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Law as Minor Jurisprudence: Is it a Mistake?

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Abstract

What is law as minor jurisprudence? Existing scholarship around the concept of minor jurisprudence associates it with processes that start something, found something, or stand outside something and, further, with processes that conceal or erase. To seek to clarify the meaning and effect of the phrase “law as” ... minor jurisprudence, I consider cases of mistake that, as legal speech acts, transform a state of affairs. In Part I, I use JL Austin’s theory about speech acts to analyse how speech can be mistaken and how such mistakes may transform states of affairs, using cases of encounters between Indigenous, settler, and international legal orders. In Part II, I survey the debut of the Trump administration as a possible site of minor jurisprudence. Informed by this study of mistakes that help make minor jurisprudence, my investigation suggests that: 1) minor jurisprudence requires major jurisprudence to be cognizable; 2) little intrinsic to the concept of minor jurisprudence offers normative guidance; and 3) the idea of law as minor jurisprudence may be a mistake. If ‘law as’ is understood as a practice of legal knowledge, what matters is the process of drawing the line between major and minor, not the minor itself.

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Genevieve Renard Painter*

What is law as minor jurisprudence? The call for papers of the fourth ‘Law As ...’ symposium suggested what minor jurisprudence is *not* and what it is *like*, but not what minor jurisprudence *is*. These definitions through simile rest on proxy indicators for minor jurisprudence. In one account, associated with Panu Minkkinen, minor jurisprudence would be novel, bring forth something new, and stand outside the boundaries of major jurisprudence (Tomlins 2015: 243). It would be ‘something rather more than only critical and antifoundational’ (Tomlins 2015: 242); it would be ‘initiatory and so, to that extent, foundational’ (Tomlins 2015: 247). ‘[C]oncealment and erasure ... and attempts not simply to criticize but to depart from them’ are things that ‘law as a minor historical jurisprudence’ might consider as its topics (Tomlins 2015: 251).

By joining together these assertions, I gathered that minor jurisprudence could start something, found something, and stand outside something and that ‘law as minor jurisprudence’ is interested in how things are concealed or erased. Concealing and erasing imply some agent or actor.

What about less agentic processes, such as mistakes that transform a state of affairs?

Mistakes that initiate something brought to mind an example

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offered by J L Austin in his work on speech acts. In discussing a situation in ‘which someone is initiating’ in their use of words, Austin draws a comparison to the invention of rugby, observing that ‘[s]ometimes he may ‘get away with it’ like, in football, the man who first picked up the ball and ran’ (Austin 1962: 30).² Someone doing something unexpected (picking up the ball) that initiates a changed state of affairs (a new game) raises the possibility that speech act theory might elucidate how mistakes can be transformative and be, in turn, signs of minor jurisprudence. This led me to look for cases of a mistaken legal speech act, a departure from a major jurisprudence, and some transformation of the state of affairs. I focused on mistakes in speech because lawyers, judges, and legal scholars are concerned with the ways that words don’t do what was intended. I sought out mistakes rather than concealments or erasures, as an (ultimately unsuccessful) attempt to dodge questions of agency.

This essay explains my work to answer the question posed in 2016: What is law as minor jurisprudence? In Part I, I use Austin’s framework to analyse how speech can be mistaken and how such mistakes may transform states of affairs, using cases of encounters between Indigenous, settler, and international legal orders. I study such encounters because I have researched and written this essay as an uninvited guest on Haudenosaunee territories, in a context in which statements of Indigenous sovereignty are routinely misheard as requests for the colonising state to grant rights and recognition. In Part II, I survey the early days of the Trump administration as a possible site of minor jurisprudence. I consider the Trump administration because I rewrote this essay during the administration’s first attacks on human and non-human flourishing. Informed by this study of mistakes that help make minor jurisprudence, my two-part investigation suggests that: (1) minor jurisprudence requires major jurisprudence to be cognizable; (2) little intrinsic to the concept of minor jurisprudence offers normative political guidance; and (3) the idea of law as minor jurisprudence may be a mistake.

1. Possible Misfires

Austin's theory of speech acts, though neither comprehensive nor entirely correct, provides a serviceable starting point. He observed how performatives – utterances aimed at doing something – can go wrong. Breaching the conditions 'necessary for the smooth or "happy" functioning of a performative' causes 'misfires' or 'abuses' (Austin 1962: 14). Misfires are utterances in which the purported act is attempted but not achieved due to defects of procedure. One such procedural defect concerns breaches of 'an accepted conventional procedure having a certain conventional effect, the procedure to include the uttering of certain words by certain persons in certain circumstances' (Austin 1962: 26). Another defect stems from failings in that 'the particular persons and circumstances in a given case must be appropriate for the invocation of the particular procedure invoked' (Austin 1962: 34). Abuses are those utterances that lack the correct thoughts, feelings, or consequent conduct, making them professed but hollow (Austin 1962: 14–16). Let us consider some examples to clarify relevance for our minor jurisprudence inquiry.

