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## How Strange the Change from Major to Minor

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### Abstract

The lines from a Noel Coward song provide the appropriately melancholic and suitably ambiguous title to an excavation of the ontology of the minor. Associated theologically with the abrogation of all law, the minor is the child, play, the modal chord that challenges, subverts and displaces the certainty of the major key and black letter law. A minor jurisprudence is argued here to be a lifestyle that challenges the extant legal form of office, the establishment as doctrine, the stasis and complacency of the institution.

## How Strange the Change from Major to Minor

Peter Goodrich\*

The celebrated *Wits* of the MISCELLENARIAN Race, the *Essay-Writers*, *casual Discourers*, *Reflection-Coiners*, *Meditation-Founders* and others of the irregular kind of Writers may plead as their particular Advantage 'That they follow the *Variety* of NATURE' (Shaftesbury 1714: 95).<sup>1</sup>

An essay on the minor ought to be short, and yet I hope to fail in that as well. My argument will be that minor jurisprudences are in the best of senses lifestyles, existential modes of inhabiting institutional space, and that they entail an open, plural and expansive thinking. The rumination of evoking minorist positions takes patience, care, time. So start with a non-definition. The goal of a minor jurisprudence is to cut holes in the fabric of law. The minor, aligned to the peripheral, the marginal and modal affect in music, if authentic, has to create a site of temporary evacuation, by which I mean an avenue of withdrawal and return, of exchange, and thereby the expression of a novelty in the putatively closed skein of legal rules. It is necessary to tear the seamless web. To break the strands that trap and hold the imagination in the dead zone of a sticky and immobile *lex*, the iron cage of a putatively comprehensive rule, decision, or other major mode of code. The minor rends, and thence performs a rendering through which the excluded, the others of law, the laws of others, and in methodological terms the peripheral passions, enthusiasms, tones and relationships, movements

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and moods, potentially intervene as critique in law. What is sought is precisely the transitivity of fabrication, the event of spinning the web, the practice of making, the invention of the strands that bind and leave adrift. There is the goal, the future of the minor, in its alternation of the major mode, in the past that was discarded, the practices that were denied, the strangers who were kept out. It is necessary first to step back, to withdraw a bit, to subtract from, to find a space and so assess the connotations of a minor jurisprudence through the concept of its minority.

From the Latin *minus*, minor is smaller, or less, the equivalent of *parvus*. In transitive mode, *minuo*, means to make smaller, to subtract from, but intriguingly the primary meaning in medieval Latin is Franciscan Friar, *frater minor*, while *minorissa* refers to a nun, a minoress, and by extension to humiliation – *minorativus* and so an exclusion, a diminution and dismissal. Finally, *minoritas* means under age, preceding majority.<sup>2</sup> It is the latter juristic meaning that is listed, for instance, in the *Manipulus vocabulorum* (Levins 1567: 110.8). The lesser, the minor, is attached to the major and as Partridge excavates the etymology, it complements *magister*, from *magis*, and thus minister from *minor*, as someone who assists in governing ‘a religious cult, a public office, finally one at the head of a political department – cf “minister of religion” or “of the Crown” (958: 406). The trajectory of the minor, at least linguistically, is towards the major, the *magister* (the magistrate) but not the *maximus* because sovereign, state or *hieros* is that from which the lesser, the servant, the official in his *officium* is subtracted and placed. In another variation, *ministerialis* also leads from public official to minstrel and minstrelsy, the music of office, the tone of governance, the rhythm of decision. In musical theory the minor mode was attached most usually to a softer and more melancholic tone, to *cantus mollis* and by extension, if it is a minor jurisprudence, to *ius mollis*. The beige and brown tones of the Franciscan *frater minor*, who has given up all possessions and all temporal law, who is happy to be less than, and withdrawn from, can be heard reflected in the affect of the minor modality and keys (Lester 1989).

It is in that crucible of theologico-juridical meanings that the potentiality of minority subsists in the present possibility of taking away from, abrogating, suspending, unfinished. To the monumental quality of hierarchy, and to the musical mode of *durus*, the affect of a harsh and inflexible tone, the minor counterposes a modest movement within law, away from law, in the resuscitation of lesser writings, a legal scholarship with passion and, to coin a term, a jurisprudence of *minumenta*. The term, to be precise, is found in a writ of commission in William West's *Symbolography* and references a list of diverse testimonies and written proofs of ownership (1601: 192 verso).<sup>3</sup> The glossographer and barrister Thomas Blount lists *miniments* as the evidences of all kinds of writings in the legitimation of legal title, and I would add, now, much later, in the making of a juristic point, in the advocacy of the minor, of the rend, and of the open (1670: s.v. miniments).<sup>4</sup> The minor is the crack in the edifice, the fissure in discourse, a site of incompatibility and novelty that Foucault more patulously termed the diffraction of discourse.

