Humic lawscapes

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Abstract

Robert Pogue Harrison claims that relations with decaying matters are constitutive of social and cultural forms. He refers to these relations as the humic foundations of the life-world. By extending the concept of humic foundations from cultural studies to the analysis of law, the jurisprudent may re-encounter the decomposing dead as constitutive of law's forms. This chapter revisits *Gilbert v Buzzard and Boyer*, a case from 1820 dealing with a citation of burial law. In *Gilbert* (1820), a court of ecclesiastical law indexed the decomposed corpse to the faltered claim to burial. Once fully decomposed, the grave was no longer occupied, extinguishing any surviving claims to exclusive use of that plot, and reverting the land to the parish. By tracing the influence of decompositions in this case, describing how decomposing materials can be a constitutive form to law, the chapter suggests that the decomposing body evinces a quality—an 'ontogenetic' and 'jurisgenerative' quality—for which conventional legal discourse and theory cannot account. The constitutive form is in the fluidity of decompositions, which defies containment, stillness and stable identities, as it leaks, expands and spreads. Human remains become excrement, as opposed to dignified and ordered, which stages a spacing of 'non-law' consequential to the formation of law and

legal ideas. Likewise, the absence that follows decomposition are also heteronomous, factoring in the formation of law. The chapter concludes by reflecting on a materialist theory of law as that is specifically applied in the context of the human dead.

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Introduction

In 1614, in the *Haynes's Case*, the 'dead body' was reportedly described by justices at the Serjeant's Inn as 'being *but a lump of earth [it] hath no capacity*.'[1] The absence of capacity meant that title to a shroud did not vest in the individual wrapped in it, but remained with whom placed the property there. To that, English jurists—Sir Edward Coke, Matthew Hale, William Blackstone—added that the case also stood for another rule: no property in a corpse.[2] For these jurists, the dead body lacked capacity of a different kind, too. Not only did the dead body fail as a subject of rights at common law; it was also not an object suitable as property. Rather, the dead body was of ecclesiastical cognizance alone. But despite what was said at Sergeant's Inn, or how the decision has been interpreted, there *is* capacity; dead bodies have affections that animate lawful relations; have capacity to secrete social effects in the folds, distention and perforation of decomposing flesh, which impress on the world and congeal as law.

Robert Pogue Harrison claims that our relations with decaying matters, and processes of decay, are constitutive of social and cultural forms.[3] He refers to these relations as the humic foundations of the life-world (the 'humic', in the sense of relating to 'humus' or decomposed materials sediment in the earth). By extending the concept of humic foundations from cultural studies to the analysis of law, the jurisprudent may re-encounter the decomposing dead as constitutive of law's forms just as the humic is constitutive of other social or cultural forms. The jurisprudent may notice the law secreted by flesh as it folds, as flesh distends, as it is perforated. Order is framed by movement, composition and destruction of the body. Flesh contorts, joins with touch and pulls apart, forming a frame incidental to the body's movement which enables from chaos an expression that obtains a certain sensibility, a sense of the lawful in that order, authority and meaning are jointly fastened on the earth as the body grazes, walks, dances,

[1] *Haynes's Case*, (1614) 77 ER 1389, 1389.
[2] Edward Coke, *The Third Part of the Institutes of the Law of England: Concerning High Treason, and Order Pleas of the Crown, and Criminal Classes* (London: 1644), 203; Matthew Hale, *The History of the Pleas of the Crown: Volume 1* (London: T Payne, 1800), 515; William Blackstone, *Commentaries on the Laws of England, Volume 2* (Philadelphia: JP Lippencott & Co, 1895), 235.
[3] Robert Pogue Harrison, *The Dominion of the Dead* (Chicago: University of Chicago Press, 2003).

plays, or is hawked or dragged.[4] In this space of encounter, abutting bodies, abutting the earth, where limbs, flesh, carbon mingle, is the place where laws form, where habits individuate from this flux of matter and obtain a certain solidity that becomes hard to bend—becomes a path that must be followed.[5] This 'vibrant' body, shedding law with each movement, with each affection,[6] forming grooves in the earth and cortical tissues,[7] have been the subject of study by legal scholars before, especially where that body exists in some recognizably living form (like the embodiment of a woman, of an intersex or racialized person, in cases of disability, pregnancy, among other embodiments),[8] but the jurisprudent can be drawn to another kind of body: that of the dead.[9] Because there *is* movement to the dead, even if we often do not think of it.[10]