A. Misfires

Failure to follow conventional procedure produces a misfire – an utterance that does not do what is said. Yet, misfires rooted in procedural breaches are not limited to problems of compliance. They also come from excesses or shortages of accepted conventional procedure for a speech act, as the following situations illustrate.

In October 1887, two Canadian commissioners met with Nisga'a and Tsimshian leaders to talk about the land in the Naas River Valley. The commissioners said that all the land belonged to the Queen and that they had come to discuss the location of Indian reserves (Enquiry Report (ER) 1888: 25). Nisga'a leaders replied that the land had always belonged to their forefathers, and it had never been given or sold to anyone. The commissioners declared the Queen's title to the land by reciting from the federal *Indian Act* and the *Terms of Union*, the agreement between the Crown, the province, and the federal government that had brought British Columbia and, supposedly, the

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land into confederation (ER 1888: 20-22). Nisga'a leaders said that they had never heard any of those words before, asked if anyone had come to talk to them before writing them, and spoke of Nisga'a presence on the land (ER 1888: 19). The Nisga'a did not simply disagree with the commissioners' words; they could not hear those words as lawful claims of ownership. The commissioners, for their part, could not hear evidence of uninterrupted Nisga'a presence as lawful ownership of the land. Both sides spoke to claim the land, but without agreement about the conventional procedures for the speech act of 'claiming the land'. On both sides, speech failed because of a shortage of accepted conventional procedure, or an absence of agreement about whose jurisprudence was major.

This is a case of shortage of accepted convention yielding mutually misfired utterances. But consider another example, of an excess of conventional procedures.

In December 1922, Chief Deskaheh of the Six Nations of Grand River, a territory of the Haudenosaunee Confederacy, visited the Dutch embassy bearing a petition to the Queen of the Netherlands. The Six Nations of Grand River sought the help of the League of Nations in defending their territories from an imminent invasion by Canada, but they could not petition the League as they lacked membership. Instead, they asked the Netherlands, an ally with whom they had treaties, to petition the League on their behalf. A Dutch diplomat, citing the obligation to deliver a petition to its addressee, transmitted the letter to the League of Nations. Britain and Canada rebuked the Netherlands for transgressing diplomatic etiquette. Alleging the absurdity of the Six Nations' claim to be a self-governing polity, they told the League of Nations and the Netherlands that they had no business intervening in a domestic Canadian matter (Woo 2003). Deskaheh did not secure official League assistance against foreign aggression.

Deskaheh closely adhered to the black-letter procedure for requesting League assistance. But he breached an implied convention for such claims, according to which 'civilised' states of the West did not interfere in each other's affairs. The actors recognised both these

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procedures to be conventional. Deskaheh's speech act failed due to a breach of convention, in a context in which more than one convention was accepted.

Another type of misfire occurs when there are defects in who invokes the accepted conventions for a speech act. For example, in denying that the commissioners' recitation of Canadian law was an effective 'claiming of the land' according to Nisga'a convention, one Nisga'a leader said, 'I am the oldest man here and can't sit still any longer and hear that it is not our fathers' land. Who is the chief that gave this land to the Queen?' (ER 1888: 20). Likewise, the Canadian and British response nullified Deskaheh's claim for assistance against foreign aggression because it came from a speaker who lacked standing to make such a request. In both cases, words misfire because of the speaker.

This analysis seems suspect, however. Deskaheh's words misfired because he lacked standing to say them, but his speech act was precisely a claim for standing to speak. This felicity condition contains a circular logic problem, as it finds that a speaker's words purportedly misfire due to procedural breaches, even if the speech challenges those very procedures.

B. Misfires and Perspective

Austin's framework rests on acceptance among a community of language users as to how speech can be felicitous. He anticipates errors but is untroubled by whether accepted felicity conditions exist. Yet when I sought examples of misfires rooted in procedural defects, I alighted on stories, not about failures to comply with procedures, but about procedures that were either too numerous (the League of Nations example) or too little accepted (the Nisga'a example). This reveals that assessing whether a speech act 'misfired' due to procedural defects takes place from a particular vantage point. If, as in the Nisga'a example, a speech situation contains disagreement about how to do things with words, assessment of misfires is based on the expectations of one of the speakers or our own expectations about speech (a further vantage point).