Oh to go back, to break the self, to collide with an autobiography, mine or another, or better a collective autogeny, a generic bios that writes, that is thought.<sup>5</sup> So I will not retrace my own minor path, the tracks of the traceless. I have inhabited the minorist office in my own way, in the space of my idiosyncratic fabulations. I have laughed at, with, against, and as the law. So where else, where new to start? What minstrelsy of beginning, what minor chord will please the horde? The answer, for me in my withdrawal, at the point of opening, seems to be in childhood, in minority as subtraction from, going back, withdrawing so as to redraw, to begin again, to act differently. The technique is that of *destruam et aedificabo*, translated into method as the deliberation on a minor past, a past of minority, and its erasure by the affects and forms of my major modality. Common lawyers have their inverted version of this genre of approach expressed in various versions of the maxim *in majore summa continentur minor* – the greater contains the lesser, the major includes, absorbs and governs the minor (Coke: 1611, 5:15). The principle has a secondary and more directly political expression in the maxim *in praesentia majoris potestatis, minor potestas cessat* – in the presence of a greater power, the lesser power ceases. The higher office

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carries with it the minor – *magus dignum trahit ad se minus dignum* (Coke 1629: 43). In all of these maxims, and the list could be lengthily expanded, the red letter type prolonged, the logic is one of subsumption and subordination, the minor is included in the major, the lesser is of significance only in becoming part of the greater but is nothing of itself, a point made poetically and *in extremis*, in the familiar and extant legal maxim *de minimis non curat lex*, which reads most usually as trifles, affects, little things, unusual acts that can be ignored as lacking legal legitimacy, as not being ‘acts in law’.

The consequence of this logic of the greater, of the major premise, is that the minor is included in the mode of exclusion. The *ex-ceptio*, the exception in Agamben’s lengthy elaboration is the invariant strategy whereby ‘something is divided, excluded, pushed to the bottom, and precisely through this exclusion, it is included as *archè* and foundation’. (2015: 264) It is thus not simply that the numerically superior is preferred but that the minor has neither jurisdiction nor status in the common law tradition: a minor cannot agree, cannot hold property, cannot govern, or act as a guardian, and is not to be believed when giving evidence without corroboration. Technically the minor is *alieni iuris*, in law but out of law as being in the power of another. Such is the view of the minor from the perspective of the major, its inclusive exclusion being predicated upon the tutelary status of the origin as juvenile, as lacking reason and capacity, as mere fact, inchoate, nascent and as yet, not yet. The initial feature of the minor is thus relational, what used to be termed dialectical, and resiles upon a looking back, a perspective constituted by and in relation to the major and thence the maximal as sovereign and sacred.

Minority, and here I borrow, for want of ambition, for loss of direction, from Deleuze, ‘minority has no model, it’s a becoming, a process’ (1995: 175). It is in this view non-conformist, creative, and committed to fabulation. While that challenge to structure and to dogma is important, I am initially more interested in taking up the opening, the site and space of the minor as the point of internal contestation of doctrine, the alien within, the foetus in the heart of the

present. From the perspective of the master and the major, of the old, of the law, minority is disempowered, fickle, unrestrained, unserious, purely emotive and so to be tolerated but constrained and on occasion protected or punished. The minor is technically in the wardship of the adult guardian, the parent or parent's surrogate who acts as the minor's trustees. What, however, of the minor from the space of minority? The minor exists nonetheless as the possibility of the major, it subsists as the ever present, emotive and unstable space of autobiography, of attachment, of an interior sense as visceral memory attached to inchoate promise, as image and relationship, fantasy and play. The child, as Freud would have it, is parent to the adult, mother to the woman, father to the man, and also, in an enigmatic sense, as I am arguing here, the unacknowledged author to the law.

Embedded in nascence, in the inchoate and imagistic domain of infancy, in the reverie of the body and in play, the child is a figure of creativity, a symbol of origin and of invention. That the child has no office and is not a person in law invokes an often remarked, distinct though limited sovereignty of the infant, a theatre of freedom that has as its initial defining features the inhabitation of images rather than language, desire as opposed to restraint, and fiction as the mode of the real. The knowledge of the child is pure experience in the *mundus imaginabilis* which in classical thought mediates between the sensible and the intelligible, and, to borrow from Aristotle, 'nihil potest homo intelligere sine phantasmate' – without imagination, nothing can be understood (1993: 24-26). For there to be law, there has to be desire and it is precisely in remaining in desire, staying with the phantasm, that promotes passion and facilitates action. It is in that space of fabulation that the *minumenta* of jurisprudence get written and the minor as project takes up its juristic place. *Homo ludens* lies at the origin of *homo juridicus*. Literally, which is here to say in the imagined *corpus*, and legally, as in the materiality of the *corpus iuris*.

