the ground of another. 'Here,' she says, 'from this place I can see ahead'; 'now I have a clear line of vision.' But the line she draws is a circle; her progress is a return. 'Ahah,' she says, 'I am standing now at the starting point';

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‘this is the place from which we may begin’; ‘this is the commonplace’. But the commonplace is already scored and cross-hatched. It bears the markings of others who have been before and arrows that point elsewhere.

Prevailing accounts of the relationship between law and its landscapes — physical, social and ideational — tend, I argue, towards the first, more Poussin-esque of these allegorical scenes. The scholarship of ‘legal geography’ has tended to cast law as mediating a perpetual tug-of-war between the private and the public in spatial terms (see, for example, Blomley et al 2001). In some versions of this scholarship, the private is in ascendance; in others, the public is gaining the upper hand. In each case, law is depicted in the foreground, responding to technological, economic, social and political developments cast into the background as ‘social fact’ or otherwise.

According to some late 20th century writings, for instance, the expanding reach of ‘privatopia’ combined with the demise of the social welfare state has led to the gradual historical demise of ‘public man’ and the landscapes in which he flourished (Blakeley & Snyder 1997, McKenzie 1996, Sennett 1977). Today, such accounts maintain, a bountiful public is in retreat as borders tighten, possibilities for protest contract, and large urban assemblages from Berlin to New York are sapped of tax revenue (Larsen 1999). Law is understood to have contributed to this degradation of the public by promoting the naturalness of landscapes averse to social, racial, political and economic miscegenation (Frug 1999: 26–53). Legal efforts to preserve and prioritise the private (pastoral expanses, suburban vistas, isolated tax pools and so forth) have, it is said, hollowed out the state. There is a sense in such accounts that the momentum of a prevailing swing to the private is both driving and exceeding the law.

Elsewhere, however, contemporary scholarship offers a directly contrary account, casting a natural state of privacy, calm and security in a receding mode. The synthetic conditions of a disorderly, technocratic public encroach at ever-increasing speed. Law is either powerless to

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stop this encroachment, or is deliberately or unwittingly contributing to it. Free trade, for instance, imperils private, individualised notions of the neighbourly and the small-scale (Gillespie 2001, Howse & Trebilcock 1997). Walls — virtual and residential — prove permeable, law's labours notwithstanding, and privacy is under siege (Edwards 2003, Bennett & Raab 2003). Again, law is cast at once as respondent, rogue, and redeemer, with its performance in each role proving somehow insufficient. In this case, it is the public or the governmental that is seen to be both impelling the law and overwhelming it.

Socio-legal narratives of both these sorts are inclined to associate the physical integrity of space (whether public square or private cloister) with an elusive, retreating harmony. Both versions of the scholarship paraphrased above import a sense that law stands at a distance from a relatively discrete, non-legal background by which it is both informed and inspired. It is the thesis of this article that law and legal scholarship in common law jurisdictions maintain this sense of distance and integrity in part by adherence to a perspectival grid. The common law, this article will go on to argue, is imbued with a perspectival preoccupation in its reading of physical and social landscapes. That preoccupation — in law as in art — both enables and impedes its vision.

Seeking (momentarily) to scramble this perspectival vision, this article scrutinises its construction and effects through a focus on private law. In so doing, this article seeks to invert a further foreground/background dynamic — namely, that between private law, on one hand, and public policy on the other. The inquiry that follows emphasises the role that private law plays in the sorts of distributions and discriminations that are most frequently attributed to extra-judicial (background) determinants: government policy, corporate purchasing power or consumer choice. Instead, it will be argued here that distributive effects may be attributed to the structural or stylistic features of private law itself. These features are neither individually 'chosen' in any determinative sense, nor beyond legal question. A perspectival orientation facilitates private law's production of a spatial grid to which that law anchors itself, and from which it derives both its rational justification and its reformist goals. Perspective thus shapes the law

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and influences the direction of legal scholarship and law reform. It does so, moreover, in a way that is *itself* cast into the background of legal inquiry. This can be seen in the mundane and apparently settled legal terrain of private property ownership. In particular, it can be seen in the common law on the tort of nuisance.

Through a selective critique of (primarily Anglo-Australian) private nuisance law, this article will probe common lawyers' habitual experience of negotiating the social-physical landscape. As suggested above, that habitual experience involves charting a course by, and laying a mark upon, a pre-existing (albeit ever-changing) background of predisposition, potential and prejudice. In place of this experience, this article seeks to generate a sense of law always still at work in producing its own background: placing and replacing those markers by which the law orients and exonerates itself. More specifically, this article seeks to counter the notion of private property as settled ground: a space always already in the background to law reform debates; pre-negotiated and emptied of regulatory opportunity (on negotiating the non-negotiable, see Derrida 2002: 1–3, 11–40). In analysing the tort law of nuisance for its perspectival orientation, law may be glimpsed in a different relation to landscape to that which the perspectival grid ordinarily dictates.

With these objectives in view, Part 2 of this article will provide a brief explanation of common law principles concerning the tort of private nuisance. It will draw from English and Australian authorities to outline the basic principles of private nuisance, ignoring, for purposes of this article, jurisdictionally specific details and divergences. In view of the mismatched historical medley that comprises the law of nuisance across common law jurisdictions, this will necessarily be an approximate and incomplete account.

Part 3 will then explain this article's claim that the tort of nuisance is informed by a perspectival vision that structures its reading of social and physical landscapes. Drawing upon English, Australian and, to a lesser extent, US, Canadian and New Zealand authorities, illustrations will be given of how the common law of private nuisance enshrines a distinctly perspectival orientation. Once again, this discussion will downplay doctrinal variations across common law jurisdictions.