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Analysis of misfired speech acts runs aground because having expectations about compliance with accepted procedures raises the question: ‘Whose expectations?’ Perceiving a mistake requires comparing speech against the expectations embedded in the speech situation. The words themselves don’t offer a neutral vantage point for determining their felicity. The context of those words does not solve the problem either. Moving the problem of perspective from ‘accepted convention’ to ‘appropriate context’ is no help because there is no view from outside context and no ‘within context’ criteria for choosing context (Jay 2011).

Speech acts that are legal claims illustrate how vantage point shapes expectations about how words work. The law contains vantage-point specific conventions for speech that determine whether utterances succeed – some call this jurisdiction (Dorsett & McVeigh 2012: 4–6). Thus, from the perspective of international law and diplomatic protocol, Deskaheh was mistaken in asking the League of Nations to intervene against Canada and the British Empire. From the perspective of Haudenosaunee law and protocol, Deskaheh’s claim exposed that international law’s procedures about speech adopt the perspectives of imperial powers. When one vantage point is occupied by a major jurisprudence and is recognised to do so by others, alternative vantage points, and jurisprudences, are eclipsed (Painter 2017). The law denies that it adopts a situated viewpoint when determining conventional procedure about legal speech acts. There is, however, no Archimedean ‘outside context’ point from which a speech situation can be analysed.

C. Hearing and Intention

Seeing flaws in his schema of felicity conditions, Austin decided that utterances should be considered in their total speech situation, wherein an utterance comprises a locution (the words uttered), an illocution (what is done by the speaker in saying those words), and a perlocution (the effects of those words).

Austin’s revision emphasizes that, to succeed, some speech acts need to be heard, in a particular way, by another. Words, when joined through speaking and hearing, ‘transform and initiate’ ‘states of affairs’

in the moment of their performance before one who apprehends them' (Constable 2014: 88). Thus, felicity conditions apply not only to utterance (speaking) but also to apprehension (hearing).

If it is through the joining of speaking and hearing that words may transform the state of affairs, it is also in that joining that they may misfire but be potentially transformative. When Deskaheh asked the League of Nations for assistance and was rebuffed by Canada and the British Empire, this seems like a misfire that confirmed a colonial state of affairs. But, the Netherlands, Estonia, Persia, Panama, India, and the Irish Free State heard his words and tried to convince the Assembly to grant him an audience (Woo 2003). Their hearing was mistaken, judging by the British Empire's indignation. Through this mistaken hearing, they recognised the Six Nations as eligible to speak and be heard in an international legal forum, thus upsetting the colonial state of affairs.

Thus, hearing words mistakenly, not just speaking them, might transform the state of affairs, suggesting that mistakes cannot be attributed wholly to speaker or hearer. That hearing can be mistaken implies that the whole speech situation matters to understanding an utterance, as in the case of anti-colonial speech that got away at the League of Nations. Mistaken hearing also implies that the speaker's intention matters. Illocution and perlocution can diverge, as the consequential effects of an utterance on the audience may bear little relation to the speaker's intentions. An utterance is felicitous when a speaker uses words in such a way that the hearer correctly recognizes the speaker's intentions (Strawson 1964: 450). Speech's effects on the hearer may be intended or unintended (Austin 1962: 106). A speech act may be so bedecked in the raiment of convention that the speaker's intentions are completely cloaked: compliance with convention guarantees felicitous hearing. This is particularly possible of legal speech acts, as in the example of the locution, 'Guilty', which succeeds if uttered by the sitting judge and not if uttered by someone in the gallery; its felicity is impervious to either speaker's intention.

As the Deskaheh case suggests, mis-hearing may be a site

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for misfires that transform the state of affairs and signal minor jurisprudence. Such mistakes in speaking and hearing may be thought of as misinterpellations. Interpellation is ‘a movement of projection and then counterprojection, a basing of authority on some seemingly unimpeachable original Subject who can ‘really’ know or call the subjects (with a very small s) into being who they (always) are’ (Martel 2017: 39). Usually, ‘the supposed recipient of the call understands what has taken place’ (Martel 2017: 37) and turns when the police officer cries ‘Hey, you there!’ But the mistakenly hailed subject, ‘the one in ten, the accident’ (Martel 2017: 41) disrupts ‘the mirror-structure that is set up with the state ... The state does not recognize itself, does not get recognized, in a misinterpellated subject’ (Martel 2017: 40). Moments of misinterpellation reveal fluidity, contingency, and uncertainty and the potential that is already there for a transformation in the state of affairs (Martel 2017: 56). On misinterpellation’s watch, the field of possibility for mistakes that beget minor jurisprudences balloons.