Start with the latter, with youth, image, body and desire in the law. Youth is defined by Aristotle as passion, as wanting too much, as imagination, image and play which gains a limited legal recognition in

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the early concept of youths desiring, in love with, or in one translation, enthusiasts for law – *juventuti cupidæ legum*.<sup>6</sup> Jurisprudence is for Justinian written for youth, for minors, and it is in its classical form a pedagogy of institutionalization that channels the desire of the student into the art and artifice of the trinity of persons, things and actions – bodies, relationships and sacraments, in the theological argot, from which the divisions derive. The development of the subject and of the institution are parallel rather than different. The model for this symbolic permutation or second birth into law is theistically driven: ‘The most private, the most intimate, that which is at the core of the very concept of the subject, to know the fantasm, is *already* marked with the institutional seal of genealogy. Every subject carries within him, if I can put it that way, the institution in the primary form of the institution of the family.’<sup>7</sup> The Law of culture precedes and dictates the temporal law. There is, in sum, a doubling of minority and of subjection in relation to two parallel authorities, *oikonomic* and public, private and sacred. The latter is instituted in the form of entry into the text, and according to Justinian the *Institutes* were a cradle of the law – *cunabula legum* – opened up for you by the light of ‘our imperial splendor’, and so as to instill the principles of a universal legality in the heart of the subject.<sup>8</sup> Resistance is futile.

The nascent legal subject learns to be a child of the text, meaning of the majesty and sovereignty of a divinely promulgated scripture. The instituted legal persona is an obedient minor, bearer of a filial fear, afraid of *hieros* and divinity, reverential towards the professors, faithful to the laws. It is classically made explicit that it is a crime to play or make jokes (*ludos*) about those who teach the law for the reason that ‘this material will have been composed by the supreme indulgence of the Deity ... consecrating as it were a fitting and most holy temple of justice (*sanctissimum templum iustitiae consecrare*)’ (D. liv). Elsewhere in the *Digest*, acting or performing on stage is banned as a crime punishable by civil death (*infamia*), along with brothel keeping as another erotic and indictable art (D. 3.2.1).<sup>9</sup> Ulpian is later cited to the effect that athletes were not performing as actors, and that musicians, charioteers and those who administer public games also escape the ban.

The latter, the administrators, according to Celsus, are not practitioners of the banned and banishing theatrical art because they perform in the course of their office (*ministerium*) and not in the mode of players or practitioners of *artem ludicram*.

The attack upon the incidents of minority, upon play, levity, jokes, upon all unofficial reveries and fabulations is found at the very start of the *Corpus Iuris*, in its minority, as it were, as its minor key, though one could equally turn to the invocation of divinity and majesty in the preamble to British Acts of Parliament. The transmission of the major modality, the white keys, into the common law tradition comes again and directly in the insistence upon sombre tone, downcast mood, melancholic deportment and proper decorum which is explicit in the early modern tradition. The third dictate of the law of nature, according to the Stillingfleet's *Irenicum* of 1662, is that '*all things ... belonging to the Government of Society, be performed with the greatest solemnity and decency that may be*' (1662: 93). The 'evil spirit' according to the same source, is marked by 'the *bleaknesse* and *turbulency* of passion, as [also] the faint *gleams* of *Lightnesse* and *Vanity*' (More 1662: 1 & 15). Enthusiasm, according to a source contemporary with Stillingfleet is the sibling of atheism and is a distemper occasioned by melancholy, a *flatuous* and *spirituous* inclination and in all probability excess of wine (1662: 96).<sup>10</sup> It is the law of solemnity, in any event, that dictates the sites and spaces of worship where grave and austere genuflection evidences that the appropriate honour and reverence are given to the divinity. The same mode and model applies to law in the exceptional form of the rules – if such is not too strong a term for these inventions – governing summary proceedings for contempt of court.

To understand the modality specific to law one can move from the theological dictates of the *lex divinae*, to the rules of respect, the prohibition of levity and requirement of reverence in the courtroom. The liturgical character of trial has stringent rules beginning with the assertion that 'the punishment of contempt is the basis of all legal procedure', as intoned in the first modern treatise on the topic by Sir John Fox. It is certainly relevant to note the origin and continuance of

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this primary and radical aura of sanctity and its dictate of ceremony that accompanies both the court and its *dramatis personae* (1927: 1). The ban on disrespect – the common law abhors contumacy – and the summary punishment of any levity, mockery, satire, and playfulness not administered as part of a court office or *ministerium*, institutes directly an atmosphere of gravity, deference of behavior, deflection of emotion and suppression of affective relationships. The root, as I have adumbrated above, is theological and the early case law confirms this in two modes. First, according to Bracton and instantiated in medieval decisions on scandalizing the court, the root of this ‘unwritten’ rule, this natural law of governmentality, lies in Roman law and specifically in the sacred character of all things public. For the common lawyers, it is the majesty of the crown, the dignity of the sovereign and the priestly character of the judges that institutes the comparably somber affect and mode that envelops the spaces and the ministers – historically the *sacerdotes* – of law.<sup>11</sup> Contempt of court, *contemptus curiae*, is *contemptus iustitiae*, and originally incited capital punishment because ‘there is no greater crime than contempt ... for all persons ought to be subject to the King as supreme and his officers’.<sup>12</sup>