The constitutive effect of the humic is demonstrated in how the dead haunt the laws of England and her colonies—common, statutory and ecclesiastical. In this chapter, I trace such hauntings in one instance: *Gilbert v Buzzard and Boyer*, a case from 1820 dealing with a citation of burial law. With

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[4] Elizabeth Grosz, *Chaos, Territory, Art: Deleuze and the Framing of the Earth* (New York: Columbia University Press, 2008). See e.g., Olivia Barr, *A Jurisprudence of Movement: Common Law, Walking, Unsettling Place* (Abingdon: Routledge, 2016); Joshua David Michael Shaw, "Confronting Jurisdiction with Antinomian Bodies" *Law, Culture and the Humanities* (2020): https://doi.org/10.1177/1743872120942770; Marc Trabsky, *Law and the Dead: Technologies, Relations, Institutions* (Abingdon: Routledge, 2019). With respect of play, see Joshua DM Shaw, "A Minor Jurisprudence of Play: Becoming Jurisprudents through Play in the *Majora's Mask*" in *Law, Video Games, Virtual Realities: Playing Law*, eds. Dale Mitchell, Ashley Pearson and Timothy D Peters (Abingdon: Routledge, 2023), 190-210.

[5] Margaret Davies, *EcoLaw: Legality, Life and the Normativity of Nature* (Abingdon: Routledge, 2022).

[6] See Jane Bennett, *Vibrant Matter: A Political Ecology of Things* (Durham: Duke University Press, 2009); Anna Grear, "Foregrounding Vulnerability: Materiality's Porous Affectability as a Methodological Platform" in *Research Methods in Environmental Law*, eds. Andreas Philippopoulos-Mihalopoulos and Victoria Brooks (London: Elgar, 2017), 3-28; Andreas Philippopoulos-Mihalopoulos, "Atmospheres of Law: Senses, Affects, Lawscapes" *Emotion, Space and Society* 7 (2013): 35; Andreas Philippopoulos-Mihalopoulos, *Spatial Justice: Body, Lawscape, Atmosphere* (Abingdon: Routledge, 2014); Shaw, "Confronting Jurisdiction."

[7] Davies, *EcoLaw*; Grosz, *Chaos, Territory, Art*. Also see Margaret Davies, *Law Unlimited: Materialism, Pluralism and Legal Theory* (Abingdon: Routledge, 2017).

[8] See e.g., Sara Ahmed, "Deconstruction and Law's Other: Towards a Feminist Theory of Embodied Legal Rights" *Social and Legal Studies* 4, no. 1 (1995): 55; Ruth Fletcher, Marie Fox and Julie McCandless, "Legal Embodiment: Analysing the Body of Healthcare Law" *Medical Law Review* 16, no. 3 (2008): 321; Fae Garland and Mitchell Travis, *Intersex Embodiment: Legal Frameworks beyond Identity and Disorder* (Bristol: Bristol University Press, 2023); Roxanne Mykitiuk, "Fragmenting the Body" *Australian Feminist Law Journal* 2, no. 1 (1994): 63.

[9] A variation of the thesis is advanced by Ngaire Naffine, in "'But a Lump of Earth'? The Legal Status of the Corpse" in *Courting Death: The Law of Mortality*, ed. Desmond Manderson (London: Pluto, 1999), 95-110. However, Naffine does not develop the thesis with respect of the legal theories with which I am engaging here.

[10] See e.g., Barr, *Jurisprudence of Movement*; Shaw, "Confronting Jurisdiction"; Trabsky, *Law and the Dead*.

Gilbert, the Consistory Court of London—a court of ecclesiastical law—indexed the decomposed corpse to the faltered claim to burial.[11] Once fully decomposed, the grave was no longer occupied, extinguishing any surviving claims to the exclusive use of that plot, and reverting the land to the parish. By tracing the influence of decompositions in this case, describing how decomposing materials can be a constitutive form to law, I suggest that the decomposing body evinces a quality—an 'ontogenetic' and 'jurisgenerative' quality.[12] The constitutive form is, in part, in the fluidity of decompositions, which defies containment, stillness and stable identities, as it leaks, expands and spreads.[13] Human remains become excrement, as opposed to dignified and ordered by sepulchre, which stages a spacing of 'non-law.' Likewise, the absence that follows decomposition also factors in the formation of law.