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Finally, in light of the preceding study, Part 4 will tender the following contention. The perspectival grid is a crucial element to be engaged in seeking to contest the current state of law-landscape relations in the common law, and the blindspots and distributive injustices to which those relations contribute. This article will close with a brief rumination on prospects for opening law's perspectival orientation to negotiation, within the law of private nuisance and elsewhere.

2 The common law of private nuisance: an overview

In order to scrutinise the common law of private nuisance for its perspectival predisposition, it is important first to grasp the basic tenets to which that law subscribes. In so doing, however, it is important to recognise that the complexity of nuisance law across the common law world far surpasses the following description. As one commentator has observed, '[t]here is perhaps no more impenetrable jungle in the entire law than that which surrounds the word "nuisance"' (Keeton et al 1984: 618).

In brief, a common law action for private nuisance arises from unreasonable interference with the use and enjoyment of land. More precisely, it arises from unreasonable interference with proprietary rights recognised as sufficient to found a cause of action in private nuisance. In other words, for a plaintiff to succeed in an action for private nuisance, the plaintiff must establish that: (a) the plaintiff has a requisite proprietary interest; and (b) the defendant has, by action or inaction, interfered with the plaintiff's use and enjoyment of that proprietary interest, which interference is unreasonable. The defendant may, in defence, either disprove one of the foregoing elements or contend that the nuisance has been rendered lawful by prescription or by statutory authorisation (Trindade & Cane 1999: 640–4, Fleming 1998: 488–92, Deakin et al 2003: 479–84, Heuston & Buckley 1996: 70–6). Let us now briefly consider each of the requisite elements of the tort.

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A Proprietary interest

In the 1997 case of *Hunter v Canary Wharf Ltd; Hunter v London Docklands Corporation* (hereinafter *Hunter*), Lord Goff of the English House of Lords stated that ‘it has for many years been regarded as settled law that a person who has no right in the land cannot sue in private nuisance’ (*Hunter*: 689). Private nuisance is intended to protect the freeholder, the tenant, the licensee with exclusive possession, and/or a party whose reversionary interest is damaged by the nuisance in question (*Hunter*: 692). In English law, exclusive *de facto* possession of affected land may also suffice to establish a right to sue for private nuisance (*Foster v Warblington Urban District Council, Paxhaven Holdings Ltd v Attorney-General, Hunter*: 688). Based on the 1976 authority of *Oldham v Lawson (No 1)*, and the *Restatement (2nd) of the Law of Torts*, respectively, this would appear to be the position in Australian and US law as well.

B Unreasonable interference

As a tort to property, the traditional realm of private nuisance was, in the words of one commentator, ‘the stinking privy, the urban hog-sty, the fouled or diverted stream, [and] the polluting chimney’ (Brenner 1975: 403). Faced with production of the pungent or the poisonous, the law of private nuisance has historically ‘dr[awn] the line around free use and enjoyment of land at that point where another’s use and enjoyment were impaired’ (Brenner 1975: 404). While the standards for adjudging actionable impairment might once have been described as ‘rural, agricultural and conservative’, the range of behaviours that have been held to amount to unreasonable interference with another’s use and enjoyment of land are now as varied as the circumstances of their invocation (Brenner 1975: 404, *Goldman v Hargrave*: 992, *Sedleigh-Denfield v O’Callaghan*: 364).

In English and Australian courts, noise, fumes, odours, vibrations, glare, dust, golf balls have all been found to constitute a nuisance actionable by those in possession of property in close proximity to the property from which they emanate. Interference emanating from one

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party's property may pose the risk of physical harm or it may be 'productive of sensible, personal discomfort' consisting of 'the personal inconvenience and interference with one's enjoyment, one's quiet, one's personal freedom, anything that discomposes or injuriously affects the senses or the nerves' (*St Helen's Smelting Company v Tipping*: 1486). Significantly, however, such interference need not take the form of physical entry onto property. Direct interferences fall under the rubric of trespass to land, rather than the tort of nuisance (Deakin et al 2003: 444–54, Heuston & Buckley 1996: 40–52).

The test that courts apply to an alleged nuisance is one of reasonableness. An interference with another's use and enjoyment of land will be judged unreasonable (and therefore actionable) where it exceeds the level of tolerance — 'give and take; live and let live' — that the law expects of people living in a populous society (*Bamford v Turnley*: 83–4). This standard is not to be set by the most fastidious or sensitive or those prone 'to dainty modes and habits of living'. Rather, it is to be determined (one oft-cited 1851 authority stated) 'according to plain and sober and simple notions among the ... people' (*Walter v Selfe*: 322, adopted in *Don Brass Foundry Pty Ltd v Stead*). Moreover, that which reasonableness is understood to require will depend upon the locality in which this assessment is to be made. Conduct that would be adjudged an actionable nuisance in an affluent, quiet, residential neighbourhood will not necessarily amount to such in a working class, industrial area (*Sturges v Bridgman*: 865, comparing Belgravia and Bermondsey, *Bamford v Turnley*: 79, comparing Grosvenor Square and Smithfield Market). The duration, timing and gravity of the interference will also be relevant to the assessment of an alleged nuisance, as may the purpose or utility of the activity in question (Trindade & Cane 1999: 632–4, Fleming 1998: 464–98, Deakin et al 2003: 465–6, 483, Heuston & Buckley 1996: 55–6).