That the institution of deference – one might say of deferring, of endlessly postponing minority – is the founding ground of hierarchy and a first principle of legal dogmatics can be evidenced by the second feature of the law of contempt, which is that it is an unwritten law. It takes the form of a structure, a law of nature that is ‘as much a part of the *lex terrae* and within the exception of Magna Charta as the issuing of any other legal process whatsoever’.<sup>13</sup> The exception referenced was to the extant and continuing common law, to which unwritten tradition contempt belongs as coeval with the courts themselves, and instituted in the indefinite time of antiquity against novelty, which indefiniteness has ‘no priority or posteriority to be discovered about it and therefore cannot be said to invade the common law, but to act in an alliance and friendly conjunction with every other provision which the wisdom of our ancestors has established for the good of society’.<sup>14</sup> In dogmatic jargon, *nullum tempus occurit Regi*, time does not run against the King (Coke, 1629: 273).<sup>15</sup> In other words, there is no source but rather an

unwritten tradition, an image of the image to be protected, which Blackstone captures rather brilliantly in stating that ‘the Judges of the Court upon testimony of their own senses, shall decide the point’. The example Sir William gives, is of youth, or in the colorful legal argot, ‘non-age’ as an object of sense that can be tried by inspection and the irrefragable proof of ‘ocular demonstration’.<sup>16</sup> Size matters. The sense of minority makes sense of the minor as something excluded.

In the later case of *Almon*, the Chief Justice makes an equivalent diagnosis, though somewhat differently, in stating that the law of contempt requires that ‘homage and obedience [be] rendered to the Court’. There is the phantasm of law, in the decorum of the court and the regalia and other indications of majesty that attach to the ambulant personage of the judges and other ministers of the sovereign. There too, in those bodies, lies the site of desire, the world of juridical imagination in which the body of the judge accedes to the mediation of the reverie of images and the synesthesia of presence. The insistence upon the *in vivo* character of trial and the aura of judicial sanctity plays a crucial role, and institutes an affective space or major key into the context and interlocutions of the courtroom. A liturgical space is a separate one in which rule, life and affect are solemnized and joined together.

The upshot, my point your honors, the trajectory of this outline of the control of manners, the dictation of honour and homage, humility and minority in the face of law’s liturgical presence is to argue that hidden in this office, the minus of the *ministerium*, the worm in the brain of legal being is precisely the persistence of minority, the alien desire within, the jurisdictions of other discourses and other laws – of space, of love, of movement, of sense, of images, of play – in the interstices of legality, meaning in the body that makes and here that is devoted to studying, that teaches, which is to say reproduces laws in their increasingly diverse forms. It could be argued that a minor jurisprudence is written for other legal scholars, that its teaching is confined to professors and their doctoral students, to trainee academics, the children of Socrates, but if it is to be meaningfully political it has also to address body and desire in the training and practice of

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lawyering. The minor jurisprudence, *mos minorum iuris docendi*, must address the minors.

Quietude, somber dress, melancholic deportment, abstinence from drink and from sex, avoidance of games, tobacco, drugs; keeping early hours, a shaved face, routine and unending study are all express desiderata of the early manuals of legal pedagogy in which, as Fulbeck puts it, 'law and religion do lie down together' (1829: 2). Even up until the 9<sup>th</sup> edition, Glanville Williams' *Learning the Law*, a popular text for youth desirous to study for a law degree, stipulated that dark dress and somber manners were the appropriate decorum of the law student. It is not, however, the express representation of the desired somatic body and deportment that is at issue but rather the mode of instituting, the method of inculcation which disciplines and solemnizes the subject, and which above all instills the chorus of juridical emotions. How to tear a hole in the cribbed and cabined constraint of legal affectivity? A beginning can be made by returning to an early minor jurisprudence, the work of a philosopher poet who moved to study law and attend the Inns of Court. Abraham Fraunce, in a largely forgotten work on legal logic makes the immortal point that the flaw in legal method, in the training adopted in the Third University as it was then called, the Inns of Court, which were the only place formally teaching substantive, Anglican common law, was closure: 'you would love the law, but *sine rivali*; you would reign, but alone, *hinc ille lachrymæ*' (1588: fol. 3 recto).<sup>17</sup> He found, in this book of logic as pedagogy, that the legal discipline was estranged from the university, and its practitioners a clique, a rabble of tenurists, that neglected not only method but even their own history and concepts as encapsulated in their peculiar diction and their misprision of their legal words of art.<sup>18</sup>

At the root of Fraunce's critique of the clique, the harpies of the law courts, the most unlearned of the learned, is the diagnosis of an error in the relationship to legal minors, the students of law who receive no adequate education, no viable instruction in the *mos britannicus*, because they study only confused cases in the arduous yet cloistered context of apprenticeship and practice in the Inns of Court. Their pursuit of law,

of a singular law, of a practice, is rote and venal, a formality and not a passion, a means and not an end. The result is likely as not confusion rather than creativity, compliance, timidity, and frequently depression. Vico can provide further support in his lectures on education where in the sixth oration, agreeing with Fraunce, he states of legal study that 'here there are tears, here there is misery' (1993: 126). The immediate reference is to parents who force their children into the study of jurisprudence to bring honor to their family, and for financial gain. He proceeds to argue 'that as long as the respect due their fathers binds them, they continue to pursue those studies unwillingly and with disdain and do not cultivate them either seriously or with enthusiasm'. Only once the bond of 'filial devotion' is thrown off, and only if the neophyte persists in law, is there any chance of developing a passion, engendering enthusiasm, and having learned nothing the first time round, starting again, and learning for herself.<sup>19</sup> Only through a species of rebirth, a resistance to institutional conformity and the norm of the major, of the contemporary version of the law and the prophets, can the possibility of playing the jurist, in Olivia Barr's terms living with the law, performing the office of a critical legal scholar, in its necessarily minor key, come into being.<sup>20</sup> The symbolic permutation has to be matched to an imaginary permutation and the minor allowed the expression of their affective mode and minority.