But, equally, attention to misinterpellation might overstate this field of possibility of mistakes. Mistaken hearing occurs relative to the speaker’s intentions. Because the perlocution, or illocutionary force, of an utterance is shaped by meaning and context, ‘it can readily happen that, in performing an illocutionary act, my utterance may at the same time carry, without my intending it, a much wider range of illocutionary force’ (Skinner 2002: 109). Consider the following example in which a speaker flouts conventional procedures, his speech act is heard, and a situation is transformed.

In 1971, George Manuel joined Canada’s official delegation on a trip to honour the tenth anniversary of Tanzanian independence. Manuel was a Secwepemc chief and director of the leading national political Indigenous organization. At the last minute, a senior official was unable to travel, leaving unclear who headed Canada’s delegation. Manuel was the first to get off the plane and greet President Julius Nyerere. Taking him to be the Canadian delegation’s leader, Nyerere shook Manuel’s hand and invited him to the state dinner. Manuel accepted. Manuel and Nyerere discussed the Non-Aligned Movement

and Nyerere's strategies to achieve Tanzania's independence. A life-long friendship formed. Their conversations shaped Manuel's theories about connections between decolonisation struggles of the Third World and of Indigenous polities (Ryser 2012: 79).

Manuel's diplomatic greeting of Nyerere constitutes a misfire, according to conventions about the right person for the speech act – Manuel lacked jurisdiction. The misfire changed the state of affairs: a friendship formed, an anti-colonial movement blossomed. That Manuel's words had an effect, in spite of procedural defects, illustrates the importance of hearing for legal speech acts. Manuel's words were transformative because Nyerere heard his diplomatic greeting diplomatically. If Nyerere had said, 'Where is the white man who should be heading the delegation?' Manuel's misfire would have hung in the air, leaving unmolested the ordinary hum of affairs. This mistake sounds like promising minor jurisprudence material.

But, if we presume that Manuel meant what he said and so did Nyerere, where is the misfire? Manuel knew about Tanzania's political significance from his acquaintance with exiles from southern Africa who were fighting apartheid (Manuel 1974: 245). It seems likely that Manuel saw his greeting of Nyerere as a chance to befriend a fellow anti-colonial leader and make a political statement on an international stage about Indigenous people. If these were his intentions, the greeting was felicitous, not a mistake. This speech act might have fired (not misfired) precisely because it not only flouted accepted conventions, but exposed that the convention allowed only officials from colonising governments to perform the speech act of diplomatic greeting. This speech act works because Manuel flouted a convention, Nyerere followed his lead, and the audience knew that Manuel was the wrong man for the words. Since any resulting change in circumstances was not from a mistaken speech act, this case would seem to be disqualified from the minor jurisprudence race.

Read in this way, intention makes all the difference in diagnosing a misfire, even in a highly conventional legal speech act. But consider this alternative: Manuel charged off the plane into a greeting with

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Nyerere without any diplomatic intention (perhaps he needed to stretch his legs). Nyerere mis-heard and greeted Manuel as the delegation's leader; the entourage read the encounter as a diplomatic greeting from an Indigenous polity. Though a gulf separated Manuel's intentions from how his speech act was heard, Manuel's speech act was still transformative.

Preoccupied as we are with how *legal* speech acts might be symptoms of a minor jurisprudence, examples of speech acts whose effects exceed intention are probative because legal speech acts are the quintessential speech act robed in convention, where intention seems redundant. The scenario in which Manuel intended his speech act shows that intention is not irrelevant even when the speech act is codified by diplomatic protocol. The scenario in which Manuel lacked a diplomatic intention but Nyerere misunderstood suggests how much hearing matters to a legal speech act.

Let me recap what I have learned from analysing how mistakes in speech that transform states of affairs might be indicative of law as minor jurisprudence. Because perspectives formed within a speech situation define the accepted conventions for a speech act, one person's misfire may be another's felicity, meaning it might not be a mistake at all. Sometimes accepted conventions are rules about standing, producing a circular logic problem if invoked to nullify speech about standing. Transformations in the state of affairs arise in the joining of speaking and hearing, meaning that mistaken hearing (not just mistaken speaking) may be fertile ground for a minor jurisprudence. Hearing places emphasis on the match between apprehension and the speaker's intentions. If a speaker breaches convention intentionally and is heard as intended, then no mistake underpins any transformed state of affairs. But, this transformation may occur in spite of the speaker's intentions and because of the hearer's apprehension, making it a mistake after all. Misfires may be felicities; intention matters or doesn't matter; hearing seems to matter as much or more than speaking. None of this amounts to a reliable diagnostic of law as minor jurisprudence.