The 'zoning function' of private nuisance law — its 'function of allocating activities to appropriate areas' through the characterisation of (un)reasonable behaviour in a manner particular to locality — has been recognised (Brenner 1975: 406). Nevertheless, judicial accounts of nuisance law tend to deflect attention away from its discretionary power

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to shape, rank and divide contemporary urban and suburban landscapes. Nuisance law's classifications of 'reasonable' and 'unreasonable' behaviours are not, it is said, attributable to the vagaries of aesthetic or value judgment, whether on the part of the plaintiffs or that of the judiciary (*McVittie v Bolton Corp*: 283, *Bathurst City Council v Saban (No 2)*: 206, *Coventry City Council v Cartwright*). Nor, the courts have frequently claimed, should these classifications be read as ventures in social engineering. Rather, nuisance law is said both to arise from, and be constrained by, that enduring, unarguable freedom consequent upon the ownership or lawful possession of property:

[T]he English common law allows the rights of a landowner to build as he [sic] pleases to be restricted only in carefully limited cases ... [W]e have a rule of common law which, absent easements, entitles an owner of land to build what he likes on his land. It has stood for many centuries (*Hunter*: 710).

Common law doctrines of private nuisance thus confirm the authority of property holders over the land to which their interest corresponds. Yet the law in this area also confers power upon such interest-holders to shape the landscape *surrounding* their properties by means other than acquisition. Through recourse to nuisance law, such interest-holders enjoy capacity legally to suppress behaviour impinging directly or indirectly upon their normality, thereby possessing authority to shape the landscape *beyond the bounds of their property*. The normality of the owner or other party deemed in control of land is quite literally grounded in the terrain of their proprietary interest, and extended outwards from that ground. The effect of this is to insulate such persons' power and preferences from the many contending claims and perceptions that might be put forward by those who pass through or share their landscape. The property holder's version of the reasonable may not be challenged by anyone other than a neighbouring property holder. In this respect, *perspective* plays a vital constitutive and validating role.

To what 'perspective' does the foregoing claim refer? The reference is to the modern representational scheme of linear perspective, a brief introduction to which now follows.

3 Perspective in private nuisance law

A On perspective

Conventional accounts of perspective in the modern period focus on *perspectiva artificialis* (as opposed to the *perspectiva naturalis* or *communis* of medieval texts) — a perspectival scheme linked to the scientific innovations of the Renaissance insofar as it purported to subject representation to the laws of optics. Such accounts tend also to focus on the innovations of a few named individuals: archetypal heroes of modernity. ‘According to the avatars of history’ wrote Hubert Damisch, ‘no sooner had Leone-Battista Alberti arrived in Florence in 1434 than he undertook to write *Della pittura*, his “art of painting” in three books, the first of which includes, under the heading *rudimenta*, an exposition of what we might call the *princeps* of rational perspective construction and rational *more geometrico*’ (1994: 59). Alongside Alberti stands Filippo di Ser Brunellescho (Brunelleschi) to whom the 1436 Italian edition of *Della pittura* was dedicated (1994: 59). Brunelleschi, Damisch observed, ‘is supposed to have put this perspective into practice, to have put it into action’ (1994: 67). So begins the standard story of the rise of modern perspective.

In Alberti’s *Della pittura*, an ‘excellent method’ was set out for ensuring that ‘objects in a painting ... appear like real objects’: a method that depended upon such objects ‘stand[ing] to each other in a determined relationship’ (1991: 56). That relationship relied, in turn, upon an anticipated distance between the eye of the spectator and the picture plane. Erwin Panofsky described the “perspectival” view of space’ invented at this time as a ‘transform[ation]’ of ‘[t]he material surface onto which individual figures or objects are drawn’ into a ‘window’ through which a spatial continuum is seen (1991: 27). ‘In a picture constructed this way,’ Panofsky explains, ‘the following laws are valid. First, all perpendiculars or “orthogonals” meet at the so-called central vanishing point, which is determined by the perpendicular drawn from the eye to the picture plane. Second, all parallels, in whatever direction they lie, have a common vanishing point ... Finally, equal dimensions diminish progressively as they recede in space, so that any portion of

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the picture — assuming that the location of the eye is known — is calculable from the preceding or following portion’ (1991: 28).

The effect of these ‘laws’ of perspective is, as Panofsky noted, to ‘create distance between human beings and things ... but then in turn [to] abolish this distance by, in a sense, drawing this world of things, an autonomous world confronting the individual, into the eye ... for these rules refer to the psychological and physical conditions of the visual impression, and the way they take effect is determined by the freely chosen position of a subjective “point of view”’ (1991: 67). Damisch elaborated further on the latter of these two effects — the role of perspective in both constituting and referencing a discrete, individualised human subjectivity identified with the ‘point of view’:

[Perspective’s] function seems to correspond perfectly to the function which is that of language, myth, and art, to say nothing of science: a function by no means specular, or passive, but rather constitutive, within the register of representation, of the order and even the meaning of things ... [i]ncluding ... the synthetic function identifiable with the *I*: the “I” which in this capacity must be inscribed, from the beginning, within the “point of view”, an idea that necessarily refers us back to that of the “subject” ... (1994: 9–10).

Perspective’s installation of the ‘subject’, Damisch demonstrated, always also entails the organisation of space according to notions of proximity to, and distance from, that subject — the demarcation of a ‘here’ and a ‘there’ and the delineation of particular ways of moving between them:

Perspective ... is not a code, but it has this in common with language, that in and by itself it institutes and constitutes itself under the auspices of a point, a factor analogous to the “subject” or “person” in language, always posited in relation to a “here” or “there”, accruing all the possibilities for movement from one position to another that this entails (1994: 53).

Damisch, however, disavowed the notion that perspective ‘reduces the viewing subject to a kind of cyclops, and obliges the eye to remain at one fixed, indivisible point’ (1994: 35). Rather, perspectival orientation around the gaze entails capture in, and movement through, a *double*

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vision: the vision of the one to whose gaze the image is referable and ‘a *complementary* vision, or another vision’ whereby the viewing subject is ‘seen from without as another would see [him/her], installed in the midst of the visible, in the process of considering it from a certain spot’ (Damisch 1994: 46, quoting Merleau-Ponty 1968: 134). Perspective ‘provides a means of staging this capture and of playing it out in a reflective mode’ (Damisch 1994: 46).