Returning to the concept of the minor, childhood is when we grow, become and become ourselves. It is the dominion of the imaginary, the *ius quaesitum alteri*, the space of inventively phantasmatic relations to the social and the site of prefiguration. There are returns to infancy and rebirths, as Vico indicates but the key lies in the attributes of origin and origination, novelty and becoming. A minor jurisprudence is minor first, as Dorsett and McVeigh's elegant study of Salmond copiously implies, because it is written for and taught to minors. It is a pedagogic text for students: 'The general audience for jurisprudence was for the most part students who would take up positions of office within institutional life' (2007: 778). Even here, the trajectory of the audience is likely at this stage of development in the main antithetical to, if not hostile towards, the minor jurisprudence expounded by

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the practitioners of *minumenta*, whose evidencing of law and title is through diverse writings, through an interdisciplinary and figurative imagination in the apprehension of the alternate realities or plural forms of legality. The practitioner of a minor jurisprudence identifies with minority and faces various modes of antipathy both from the minors, the students, their charges hurrying to office, emplotment and employment, and from the institution, for not conforming to the law and prophets either in style or in substance. A marginal position in the academic institution, escape to adjoining humanistic disciplines, a divided identity, isolation or depression can frequently ensue, although, ironically it is frequently the passion, the commitment, the enthusiasm of the critical legal scholar and the diverse race and gender positions that have followed from it that are most threatening and uncomfortable in the persona of minority.

Identifying with the minority is primarily what Deleuze and Guattari reference as qualifying the status of minor languages and minor literatures, although they also suggest 'juridical and political' implications. The minor does not exist in itself, but only in relation to the major, although this bifurcation is complex in that the minor is a deterritorialized language, a literature of the outsider, a continuous 'becoming of everybody, one's potential becoming to the extent that one deviates from the model'. For them the minor can become major because the essence of minority is 'a determination different from the constant ... a subsystem or an outsystem'.<sup>21</sup> This is generally framed as some version of the critical jurist's dilemma.<sup>22</sup> For Barr this is posed in terms of a choice between escaping the law or learning to live with it.<sup>23</sup> The latter is interpreted as taking responsibility for one's office, the practice of law. The Swedish jurist and singer Elisabeth Eneroth elaborates upon this sense of responsibility, the ethical substrate of the critical jurist's minor role, by way of developing a model for justification of action 'in the sense of care for the reasons for a certain interpersonal course of action' within the ambit of applying the law.<sup>24</sup> To Deleuze and Guattari's binaries, reversals, antinomies and dialectical switches, I would suggest instead a focus upon this *lex caritatis*, upon an erudition *in eroticis*, as Nietzsche framed it, one which walks slowly and attentively

in the space of amity and desire as they play out in relation to and as juridical practice. If the minor is an inconstant state of becoming, the unfinished project of a jurisprudence to come, then it implies both a 'minorization' and imagination, the will to fabulation, the autonomous gesture of a legal fiction concerned with the not yet, with forces as yet undetermined and relationships still to be built.

If the minor is not to be entirely oppositional, if it is to take its place as part of the legal institution it requires its own positivity. Critique is admirable as far as it goes, as method, as the child on the back of the norm, as rectitude of practice, but its tendency is to remain critique 'of' rather than substantive expression. To add something akin to an office of the minorist, a jurisprudence that is both pre-law and in law, is to invoke the radicality of the child, the force of the inaugural in the free play of thought. Barr suggests responsibility, and Eneoth advocates care and the building of trust through the practice of justification. These are facets of a humanistic project and of an equitable orientation, part of the *spiritualia* of office that perhaps gains its exemplary expression in the *ordo minorum* of the Franciscans as recently excavated and expatiated by Coccia and Agamben. The object of the order was life itself as the first law, wherein living lawfully was the primary dictate of practice: rule is life and life is rule being the constituent element of what I would propose as an emergent *mos minorum*.<sup>25</sup> Legal precepts become vital precepts: 'A law that is indeterminated into life has as its counterpart, with a symmetrically inverted gesture, a life that is totally transformed by law'.<sup>26</sup> Acting becomes writing, life becomes law.

The *mos minorum* has the virtue of what St Francis famously coined as *regula non bullata*, meaning rule without papal Bulls, the absence of any pontifical authorization, and so a voluntary jurisdiction, persuasion through action and not legislation. This means a withdrawal from law, *abrogatio omnis iuris*, in favor of life, in honor of all things in common, in praise also of worms.<sup>27</sup> The minorization of law into form of life, and rule into vital precept also greatly expands the meaning and expansiveness of right as a shared or common sense, an all-encompassing synesthetic openness to the dominion of experience.