Such a thesis demands a materialist theory of law. Within contemporary jurisprudence, there are varied accounts of how physical matter relates to law, and *vice versa*, drawing disparately from Marxist, new materialist and actor-network theories, among other strands. But, like critical legal theorists Hyo Yoon Kang and Sara Kendall, my interest in materiality (the stuff, things, objects, etc. that make up the world) attunes to 'the legal meaning or quality of the elements that fabricate law.'[14] Such an attunement requires me to: 'observ[e] how certain elements mobilize and condition legal meaning by simultaneously serving as law's material conditions and as the embodiments of legal matters themselves,' and 'investigat[e] the properties of those legal materials,' as 'a mode of understanding law's composition and

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[11] *Gilbert v Buzzard and Boyer* (1820), 3 Phill 335, 161 ER 1342 [*Gilbert* (1820)]. The case was previously heard in a court of common law and reported as *R v Coleridge* (1819), 2 B & ALD 806, 106 Eng Rep 559. There, the Crown sought, on behalf of Mr. Gilbert, mandamus which would require 'the rector, officiating curate, churchwardens and sexton of the parish of Saint Andrew' to effect the burial in an iron casket (560). Five justices unanimously held against the Crown, each stating that the method of burial was of ecclesiastical cognizance alone.

[12] See Joshua DM Shaw and Roxanne Mykitiuk, "Jurisgenerative Tissues: Sociotechnical Imaginaries and the Legal Secretions of 3D Bioprinting" *Law and Critique* 34, no. 2 (2023): 105. Also see Margaret Davies' discussion of biogenesis and jurisgenesis in Davies, *EcoLaw*.

[13] See discussion of 'leaky bodies' in Elizabeth Grosz, *Volatile Bodies: Toward a Corporeal Feminism* (Bloomington: Indiana University Press, 1994); Robyn Longhurst, *Bodies: Exploring Fluid Boundaries* (Abingdon: Routledge, 2001); Margrit Shildrick, *Leaky Bodies and Boundaries: Feminism, Postmodernism and (Bio)Ethics* (Abingdon: Routledge, 1997).

[14] Hyo Yoon Kang and Sara Kendall, "Legal Materiality" in *The Oxford Handbook of Law and Humanities*, eds. Simon Stern, Maksymillian Del Mar and Bernadette Meyler (Oxford: Oxford University Press, 2019), 20-37, 34.

relationality.'[15] Relatedly, Alain Pottage describes materialist enquiry into law as, 'instead of presuming "law", beginning:

> […] with a set of raw elements: texts, institutions, statements, gestures, architectural and material forms, formalized roles and competences, and self-descriptions (people often characterize themselves as practitioners or participants in 'law'). And, instead of abstracting to a field, medium, code or rationality in which these elements cohere into 'law', one would explore the ways in which elements are assembled into *dispositifs* [whose networked relations, in duration and place, conduce effects experienced as, or later recognized as, 'law'].[16]

As I explain below, I develop a materialist theory of law with the assistance of concepts—principally, Andreas Philippopoulos-Mihalopoulos' 'lawscape'—which enlarge and draw focus to the contribution of spatiality, temporality, corporeality and affect to the genesis of law and legal meaning.[17] In doing so a materialist theory of law can re-animate, and trace, the relations that comprise the human dead for law.

A right to be deposited in our parental earth

English doctors of ecclesiastical law claimed all God's creations, upon death and by natural right, were deposited in their 'parental earth.'[18] Ecclesiastical law facilitated that right within the English parish and improved it by associating the right with the churchyard where the dead could lie proximate to prayerful communities interested in their absolution. Burial was a spiritual matter, in that it expressed a fundamental relation with God, and ecclesiastical law reflected this in its formulation of the right to Christian burial. But as laid bare in *Gilbert*, the right so claimed could also assume a material form: it referred to the placement of the body in terms of location and mode, and evoked the process of decomposition in how it related the body to the earth and other matter. *Gilbert* thereby shows how the