In these effects, the influence of perspectival orientation extends well beyond the realm of pictorial representation and visual experience. Perspective works not only, as Alberti’s text would suggest, ‘on painting’ (Cosgrove 1985). Rather, as the ground-breaking work of Hubert Damisch highlighted:

To say that our culture has been and continues to be shaped, informed, and programmed at bedrock level by the perspective paradigm is more than mere wordplay... Perspective has become so completely integrated into our knowledge, at the most implicit or unconscious level, that today we must turn to another kind of knowledge, erudite knowledge, and embark on an anamnestic project designed to recover it from the technological oblivion into which it has been plunged by ideology (Damisch 1994: 52).

Indeed, the ‘programming’ effects of perspective are often, Damisch observed, precisely *not* visible, notwithstanding their rootedness in the visual:

As a paradigm or regulatory structure, perspective is sometimes in operation precisely where one least expects it, where its intervention is least visible... its function extends ... [to] providing ... a network of indexes that constitutes ... the equivalent of an expressive apparatus or sentence structure ... (1994: 25).

This paradigmatic structure is borne out in the jurisprudence of private nuisance at common law.

B The landscape of private nuisance law

In assessing behaviour by reference to the outlook of an aggrieved property holder, nuisance law echoes perspective’s orientation around an individual viewing subject. Nuisance law similarly constructs an

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‘autonomous world’ of things and actions and draws this into a singular observational standpoint. From that standpoint, the world recedes towards a vanishing point in an even progression, such that the distancing of one thing from another within the picture plane is rendered unavoidable. The eye may only bridge that distance via predetermined, navigable paths: by tracing those parallels that organise and fix the perspectival sense of place so that ‘any portion of the picture ... is calculable from the preceding or following portion’ (Panofsky 1991: 28).

One may discern such a perspectival structure in the 1981 English case of *Laws v Florinplace Ltd* (hereinafter *Laws*). The plaintiffs in *Laws*, who were residents of Longmoore Street, Pimlico, in London, sought an interlocutory injunction to restrain the continued operation of a shop selling pornographic magazines, books and videos. That injunction was granted upon a finding that there was at least a ‘triable issue’ that the operation of a sex shop amounted to ‘such an affront to the reasonable susceptibilities of ordinary men and women’ that it constituted ‘an interference with the reasonable domestic enjoyment of [the plaintiffs’] property’ (*Laws*: 666–7). Vinelott J set the scene as follows:

Longmoore Street is a residential street in Pimlico, about a quarter of a mile or a little more from Victoria Station. It bisects a busy road, Wilton Road, which runs south-east from the station. If a visitor continues south-east down Wilton Road after the intersection with Longmoore Street he will reach, after a distance of some fifty to a hundred yards, another main road, Warwick Way, which again crosses and marks the end of Wilton Road. Retracing his footsteps and crossing again the intersection with Longmoore Street he will reach after a longer distance, some three or four hundred yards, another intersection called Gillingham Street. The part of Wilton Road which lies between Gillingham Street and Longmoore Street consists almost wholly of commercial properties of one kind or another, which serve to some extent the casual trade of people coming to and from the station ... But the part of Longmoore Street which lies to the south-west side of Wilton Road is almost wholly residential. The houses are small terrace houses, built a hundred years ago for artisans (*Laws*: 666).

By so framing the area under consideration, Vinelott J went a considerable way towards deciding the outcome of *Laws*, even before

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his evaluation of the parties' substantive arguments got underway. For the character of the area was critical to the determination of what amounted to reasonable enjoyment of property in the vicinity:

Mr Laws, a barrister who lives there and who is the first-named plaintiff, has described this area, that is, the bottom half of Longmoore Street and the part of Wilton Road which lies between Longmoore Street and Warwick Way, as having a marked and attractive village atmosphere. That description is disputed by the defendants, who point to the proximity of Victoria Station, to the commercial nature of the part of Wilton Road which lies between Longmoore Street and Victoria Station, and more particularly to the existence on the north-east side of Wilton Road, near the intersection of Gillingham Street, of a bookshop described as an 'adult bookshop'... and to the existence on the other side of Gillingham Street of a cinema which, it is said, displays films of the kind often described as 'soft pornography' and of a shop described as a 'sex shop' (*Laws*: 667).

By envisaging the area from the perspective of a single pedestrian, beginning at the intersection of Longmoore Street and Wilton Road and walking first south-east and north-west along Wilton Road, and then south-west down Longmoore Street, Vinelott J rendered natural a focus on the bottom half of Longmoore Street, and its distinction from the rest of the area described. Had the imagined spectator been given a bird's eye view, for instance, it might have seemed unreasonable to characterise 'the bottom half of Longmoore Street and the part of Wilton Road which lies between Longmoore Street and Warwick Way', as distinct from the surrounding area. Similarly, had this hypothetical viewer not begun his/her perambulations on the busy thoroughfare of Wilton Road, the above-mentioned area might have not seemed so quiet and village-like in comparison. Vinelott J's positioning of the 'eye' in this case thus established the perspectival 'sentence structure' (per Damisch) through which the landscape under survey was comprehended. Vinelott J's selection of this point of view ensured that the 'small terrace houses' of Longmoore Street came to comprise a 'here' and the commercial properties, adult bookshop, cinema and sex shop of Wilton Road comprised a 'there', with the rights of the respective parties calibrated accordingly.