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Jurists, however, are no longer cenobites. The history is important mainly for another reason, which is related to the alternate potential of minority, the commonality of the child as vital expression and as opening through withdrawal, suspension and inhabitation of the institution of thought in the mode of singular universality, inscription that takes place impersonally, affectively, openly.<sup>28</sup>

Alongside the cenobitic tradition and the *mos minorum* of the *ordo fratrum minorum*, there is also the history of the minority of women which I took, years ago, in the last flings of love and youth, as the exemplum of the minor (1996; 2006a). The voluntary jurisdiction of the courts and laws of love offers an opening into a law of imagination, a surprisingly contemporary experiential and relational casuistry, an amatory set of affective precepts and practices whose guiding principles were visceral and libidinal and most definitely *regula non bullata* in that the *Tractatus de amore* was banned.<sup>29</sup> The case where the glossator Symphorianus expressly mentions the concept of minor judgments – *minoris iudicii* – as the apposite definition of decisions taken, involves an encounter between lovers in the woods. She was playing with friends and he surprised her with a kiss to the hem of her dress. Such was his passion and her surprise that she fell to the ground and exposed her petticoats. She complained to the court of the Mayor of the Woods that the behavior was uncouth and upsetting. She received favourable judgment which was upheld on appeal to the High Court of Love (1731: 47). The judgment was founded on Ovid: who is counting how many times I have kissed your clothes?<sup>30</sup> The decision was that greater care should be taken by the lover in approaching his inamorata. She did not like surprises and so she should signal that she knew and assented to his sartorial embraces. Passion could follow after honorable amends had been made.

The interest, the force as opposed to the credit, of the example lies in its imaginative and imaginary character. It creates and opens a world, the enduring discourse on the practices and purviews, relational intricacies and affective conflicts, the beginnings and endings of the amicable and amatory domains that we still inhabit. It is minorist in

multiple senses all associated, or so at least I have labored to argue, with childhood, with aspects of childishness here viewed positively and actively as the core, the opening of being and so equally, by extension, as the libido, the energy in jurisprudence. I will list these facets as a kind of manifesto for the child, for the *alieni iuris* in the *sui iuris* and as the best available indication of possible futures:

1. I am hesitant to put the record straight, for fear of being correct, for the lack of seriousness of it, but the subtitle of *Law in the Courts of Love*, was 'Literature and other minor Jurisprudences'. The minor is plural, but who reads to the end of a subtitle or bathes in milk any more? Symphorianus also stipulates the plurality of minority, its many courts and judgements. In being nascent, in becoming, the child is exuberantly several and a jurisprudential office of the minorist is similarly a multiple and floating event. No major reinterpretation, no great ark and covenant of a Kafkaesque 'literary continent', just an enthusiasm for the several and a recognition of minor and plural beings. Then decisions have to be made. The minor can be radically evil, dangerous, tortured, or open and full of aura and potential, fantasm and truth for you. Take your pick.

2. To be done with leaders, with above and below in thought. The judgment of love is predicated upon a non-coercive jurisdiction, absence of validity, whatever that most dubious of jurisprudential terms is taken to imply, in favor of mediation and remediation, the *lex caritatis* of facilitating relationship, trust, amity and *amor*. Minor jurisprudences, the offices of the minorists are here those of acting plurally, of becoming ears and performing the auricular tasks of transmitting the demands of desire, the passions and enthusiasms of minor causes in the pedagogic, tutelary, and practical institutional sites that we inhabit. Gnome for the gnomes, as it were, at least as a motto, as an ethically appropriate start. The site of judgement, to make the case, lies in the subject object relation as the fulfillment of a ligamen, a bond, a love between the parties, not one or the other but the phantasm, the 'nova persona' that is the imaginary product of their conjunction. The object of decision is the phantasm seen as the collective site of the union of subject and the active intellect.

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3. The offices of minorists are always uneasy because littoral and liminal. The art of subtraction, the dilemma of withdrawal resides in the institutional dissonance of action. Re-emergence involves existential and political exposure, the taking of a stand in thought, facing up to being faced off. Joining the collectivity of thought is a dangerous activity for a jurist because it potentially weakens the discipline, the brand, and reveals the *arcana iuris* or mysteries of governance as inhabited in university settings. The jurists enjoy what in the old language of advowson are benefices, livings, and in that ecclesiastical sense seek to maintain the separateness of their *persona*, technically *ideona persona* or proper person, and the justification of their investiture in the benefice by virtue of *Aetas, Scientia, Mores et Ordo* – age, learning, morals and degree in law. The minorist, seeking through a moment of withdrawal a connection to an earlier or simply different state of disciplinary and existential being, the chronological and ebullient theoretical positioning before of before the law, has to withdraw, retract so as to uncontract, so as to question and thereby inhabit the phantasm of both being and being in an institution.