D. Transformation and Narrative

So much for mistakes. What about the idea that minor jurisprudence is signalled by something that initiates and brings forth something novel? Let's lower the bar to the initiation of a transformed, rather than novel, state of affairs.

Each case under consideration is a story of a speech act that transforms a situation. The commissioners said the Queen owned the land; the Nisga'a denied these words were law and said they owned the land; reserves were staked out despite protests. Deskaheh petitioned the League for help; Britain and Canada jeered; other countries heard him as a sovereign speaking; the League didn't give assistance. Manuel greeted diplomatically; Nyerere heard him; a Third World-Indigenous alliance formed.

However, these are not the stories of transformation usually told around these speech acts. Instead, the Nisga'a meeting is taken as the beginning of the Nisga'a's land claim battle in Canada's courts, even though the Nisga'a did not see themselves as subject to Canadian law when they spoke with the commissioners (Foster 1998). Deskaheh's efforts are hailed as precursors to the Indigenous rights movement, in a reading which overshadows the ways his words were heard by diverse polities fighting the British Empire (Niezen 2003: 50). Little has been made of George Manuel getting off that plane in Tanzania. That is to say, I am the idiosyncratic audience who considers these speech acts to be transformative encounters. I mis-hear them.

My mishearing is possible because, rather than being 'a linear sequence or 'sum' of speaking plus hearing' (Constable 2014: 88) that can be conclusively heard, a speech act remains incomplete and imperfect, so that 'even the most stale or conventional utterances may unexpectedly take on new meaning or raise new issues' (Constable 2014: 89). We have been saying that the sun rises for thousands of years, but it means something different now that we also say that the earth revolves around the sun (Fasolt 2015: 431). In this regard, speech acts are like texts that, disconnected from their authors, remain open to polysemic readings (Ricoeur 1973: 107). Once rendered in text, a speech act's

perlocutionary effects remain indefinitely open, its locution indefinitely capable of new misfires and potentially catalytic of transformed states of affairs. Such a speech act becomes a historical event that is never closed to new misfires and new mis-hearings, never powerless to transform or initiate (Skinner 2002: 124).

Mis-hearing of an utterance by an idiosyncratic listener distant in time is not the outlier case, but rather the strong case of the fact that asking if a speech act transforms a state of affairs is asking the historian's workaday question. Understanding perlocution requires knowing what happens after and because of a locution. Historians' interpretation of words, constellated into events with significance, rests on knowing what came after them. My mis-hearing shows that 'after' need not be immediate and 'cause' need not be proximate. The past may change depending on the futures that are seen to flow from it, analogous to the way that a speech act is completed through hearing and may be completed in different ways through new hearings.

This goes further than analogy, because language is the medium through which the indeterminate, mistake-riddled past is narrated. Jacques Derrida has this covered like wall-to-wall carpeting. For Derrida, the past is recognisable *as* history because of how language works. Recall that utterances can do what they say because they happen against a horizon of anticipation shaped by conventions about speech. Similarly, events are recognisable *as* such because they emerge from a horizon of what is already possible (Derrida 2002: 233). Because events, like speech acts, appear against a backdrop of expectation, a truly new, 'strong event' 'would suppose an *irruption* that punctures the horizon, *interrupting* any ... convention' (Derrida 2002: 234). Such a truly 'strong event' would be not only unforeseeable and emergent from the impossible, but an absolute surprise (Derrida 2007: 446).

A 'strong event' may astonish, but its new-ness is extinguished by its narration *as* an event that has happened. 'Saying the event', using language, comes after the event; because this saying is repeatable, by definition, it defeats the newness and the surprise of the 'strong event'. Telling history through words about events consists in herding

all that may once have been impossible into the corral of the possible, chewing all that was once surprising into a smooth, humdrum paste of the foreseeable.

My earlier analysis of vantage point and intention put such pressure on the category of ‘misfire’ that it cast doubt on how much ‘misfiring’ there might be. Here, the pressure runs in other directions. If, following Paul Ricoeur and Marianne Constable, text is indeterminate and speech acts are open to completion by innumerable hearers, endless new hearings by new audiences permit endless misfires and mis-hearings that might yield transformed states of affairs. But, if Derrida is right about the relationship between language and history, there is almost no ‘novel’ at all. Even if something surprising occurs, the narration of that happening as a historical event through language cannot help but stitch it onto a backdrop of convention and expectation. On the transformed state of affairs criterion, it is either feast or famine.