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By fashioning the landscape in this way, the people who frequented it were likewise divided. They became, respectively, the decent and the indecent, with each of the two constituencies occupying a relatively discrete location within the spatial continuum. Their separation was rendered as natural and proper, in this account, as a perspectival relationship between the near and the far. Accordingly, Vinelott J accepted the following submissions from the plaintiffs:

Counsel for the plaintiffs put his case on two broad grounds. First, he submitted that the existence of a business of this kind, selling hard pornography, and selling it in such a way that the nature of the business would be apparent to those living in or visiting the area, is itself a nuisance, because the instinctive repugnance that would be felt by ordinary decent men and women, and the embarrassment that would be felt by visitors, would in itself constitute a material and unreasonable interference with the comfort and enjoyment of their property. Second, he said that the nature of the business was such that the plaintiffs are justified in fearing that it may become a plague spot, attracting undesirable customers, and with them others, such as prostitutes, who trade on those customers, and in turn, criminals trading on the prostitutes. Further, some of the customers, it is suggested, may be of a kind who might molest young girls with indecent suggestions (*Laws*: 667).

C The law and its backgrounds (part I): economics

Even where courts do not engage so explicitly in setting out the visual panorama of a case, it is possible to discern certain routine operations by which a particular decision in one or other case is made to appear logically defensible, sometimes even unavoidable. These are operations in which perspectival structure is at work. That is, these operations betray an unthinking adherence to a particular ‘viewpoint’ and a prescribed set of spatial relations flowing from that viewpoint. One such operation involves the distancing of law from the sphere of economics (specifically, the economics of proprietary value). A second entails the distancing of law from the sphere of the aesthetic (the realm of personal idiosyncrasy or ‘mere’ taste).

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The first of these operations is discernible in the requirement that legal constraint under the doctrine of private nuisance be justified by reference to ‘injury’ to a proprietary interest. Injury, in this context, is understood as a loss in the value of that property, whether its capital value or its amenity value (*Hunter*: 696). A nuisance will only be actionable where such a decline in property value is shown to arise from the alleged tortfeasor’s unreasonable interference (see, for example, *St Pierre v Ontario*). An oft-cited statement to this effect is that of the Lord Chancellor in *St Helen’s Smelting Company v Tipping*:

If a man lives in a street where there are numerous shops, and a shop is opened next door to him, which is carried on in a fair and reasonable way, he has no ground for complaint, because to himself individually there may arise much discomfort from the trade carried on in that shop. But when an occupation is carried on by one person in the neighbourhood of another, and the result of that trade, or occupation, or business, is a *material injury to property*, then there unquestionably arises a very different consideration. I think, my Lords, that in a case of that description, the submission which is required from persons living in society to that amount of discomfort which may be necessary for the legitimate and free exercise of the trade of their neighbours, would not apply to circumstances the immediate result of which is sensible *injury to the value of the property* (emphasis added) (*St Helen’s*: 650).

Framing nuisance in these terms collapses assessment of the parties’ contending claims into the logic of the quantitative: a logic that is distinguished from and, to a significant degree, insulated from legal question. The assessment of value and the finding that value has diminished are understood to be matters of *non-legal* expertise. Typically, expert opinions are taken on these issues from real estate agents and land valuers (see, for example, *Hawkes Bay Protein Ltd v Davidson*, *Vukelic v Hammersmith and Fulham London Borough Council*). This non-legal sphere of quantitative evaluation falls into the background of the legal dispute and yet remains integral to it. So, in *Hunter*, Lord Lloyd commented:

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[T]he essence of private nuisance is easy enough to identify, and it is the same in all three classes of private nuisance, namely, interference with land or the enjoyment of land. In the case of [nuisance by encroachment on a neighbour's land or nuisance by direct physical injury to a neighbour's land,] the measure of damages is, as I have said, the diminution in the value of the land. Exactly the same should be true of [nuisance by interference with a neighbour's quiet enjoyment of his land]. There is no difference of principle. The effect of smoke from a neighbouring factory is to reduce the value of the land. There may be no diminution in the market value. But there will certainly be loss of amenity value so long as the nuisance lasts. If that be the right approach, then the reduction in amenity value is the same whether the land is occupied by the family man or the bachelor (*Hunter*: 696).

The demand that the plaintiff show a decline in property value casts into the background of a legal dispute the question of how to characterise and rank the various harms said to have been caused by an alleged nuisance, and the various ways in which supposedly offensive conduct may be experienced by different people. Instead, valuation takes place, at least in part, in a conceptual (or literal) back room to a nuisance claim. The constituent elements of that valuation are presented to the court as 'facts', the strength of which depends more on the perceived veracity and expertise of the non-legal valuers than upon the substance of the claims underpinning them.

Recourse to the quantitative 'background' of property value is, moreover, understood to distance the law from the vagaries of individual personality or prejudice. Speaking for the Ontario Court of Appeal in *Hollick v City of Toronto* (while refusing to certify a class action in nuisance involving 30,000 plaintiffs residing in a 16 square mile area), Carthy JA observed, for instance:

[C]omplaints of odours are by their nature subjective and thus would have to be individually assessed in order to ascertain whether emissions from the respondent's site had materially affected each class member's enjoyment of property ... (*Hollick v City of Toronto*: 267).

The invocation of proprietary value, and the anchorage to that value of a particular legal decision (that is, whether a nuisance is found to

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have arisen), thus circumscribes an inquiry that might otherwise veer off in a number of directions. Legal inquiry might otherwise include scrutiny of injury-causing behaviour by virtue of which property interests had come to rest in the hands of the property holder(s) in question. It might also involve consideration of the competing claims of property-holders and non-property-owning occupants alike, and of the relationships between them. Yet the commodity value of property, as Marx recognised in the 19th century, exerts a talismanic force that forestalls such investigations, ranking the property-holder's comfort and interests above all others'. By its very nature, recourse to the commodity (in this case property) blocks examination or disruption of the social relationships necessary to its production and recognition as a value-bearing thing (Marx 1919: I: 81).