4. The major can be minor because the foetus invariably remains present at the heart of being. My favorite example is that of Lord Rogers in a case involving the meaning of the word family in the Rent Act.<sup>31</sup> Could a homosexual couple legally be husband and wife? This may seem obvious, but the case is initially heard in England, at the end of the twentieth century and, as one Law Lord put it, to term a same sex couple husband and wife would be ‘to read “black” as meaning “white”, [and] is self-contradictory and a nonsense’. To which Lord Rogers replies that the Act requires emendation for failing any longer to reflect the intentions of the drafters. Their thought must be rendered anew and for this it required a return to Selden’s *Queen of the Sciences*, philology, and specifically to a lecture by the poet and Cambridge classicist, A.E. Housman on ‘The Application of Thought to Textual Criticism’ (1962: 142). Hardly a valid source of law and yet here an especially appropriate aid to judgment in its address of emendation of corrupt texts. Poetics to the rescue of law, a mixing of jurisdictions so as to create a novel application and allow new *personae* into the

web and worms of norms. Housman argues that ‘the prime requisite of a good emendation is that it should start from the thought’. Lord Rogers, himself a scholar of Roman law, walks through the hole that he has cut in the fabric of law, while leaving Housman’s ‘addle-pates and impostors’ to maunder and lie. More than that, just to accelerate a sense of the ethics of the minor, the emendation of the statute, as its wording relates to homosexual partners, is occasioned through the textual criticism of a gay poet’s theory of corrupt texts and even worse manners. *Touché*.

5. Minorists are hedonists, that at least is my claim for the sense of critical minorism as the opening to expression of believers in the enjoyment of thought, the pleasure of joining in thinking as the form of life of a discipline outside of any individual ambition, project or career. It is the practice of thought, the ambulatory idea, the shared *character angelicus* of the intellect that is the site of withdrawal, the point of tension and release. Enthusiasm is the term that Shaftesbury begins to expound in a profane sense and as against the pontifications and other *regulae bullatae* of conformism and rote. The minorist is true to their *Daimon*, the outside within, the process of thought as attention to phantasms as the objects of intellection, the mixing of passion and imagination in the ambulant activity of the academic form of life. Shaftesbury tells the story of an itinerant enthusiast who was imprisoned and placed in solitary confinement without company or light. ‘In this banishment from letters and discourse, the man very wittily invented an amusement much to his purpose and highly preservative of health and humour ... he tuned his natural pipes’ so as to form all sorts of ‘articulate voices’ (1999: 128–29). When he was released he composed a philosophical treatise on the topic of voice and sound. A minor work but one which evinces both the maintenance of enthusiasm in compromised circumstances and the will to think actively in confinement. An instance of the *Well Tempered Clavier*, the genius of a major composition that alternates in minor keys (Manderson 2001: 4–21). Don’t stop.

6. I have said much about the attributes of image and imagination,

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phantasm and enthusiasm as the media of the child, and as the avenues of invention, the tools of creative thought for the minorist. These aspects of phantasy and play of imagination in thought, of thinking as participation in the perambulation of a collective reverie in its various modes and inspirations gains another minor expression in the concept of fiction or Deleuze's fabulation. The latter term has the advantage of connoting fabrication, figure and making, and suggests a last though not lasting image of the minor in Quintilian's *Declamationes minores*.<sup>32</sup> These were in the main exercises, legal arguments as to hypothetical conflicts in the future and fictive tense. Potential lawsuits and their rhetorical and often humorous argumentation. *Pro* and occasionally *contra*, but never to judgment. Quintilian taught, in this genre, the free flow of future ideas, the passages of thought and their modes of *advenience*. The latter term, *adveniences*, according to Barthes, are points of attraction, images and ideas that 'set me off', that *advene* and transport (1974: 19).<sup>33</sup> The image that *advenes* is one that instigates an adventure in thought, a haptic and incomplete becoming, the minority of an idea helped on its way.

To cut a hole in the fabric of law is to insist upon more than law within the institution of legality. The hole, rend or tear that is made by the minor, by commitment to minority, thus turns minorist offices against the comfort of the constant and the habitus of habit. The minor practice exists so as to let the phantasm through the breach and in doing so breaks down the abstraction of the legal norm. Figures, *dramatis personae* – same sex married couples, Persian cats, malapropisms, allegories on the Nile, long forgotten genders and denizens, King Canute, lines and apparatuses – emerge in the space of judicial judgment and their accompanying corridors and choral opinions. The minor, the child, threatens to make law real and all too human. Alternately, precariously, the minor is an ontology in law, a visceral mode of occupying an institutional space, a lifestyle in contestation with a form of life. As ontology, as minor gesture, singular life, there is a sense of resistance, of interruption and of puncturing that veers away from the abstraction and mere, because closed, epistemology of law.<sup>34</sup>