When we ask how a misfire might initiate a transformation in circumstances, we are asking whether something *will have been* a misfire that *will have been* transformative. Ian Hacking says that we cannot ask this question in the beginning, because we cannot know significance or apprehension without knowing the future (Hacking 1995: 249–50). We cannot ask this question at the end, because new descriptions of events make new actions possible in the past.³ The past and present are always waiting, ready to be completed again by future events. We are forced to ask this question in the middle – in the present. One present is Trump’s presidency.

2. Minor Jurisprudence in the Present

Let me start over by hearing the speech act, ‘law as minor jurisprudence’, for what it does in the present moment, rather than for what it describes. Others may write about what ‘law as minor jurisprudence’ did in the mid-1990s when legal scholars cribbed it from their humanities colleagues, or in 2012 when Olivia Barr explored the common law through a ‘minor jurisprudence of movement’ (Barr 2012), or in 2014 when Christopher Tomlins framed the symposium around the mid-

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1990s scholarship. What can ‘law as minor jurisprudence’ do in the context of academic inquiry in California in the early days of the Trump administration?

At a time when I was thinking about novel things that escape boundaries, Trump’s election and first hundred days was an event that seemed to be a stunning, surprising break from the major, one that promised to upend the state of affairs. I was apparently not alone in this view, as pundits opining on the administration’s debut found themselves to be overnight experts on the rise of fascism.

Battered by the news, I asked myself: ‘What is this event? What does it mean? What can I do to avert the bad things that might happen next?’ Similar questions may have gripped the Nisga’a when the Crown’s officials declared that the Queen owned their land, an event that I had taken as a possible instance of something transformative that signalled a minor jurisprudence. I realised I had selected cases of Indigenous jurisprudence set against colonial jurisprudence. The election reminded me that a transformed state of affairs has no inherent normative value. I had little variation in my sample composed of examples of Indigenous law fighting the declared major-ness of the coloniser’s law. As a contrast, then, what about studying the apogee of major jurisprudence – the speech acts of a newly elected US president – as a potential site of minor jurisprudence?

I narrowed the scope to investigate Trump’s efforts to ban Muslim travel as a misfire leading to transformation that might exemplify law as minor jurisprudence. The core of Trump’s Executive Order on immigration is a speech act banning Muslims from seven countries from the United States (EO-13769, EO-13780).⁴ Recall that a misfire is a speech act that breaches conventional procedures. Presidential executive orders are rife with convention, down to the menu cover in which they are signed and photographed. Trump is the right man for the speech act of declaring an executive order. But several courts voided the President’s speech act by ruling that conventions in the Constitution limit what he can say in those orders. This is a case of someone being the right man for the speech act and following many conventions,

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only to find his utterance could not do what he intended. Once I put aside my presumptions about Trump's entitlement to speak the major jurisprudence, grounded in my vantage point as a beneficiary of settler colonialism, the scenario reminded me of Deskaheh petitioning according to conventional procedures but asking for something he could not ask for, according to the institutional conditions for felicitous speech.

If, for argument's sake, Trump's Executive Order is a misfire, how does it weather the same scrutiny as our other examples? First, I argued that the categorisation of a misfire depends on vantage point in a speech situation. From one perspective, this executive order must be a misfire, because an executive order cannot violate the Constitution, and these words do. This reaction demonstrates how major jurisprudence provides the background conditions against which potentially transformative speech is evaluated. But, from another vantage point, this speech act does not breach conventions of major jurisprudence but, rather, complies with conventions about political campaign speech becoming policy. Remember how the state law declares itself to be outside the speech situation and able to adopt a neutral vantage point? When judges invalidated the order, Trump attacked them for being biased, a rebuttal of this judicial claim of a 'view from nowhere'.

Second, I explored how a speaker's intentions qualify a potential misfire. The case of Manuel's meeting with Nyerere illustrated that, particularly for codified legal speech acts, the effects of speech may exceed speakers' intentions. In the case of the Muslim travel ban, one explicit intention is that the ban is a new response to security threats from a take-charge strongman, whose words have force precisely through their candid repudiation of convention. But, like a diplomatic greeting on the airport tarmac, an executive order is a legal speech act of such force that it drowns a speaker's intention. Thus, regardless of his intentions, Trump's speech act had the effect of hailing all Muslims as suspected terrorists and all white people as the rightful beneficiaries of white supremacy.