The invisibility of social relations in the assessment of property value is evident in nuisance law's inattention to residents or routine occupants of the property said to have been injured, where those residents or occupants possess no recognised proprietary interest. *Hunter* confirmed, for instance, that private nuisance does not permit suit by 'husbands ... wives, or partners [of the holder of a proprietary interest], and their children, and even other relatives living with them' (*Hunter*: 693). Similarly, in *Hunter*, Lord Goff refused to contemplate extending a right of suit in nuisance to 'the lodger upstairs, or the au pair girl or resident nurse caring for an invalid who makes her home in the house while she works [on the property in question]'. 'The extension of the tort in this way would,' Lord Goff opined, 'transform it from a tort to land into a tort to the person' (*Hunter*: 693).

It is critical to the law of private nuisance that it concerns a wrong done to a proprietary right, which right is understood to exist independently of the sensibilities, status or social circumstances of the aggrieved person who holds it. However, the sensibilities of an aggrieved person *do* form a legitimate basis for a nuisance action when injury thereto may be expressed as diminished enjoyment of a proprietary interest. No matter how much a non-property-holding person may suffer as a result of an interference affecting the property where s/he lives,

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that person's discomfort will fail to register as the basis for a nuisance action. In contrast, the landowner's 'sensible, personal discomfort' is readily translated into terms of an injury to property, as Lord Hoffman's reasoning in *Hunter* demonstrated:

In the case of nuisances 'productive of sensible personal discomfort,' the action is not for causing discomfort to the person but, as in the case of the first category, for causing injury to the land. True it is that the land has not suffered 'sensible' injury, but its utility has been diminished by the existence of the nuisance. It is for an unlawful threat to the utility of his land that the possessor or occupier is entitled to an injunction and it is for the diminution in such utility that he is entitled to compensation (*Hunter*: 706).

The routine distancing of issues amenable to *legal* deduction from questions of proprietary value helps to render non-negotiable this prioritisation of the sensibilities and sufferings of property holders over those of other people who live with or near them. This distancing relies upon a distinctly perspectival outlook. The common law divides the landscape of a nuisance claim into a series of legal and non-legal planes and casts that division as an autonomous order of nature. In so doing, it determines what is proximate (and open to discussion) and what is remote (and non-negotiable), thereby circumscribing 'the possibilities for movement from one position to another' (Damisch 1994: 53).

D The law and its backgrounds (part II): aesthetics

The second operation — in many ways comparable to the first — entails the separation of questions of taste from questions of law in nuisance claims (see generally Coletta 1987 and Smith 2000). Taste is, in this account, the sphere of personality, particularity and instinct. This is a sphere supposedly saturated with subjectivity. By distancing law's understanding of property's 'ordinary' uses and purposes from a sphere so characterised, those ordinary uses and purposes are stiffened with a sense of inevitability or commonality. In this way, the suppression of activities not decreed 'ordinary' is cleansed of partisanship.

This effect was discernible in the Missouri Court of Appeals' determination, in *Ness v Albert* (hereinafter *Ness*), that a would-be

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nuisance suit failed to state a cause of action. The plaintiffs in *Ness* alleged that the presence of certain ‘rusted objects’, pieces of concrete, parts of old sinks and stoves, and a partially burned house trailer on the defendant’s property was ‘unsightly’ and ‘thus constitute[d] a nuisance’. Dismissing the suit, the court ruled that nuisance actions could not be based solely on aesthetic considerations. By rejecting a nuisance suit so framed, the court in *Ness* reinforced a sense of itself as a decision-making body free of bias:

Aesthetic considerations are fraught with subjectivity. One man’s pleasure may be another man’s perturbation, and vice versa. What is aesthetically pleasing to one may totally displease another — ‘beauty is in the eye of the beholder’. Judicial forays into such a nebulous area would be chaotic. Any imaginary good from doing so is far outweighed by the lurking danger of unduly circumscribing inherent rights of ownership of property and grossly intimidating their lawful exercise. This court has no inclination to knowingly infuse the law with such rampant uncertainty (*Ness*: 2).

The Colorado Court of Appeals sought to adopt a similar posture in *Allison v Smith* (hereinafter *Allison*):

To constitute a nuisance, it is not enough that a thing such as accumulated debris and rubbish be unsightly or that it offend one’s aesthetic sense (*Allison*: 794).

That court, however, went on to find that the defendant’s accumulation of ‘inoperable automobiles, large rigs, a bulldozer, tons of scrap metal, pipe, new and used construction materials, drums of petrochemicals, large amounts of everyday litter and rubbish, and other “obnoxious debris”’ on property adjoining the plaintiffs’ *did* amount to a private nuisance. It did so by setting the question of unreasonableness apart from the question of ‘mere unsightliness’. The court characterised its decision as one not based on ‘aesthetic sense’, but rather based on a finding that the ‘questioned activity [was] [un]reasonable under all the surrounding circumstances’ (*Allison*: 794). In so doing, the court relied on the separability of matters of law and reason from matters of aesthetics, associating itself insistently with the former:

[L]egitimate but unsightly activity such as the accumulation of debris on land or the operation of a junkyard or auto salvage business may become a

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private nuisance if it is unreasonably operated so as to be unduly offensive to its neighbors, particularly when it is located in a residential district (*Allison*: 794).