## **Endnotes**

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1. I insist on using the earlier edition because I happen to have it, but more because modern editions do not reproduce the *emblemata* that Shaftesbury was at pains to include, and also dispense with the typography of the earlier editions, as if images and orthography were entirely dispensable to the operation of signs. On which, see Felix Paknadel (1974: 290).
  2. In addition to Lewis and Short (1958), see Baxter and Johnson (1934).
  3. The term *minumenta* is found in William West (1601) at 192 verso, where proof of ownership in Chancery can be through examination of '*minumenta, scripta, recorda, transcripta, territoria, chartas, ac alias evidencias ...*'
  4. The 1672 edition of John Cowell's *Interpreter* [1610] edited by Thomas Manley carries the same definition.
  5. On the generality or impersonality of thought, drawing on Averroes, see Emanuel Coccia (2005) and also Roberto Esposito (2015).
  6. This forms the last line of the dedication to *Justinian's Institutes* and is generally not glossed. See Pierre Legendre (2007); and the excellent study of images and childhood by Vicky Lebeau (2008).
  7. The concept of symbolic birth is taken from Alexandra Papageorgiou-Legendre (1990) 56-65.
  8. *Institutes* Proem.
  9. Discussed in Goodrich (2006) s.v. law.
  10. Discussed, opposed, ridiculed in Anthony Ashley Shaftesbury (1714) 63-70.
  11. Henry de Bracton, [c.1250] (1958) 127b. The filial fear of law and the designation of judges as *sacerdotes*, as holy men, comes from Sir John Fortescue, *De Laudibus legum Angliae* [c 1460] (1998) though we find it in varying forms in all of the subsequent pedagogic texts.
  12. Bracton (1958) vol. 3, 368 can also be accessed through <http://bracton.law.harvard.edu/Framed/mframe.htm>
  13. *The King v Almon* 97 Eng. Rep. 94 [1765].

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14. *The King v Almon*, at 99. (Almon, a bookseller, had criticized Lord Mansfield for a decision relating to the English radical and Parliamentarian John Wilkes).
14. On the implications of the maxim, see Grenville Sharp (1779). Intriguingly, and supportive of Bataille's theory of the child as sovereign in their limited kingdom, it is also a maxim of law that prescription does not run against a child.
15. Sir William Blackstone, [1765-69] (2016) vol. 3.22, 218-219 discussing, appropriately enough the proofs of the non-age – the minority – of the cognizor, 'or to set aside a statute or recognizance entered into by an infant'.
16. I should note, accuracy requires it, honesty comports with it, that there is a recent edition of the *Logike* which appeared in 2013, edited by one Steve Sheppard, but it begins in conformity with my sense: 'As a matter of legal history, the work is now largely unknown'.
17. Fraunce (1588) preface. For more on this theme, to avoid repetition, see my 'A Short History of Failure' in *Languages of Law* (1992); and, of course, because I mentioned him in the last footnote, Steve Sheppard, 'Abraham Fraunce, Legal Analysis, and Legal Scholarship', the Introduction to the 2013 reprinting of a facsimile edition of *The Lawiers Logike* (Clark, NJ: Lawbook Exchange, 2013).
18. In slightly more contemporary terms, see Fiona Cowney (2004) which, based on surveys, finds that the primary reason for studying law was to please the parents.
19. O. Barr, (2016) 61, defining jurisprudential office as 'the practice of a lawful life'.
20. Gilles Deleuze and Félix Guattari, *A Thousand Plateaus: Capitalism and Schizophrenia* (London: Athlone, 1987) at 105. My commentator of choice on Deleuze and the minor, an informed and intellectual minorist, is Edward Mussawir, *Jurisdiction in Deleuze: The Expression and Representation of Law* (Abingdon: Routledge, 2011).
21. Karlo Tuori, *Critical Legal Positivism* (Aldershot: Ashgate, 2002) ix: '[I]f law is a coercive and, at least in this sense, repressive order, how can a legal scholar, conscious of this fact, justify her own activity, which necessarily contributes to the reproduction of this order?'
22. O. Barr, *Movement*, 59.

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23. Elisabeth Eneroth, *Critical substantive validity testing of legal norms* (Stockholm: Jure, 2016) 16.
24. Pietro di Giovanni Olivi, *Expositio super regulam*, (éd. par D. Flood, Wiesbaden 1972) 117: *Regula et vita fratrum minorum, vocans eam non solum regulam sed et vitam, ut sit sensus quod est regula, id est recta lex, et forma vivendi ...* Cited in Emanuel Coccia, “Regula et vita”: Il diritto monastico e la regola fanscescana’ 20 *Medioevo e Rinascimento* (2006) 97, 135.
25. Giorgio Agamben, *The Highest Poverty: Monastic Rules and Form-of-Life*, 86.
26. The root is St Augustine though see also Nicola Masciandaro, ‘Womsign’, in Scott Wilson (ed.), *Melancony: Black Metal Theory and Ecology* (London: Zero Books, 2013) 81.
27. Should it be relevant, the notion of impersonality references the escape from persona that minority implies and that universality – everyone and no one, an escape from the One – dictates. See especially Roberto Esposito (2015).
28. For details, see P.G. Walsh, ‘Introduction’ to the translation of the *Tractatus de amore*: P.G. Walsh (trans.), (1993).
29. Ovid, *Heroides*, 19.31.33
30. *Ghaidan v Godin-Mendoza* [2001] 1 AC 27 (HL).
30. The most recent translation by Shackleton Bailey, published in the Loeb Classical Library, is published as *Quintilian* (2006).
31. Dynamically recuperated and discussed in David Panagia (2016) Thesis 1.
32. On which, see Erin Manning (2016) 7: ‘This capacity to actualize, at the edge of the virtual where the actual is not-yet, is what makes the minor a gesture ...’

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