Recall that 'strong', surprising events may be transformative but

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are quickly rendered foreseeable through their narration. Trump declared his travel ban to be totally new, more transformative than a newborn. But, as soon as he had spoken, he explained that the Obama administration had selected the countries targeted by the ban and that, in any case, the injunctions were another display of over-reaching by activist judges (a bestselling right-wing gripe). The subsequent narration of this event showed how it fit with what had come before it. Even if this misfired presidential speech act was surprising and transformative for a moment, its subsequent narration made it a flash in the pan.

I began my inquiry focused on what people say, but I learned that how they are heard makes either half or all the difference. How were Trump's words about the Muslim travel ban heard? Opponents heard a man whose facts about refugee screening needed checking. Supporters heard a man keeping campaign promises to secure the country (Tavernise 2017). The order interpellated everyone as fearful subjects of a US border control system based on race and creed. But several thousand people were misinterpellated, as they heard the order as a call to direct action and staged massive, flash-mobilised protests at airports across the country. Lawyers and judges were interpellated as defenders of the rule of law.

Indeed, Trump's power to transform the state of affairs may rest not in speaking, but in hearing. Senior adviser, Kellyanne Conway, parried a reporter's fact-checking move with the explanation that Trump had simply proposed 'alternative facts' (Bradner 2017). When reporter David Muir challenged Trump over the fabricated story about voter fraud, Trump retorted that what mattered was that his supporters believed the voter fraud story (ABC News 2017). Trump severs the link between word and world by using words in ways that mean we cannot believe our ears (Constable 2016).

This speech that arises from one hand clapping and being heard does more than change how words work. Its serpentine recoil changes the world. As justification for the Muslim travel ban, a majority of Trump voters cited the 'Bowling Green Massacre'. This massacre was pulled from thin air by Conway (England 2017). Despite her retraction and

a widespread media debunking, fiction became fact in many minds.

If the severing of speech and hearing yields a new relationship between word and world, the best examples involve hard-boiled facts, like whether the sun shone during Trump's inauguration speech (it didn't) or whether the crowd was larger than previous presidents' (it wasn't). Twinned with the lies told and believed, this uncoupling of word and world suggests something very transformative indeed.

Nothing intrinsic connects word and world, and human and non-human flourishing may be possible if rainfall is called sunshine. Imagining utopia might actually demand loosening the screws on language (Le Guin 2002). But Trump's re-ordering of word and world serves not the utopic imagination, but the sublunary plan to 'make America great again'. The slogan hails those who can pine for the past. For the national and global majority for whom there is no past America that was great, the slogan promises to make life unlivable in familiar and fresh ways. Since hearing matters so much to speech, this call is a site of resistance. I can refuse to be called as a subject with less of a right to equal pay because of my gender and more of a right to cross a border because of my race. The harder calls to mis-hear concern the unknown futures I am interpellated into, particularly those in which I benefit.

Injunctions suspending the travel ban were celebrated as proof that the rule of law could force Trump's outlandish solecisms to bend to convention. The rule of law triumphed by hooking the executive order into a long chain of precedent and finding it unconstitutional. By these lights, Trump's bold escapes from both the accepted conventions of speech and the accepted conventions of presidential power look like insurgent, pioneering minor jurisprudence 'getting away', only to be corralled by a major jurisprudence wielding the law to insist on the prior, habitual fit between world and word.

But retrenching around the facts and enforcing the law offer only ersatz justice. Restoring the bond between word and world, between event and precedent is also restoring the rule of law that produced and condoned bank bailouts, mass incarceration, drone strikes, and the Supreme Court's decision on the Muslim travel ban, because

‘[t]he worst, most terrible things that the United States has done have almost never happened through an assault on American institutions; they’ve always happened through American institutions and practices ... and the rule of law’ (Robin 2017).

This is not the time for staring in paranoid positivist amazement, dubbing this moment Copernican, or bleating about how this could happen ‘here’. When the Nisga’a heard the declaration that their land belonged to a queen they had never met who had seen fit to give them a reserve, they made sense of this speech act through language. ‘We have no word in our language for ‘reserve’, Charles Russ explained, ‘[w]e have the word ‘land’. ... Your name for our land is ‘reserve’” (ER 1888: 18). The Nisga’a reasoned that the white man had not changed the world but the relationship between word and world. A loosening and reordering of the relationship between word and world may make visible moments of political significance. The battle against Trump’s minor jurisprudence is worth fighting and winning, and facts and major jurisprudence might be quite useful. But that victory is no substitute for a vision of how to build a world we would actually want to live in.