In *Allison*, the court's ability to condemn particular activity as a nuisance hinged upon its capacity first to identify a singular, ideal standpoint from which to view that activity, and second to strip that ideal spectator's position of personalising preferences. The locus which the court attributed to itself for this purpose was that of the property holder(s) against whom the nuisance was alleged to have been committed. Were the property holder in question understood to be viewing the alleged nuisance through the lens of personal aesthetics, the intolerability of the alleged nuisance would have carried no credence with the court (as in *Ness*). Yet where the alleged nuisance was viewed in such a way as to imbue that viewpoint with the universalising properties of reason, its offensiveness was understood to merit the court's censure (as in *Allison*).

It is the regulatory paradigm of perspective that enables this latter form of seeing: that lays claim to a shared reality while emanating from the standpoint of a single viewer. For it is the perspectival grid, with its parallels converging on a single vanishing point, that draws the singular into the common, investing the viewing individual with the omnipotence of the rational or scientific. That which might otherwise appear as a singular vantage point becomes 'reality' by virtue of its adherence to certain mathematical laws. The space of the viewing subject is thereby made to merge seamlessly and methodically with the spatial continuum of the visible world.

A perspectival mode of representation asks that the outlook and interests of the *private property holder* be taken as the outlook and interests of *all* by virtue of the former's inherent 'reasonableness'. Perspective constitutes a tangled melange of public and private from which neither can be extricated cleanly (on the intermingling of public and private within property law, see Hennigan 2004: 197–8). Private property gains, through the operation of perspective, an encompassing, public dimension:

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Just as there is no private property in language, there is none in perception: the very idea of a 'perspective' contradicts such a notion (Damisch 1994: 34).

Nuisance law's capacity to proscribe certain behaviours with relative impunity on the basis of their 'unreasonableness' thus depends, in part, on that law's positioning itself at a distance from the realms of value quantification and personal fancy. On one hand, the legal assessment of nuisance piggybacks on the dryness, impartiality and relative opacity of property valuation. On the other hand, the legal calculus of nuisance becomes invested with a sense of neutrality and commonality by virtue of its distance from the avowedly subjective domain of taste. By repeated invocation of these distancing relations, courts are inured to protect landed plaintiffs against 'sensible personal discomfort' without being regarded as prejudicial arbiters among conflicting tastes. These relations, in turn, depend upon a divided, repetitive ordering of space that may be traced to the paradigm of perspective. Yet just as law's perspectival inflection makes possible the legitimising strategies described above, so the perspectival dimension of nuisance law submerges the property holder in an endless cycle of social exchanges: exchanges that are bound up in the act of seeing and being seen (Berger 1972: 9). Perspective insulates law, but it also immerses it.

E The law-landscape connection

Through recourse to planar distinctions such as those discussed in the preceding section, law champions and safeguards a particular type of landscape — above all, a divisible landscape. From this landscape, the law then derives reassurance of its own rectitude. For, despite its preoccupation with the separation of law from economics and aesthetics, private nuisance law is heavily invested in the notion that certain landscapes are determinative of positive ethico-political and/or material outcomes. The law of private nuisance works affirmatively, for example, to separate industrial and suburban landscapes (or the division of 'workplace' from 'home'). In *Dennis v Ministry of Defence*, for instance, the fact that the neighbourhood in which the alleged nuisance took

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place was ‘essentially rural’ meant that the noise caused by the overflights of military aircraft amounted to a nuisance in such an area. By implication, had the plaintiffs resided in a landscape where military and/or industrial operations featured prominently, they might not have been successful. Nuisance law favours the preservation of single use landscapes through the designation of the ‘essential’ character of a neighbourhood. The conferral of this character is almost invariably understood to precede the law’s own characterisation thereof.

The law of private nuisance thus reinforces the naturalness (or reasonableness) of a landscape divided into relatively discrete parcels by reference to ownership, residence, usage and/or occupation. Nuisance law then justifies its own properties by reference to that landscape. Landscape, organised into separable planes or units (locality, street, neighbourhood etc), is understood to lay out the pre-existing terrain that law must strive to entrench. Yet law is, at the same time, envisioning and rendering that landscape according to a particular model. Consider, for example, the emphasis placed on an individual belonging to a single, confined locality, to the exclusion of others from outside that locality, in *St Helen’s Smelting Company v Tipping*:

If a man lives in a *town*, it is necessary that he should subject himself to the consequences of those operations of trade which may be carried on *in his immediate locality*, which are actually necessary for trade and commerce, and also for the enjoyment of property, and for the benefit of the inhabitants of the town and of the public at large. If a man lives in a *street* where there are numerous shops, and a shop is opened next door to him, which is carried on in a fair and reasonable way, he has no ground for complaint, because to himself individually there may arise much discomfort from the trade carried on in that shop. But when an occupation is carried on *by one person in the neighbourhood of another*, and the result of that trade, or occupation, or business, is a material injury to property, then there unquestionably arises a very different consideration. I think, my Lords, that in a case of that description, the submission which is required from persons living in society to that amount of discomfort which may be necessary for the legitimate and free exercise of the trade of *their neighbours*, would not apply to circumstances the immediate result of which is sensible injury to the value of the property (emphasis added) (*St Helen’s*: 650).

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Nuisance law thus propagates the expectation that the ‘right’ (divisible) landscapes and the ‘right’ (predictable) laws are determinatively, if imprecisely linked, even as they are understood to stand apart from one another. Laws characterised by consistency, uniformity and navigability are often understood to be conducive to the realisation of freedom and prosperity: first, by their deference to the ‘certainty’ of proprietary interests; second, by their promotion of ‘reasonableness’ and hence their suppression of societal conflict. So too does the law of nuisance favour a landscape in which space is measurable, divisible and navigable. The one, it seems, engenders the other. Renderings of law and landscape come to emulate one another, even as they are understood to be made of entirely different stuff. As Damisch observed, perspective captures the viewer in a double vision: looking, while watching herself looking. Likewise, the law looks to the landscape for the very properties that it seeks to engender in itself.

This self-fulfilling law-landscape relation persists, rather counter-intuitively, in reformist literature concerned to disrupt socio-economic disparity and racial segregation. Margalynne Armstrong, for example, focuses on the effect of ‘irrational ... white perceptions about the effect of black ownership on property values’ in her discussion of the entrenchment of spatial segregation in the United States (1998: 1054). In Armstrong’s account, the background of residential segregation is comprised of social, psychological and economic elements, from which the law stands apart. Law is called upon to work against and upon this bias-sodden background. Ideally, law must rid itself of the taint of this background irrationality in order for the progressive vision of an integrated spatial continuum to be realised in landscape. Yet law is, in Armstrong’s judgment, ultimately unable to penetrate the background before which it works:

The problem of white withdrawal from the market due to property owned by African-Americans and the resulting intransigence of residential segregation reflects fear, ignorance, and bad faith involving social, psychological, and economic factors. The past thirty years show us that law acting alone cannot eliminate segregation. Expanded integration and African-American market equality will require interdisciplinary strategies that include, but go beyond, simply legal solutions (1998: 1063).

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In Armstrong's article, as in the work of many progressive legal scholars, '[s]pace is *implicitly* understood to be the inert context *in* which, or the deadened material *over* which, legal disputes take place' (Ford 1994: 1857 (emphasis in original)). In both respects, this understanding depends upon the perspectival detachment of foreground from background.

If a law-landscape connection along a perspectival axis is a feature of the very juridical common sense that much reformist literature is concerned to change, then it seems rather surprising that a perspectival orientation is so readily (and silently) accepted in that literature. In accepting the perspectival set-ups that the law poses, one begins one's law reform conversation at the *end* of a negotiation. The reformer who looks to the background of 'context' or the 'interdisciplinary' for answers already accepts that these backgrounds are neatly and necessarily separable from their legal foreground. S/he aspires, perhaps, to stand where the sovereign would stand: in a space outside the messiness of the social, where one knows oneself to be working on the side of the good. However, to tackle bias embedded in the commonplaces of law-landscape, I would argue, one gains much from beginning at one or other place of impurity: points where public/private, law/landscape, authentic/inauthentic, power/freedom, law/non-law and related distinctions break down, corroding the smooth glaze of that which presents itself as non-negotiable. As I have sought to show, the tort of private nuisance may be one such starting point, among many.

4 Final thoughts: prospects for troubling the grid

David Delaney has observed, in relation to legal understandings of 'nature', that '[o]ften, to theorize the legal is to draw boundaries around it, to mark its limits, to distinguish the interior of law from the extra-legal ... 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' (2001:

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78). The common law of nuisance, this article has sought to demonstrate, depends on such operations for the production of its own legitimacy.

Nuisance law relies, for its legitimacy, upon the capacity (and propensity) of law to separate itself from the ‘ground’ of economics and aesthetics. It relies too (as much legal scholarship does) on the construction of a ‘private’ domain (of law, property, subjectivity etc) repeatedly set apart from the ‘public’ domain of policy argumentation and resource allocation. The production of these scenes in turn depends upon the adherence, by readers and writers of legal texts, to a perspectival orientation. That orientation permits the naturalisation of ‘conceptual or analytical distance between “law, properly speaking,” and its mere contexts’ as reality. Perspective engenders individualisation and monopolisation of the act of seeing within law and fosters the predominance of an associated subjectivity.

Against this outlook, this article has suggested possibilities for reading private law generally, and nuisance law in particular, as an area of law where significant and politically controversial decisions are taken regarding the constitution of polities, the shaping of landscapes physical and social, and the allocation of power across them. Moreover, the mode of reading enacted in this article — reading the surfaces of nuisance law for pattern and predisposition — resists the layering of law into legal and non-legal or private and public planes, with the latter serving as a determinative underlay. Instead, this article has sought to suggest, the architectural make-up of law (or, per Damisch, its ‘sentence structure’) remains ripe for critical engagement by those concerned about law’s role in concentrating power and resources in relatively few hands. A key element of this make-up is the perspectival grid through which prevailing legal ‘ways of seeing’ are structured (Berger 1972). Law-landscape relations within the common law cannot be comprehended except by reference to this ‘paradigm’ (Damisch 1994). More importantly for those engaged in critical projects of various stripes, law-landscape relations within the common law cannot effectively be disrupted without tackling this perspectival programming.

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Rich potential for critical questioning lies within law's perspectival 'program'. For, as noted above, embedded within that program is all the messiness of social exchange: The individual viewpoint that perspective works to ensconce within legal understandings of landscape is always unsettled and in the course of reciprocal articulation. The interests and outlook of the private property holder may be entrenched through the operation of law's perspectival grid, but that grid also necessitates an engagement with the viewing actions of others. Perspective enthrones the viewing subject only insofar as the viewer knows herself to be seen. Accordingly, far from standing before a background of social context, law *contains* the stuff of the social. Far from detaching itself from a collective background, private law is a publicly negotiated and publicly negotiable artefact. Recalling this may be a first step towards questioning the political imperviousness of contemporary private law and the particular interests that it serves.

More than a decade ago, Damisch proposed an 'anamnestic project designed to recover [perspective] from the technological oblivion into which it has been plunged' (1994: 52). Law too now languishes in a technical limbo, forever the chorus to a 'contextual' (read social or economic or aesthetic) main act. Perhaps, then, there is occasion for an anamnestic project directed at both legal and perspectival technologies: a concerted forgetting of law-landscape in a perspectival mode, so that new set-ups might be tried and new windows opened. Before law's landscapes, '[t]he central question [might] then become how — under what conditions, with what consequences — they are made up' (Delaney 2001: 107).

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