3. Conclusion

The minimum that can be salvaged from thinking about law as minor jurisprudence using speech act theory is that, just as the meaning and effect of speech acts emerge from a background of shared expectations about what can be said and heard, minor jurisprudence, in its purported, mistaken transformation of circumstances, exists relative to major jurisprudence. The idea of the minor needs the major.

Hence, interpreting a legal speech act is not about revealing in a truth about either the foreground or the background but about understanding the relationship between the two. A word ‘gains its meaning from the place it occupies within an entire conceptual scheme’ (Skinner 2002: 164). What matters is *seeing* the flash that erupts from the backdrop and *drawing* the distinction between the major and minor. What matters is the verb, the action of sorting the major from the minor and the misfired utterance from the felicitous.

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The action of distinguishing between the major and minor trains our attention on the criteria that distinguish those categories and our agreements about those categories. What we do with words matters not because it reports on truths about worlds, but because it is entangled with our agreements on the criteria for judgment and our agreements to be humans, together, that say and, in saying, appeal to others' understanding (Fasolt 2015: 429). We can dodge the question of foundation (i.e. turtles all the way down) by moving sideways, to one another and our agreements about language (i.e. turtles all the way sideways).

The other ways through the problems of mistake, language, and law may tend towards fascism, and here is why. Ricoeur was concerned with how world and text were bound together. He hit an impasse that he thought the law helped him overcome. Legal reasoning offered a theory for validating the connection between world and word because, according to H L A Hart's explanation of legal reasoning, 'the plurivocity common to texts and to actions is exhibited in the form of a conflict of interpretations, and the final interpretation as a verdict to which it is possible to make appeal' (Ricoeur 1973: 110). In law, debates over interpretation end because the judge decides but, outside the law, Ricoeur laments, there is no 'such a last word. Or, if there is any, we call that violence' (Ricoeur 1973: 110). For Ricoeur, reading Hart, victory in the interpretive struggle over language is possible in law *only* because public power grants a judge the final say. Ricoeur may be wrong about the violence done by judges with language (Cover 1986), but he illustrates the allure of the flight to judicial power as a means of fixing the bond between word and world.

The absence of an authority figure deciding how words work may be what keeps historians in harness. The past and the speech act of historical narration are exactly where the battle is joined between word and world, as '[t]here is history precisely because no primeval legislator put words in harmony with things' (Ranci re 1994: 35). Walter Benjamin thought that the sorting of the major and the minor distinguishes human history from messianic omniscience. In his words,

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'[a] chronicler who recites events without distinguishing between major and minor ones acts in accordance with the following truth: nothing that has ever happened should be regarded as lost for history. To be sure, only a redeemed mankind receives the fullness of its past' (Benjamin 1968: 254). To forgo the sorting between the major and minor, hence, would be to cede the ground of language and history to a sovereign, whether secular or divine, who orders word and world.

I don't want to pine for that legislator or for that redemption. The point of asking about the difference between law as minor or major jurisprudence is not that the answer could tell us how things are or what we must do. The distinctions between the major and minor cannot do the work of political judgment. That a jurisprudence is transformative and a break from the major tells us nothing about whether it is desirable.

Though there is nothing intrinsic to distinctions or to the words we use to draw them, the action of distinguishing is essential. Hence, my commitments are to the *activity*, with others, of drawing distinctions about things. Drawing distinctions is what we do when we try to see clearly, hear carefully, and speak truthfully, even though our world(s) escape our desire for clarity, care, and truth (Constable 2014: 128–9). We cannot say how the Muslim travel ban will have been transformative, nor how it will have been heard, nor what minor jurisprudence it will have signalled. What grows from the present's seeds is the future's province – this is why many are terrified, while a minority awaits the rapture. Though we cannot know how the present moment will have been new, we can distinguish between the past and the present by refusing, with others, to continue business as usual, to remain obedient, still, and mute. What makes and interrupts history, Arendt said, is '[t]he faculty of freedom itself, the sheer capacity to begin' (Arendt 2000: 458). If you are looking for me, I will be on the streets.

Endnotes

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1. Austin’s example may mislead readers who think Mia Hamm played professional soccer, not professional football.
 2. Discussing the example of those court-martialed in World War I now described posthumously as victims of post-traumatic stress disorder in need of psychiatric care, not execution, Hacking writes: ‘If a description did not exist, or was not available, at an earlier time, then at that time one could not act intentionally under that description. Only later did it become true that, at that time, one performed an action under that description. At the very least, we rewrite the past, not because we find out more about it, but because we present actions under new descriptions.’ (Hacking 1995: 243)
 3. For full procedural history, see *Trump v. International Refugee Assistance Project et al.* 582 U.S. ____ (2017) (26 June 2017), 2-7.

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