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[15] Kang and Kendall, "Legal Materiality," 34.
[16] Alain Pottage, "The Materiality of What?" *Journal of Law and Society* 39, no. 1 (2012): 167, 181.
[17] Philippopoulos-Mihalopoulos, "Atmospheres of Law"; Philippopoulos-Mihalopoulos, *Spatial Justice*.
[18] Robert Phillimore, *Ecclesiastical Law of the Church of England* (London: Henry Sweet, 1873), Chapter 10; also see generally about the ecclesiastical legal history of burial in England in Heather Conway, *Law and the Dead* (Abingdon: Routledge, 2016).

office of Christian burial factored the process of decomposition, which in turn begins to illustrate my claim that bodily decompositions can matter to law and theory. Principally, *Gilbert* demonstrates that the decomposing body can mediate the transition between legal statuses, and the relations that comprise those statuses.

In *Gilbert*, the Consistory Court of London was asked whether churchwardens could refuse to bury a parishioner in an iron casket and insist on the use of wooden one instead. Alternatively, if the churchwardens could not refuse, could a parishioner be charged more for the burial? Key to the parishioner's argument was that 'the ground once given to the interment of a body [was] appropriated for ever to that body.'[19] A parishioner's right to Christian burial was forever, and so it did not matter whether the casket's material prevented or delayed the body's decomposition (although the parishioner also maintained that iron 'goes to rapid decay' and 'would decay as soon as wood').[20] To admit authority to decline materials was to erode the parishioner's right to burial:

> If the imperishable nature of the article is admitted as a ground of objection, where is the objection to stop? It may next be made to the interment in lead. There can be no legal right to reject the material: the churchyard and burial grounds belong to the parish, for the interment of the parishioners; they are vested by law in the incumbent and the parishioners. Every parishioner has generally a right to a place in the churchyard; he has no right to any particular spot; but when death and interment have taken place, then there is a severance of the common property, the general right has become a particular right, there is a legal appropriation of a legal right. Inviolability of sepulture is one of the dearest and most ancient rights of mankind; it is most deeply impressed on all our minds, and embodied in our common forms of speech. In the grave a man expects to be undisturbed; it is his list home; and this, *ut requiescat in pace, usque ad*

[19] *Gilbert*, 1344-1345, 1350.
[20] *Gilbert*, 1344.

resurrectionem [that he may rest in peace, until the resurrection] (2 Inst. 489), is considered by Lord Coke as a ground of the parishioners' duty of repair.[21]

The churchwardens replied that '[c]ast-iron would certainly be imperishable,' and that its common use would interfere with the rights of parishioners to Christian burial:

> if the mode of burying in iron coffins were resorted to, it would be impossible for all the parishioners to be buried in the church-yard, and they would be driven at considerable expense to purchase additional grounds out of the parish. The right of burial is like other rights; it is not to be so used as to injure others.[22]

Further, the allotment of land for a parishioner's burial was not forever. Rather, churchwardens were only required to ensure 'that the body be kept unmolested until it decays.'[23]

Dr. William Scott of the Consistory Court held that a parishioner's right to Christian burial could not be denied outside the canons. The canons generally required the body to be laid to rest and buried in consecrated soil, consistent with those portions of theology concerned with death, God's Last Judgment and the resurrection (otherwise known as 'eschatology').[24] Once committed, the burial ground could not be put to any other use as the land and the dead were inviolable, for as long as both were identifiably present; limited exceptions provided by the canons were exercised somberly and with hesitation. Sir Henry Spelman—an English scholar of antiquaries cited by Dr. Scott—said in his seventeenth-century tract that 'the very burial of [the] body […]' 'assigned [a place] to some office of Religion' or *Locus Religiosus*, because:

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[21] *Gilbert*, 1344-1345. Latin translation is my own.
[22] *Gilbert*, 1345.
[23] *Gilbert*, 1345.
[24] The right to a Christian burial was enjoyed by all who belonged to the Christian community; namely, as parishioners to the parish churchyard. Exceptions could be granted to those travelling or itinerant. Those dissenting from the Church were by the nineteenth century increasingly admitted, by statute, into their own burying grounds. See generally Conway, *Law and the Dead*.

the nature of the soil has changed from secular, and, in reverence of this new function, counted to be religious, and now therefore by the Canons nothing may be taken for any more graves there.[25]

To be buried was to finally return the body to the earth and emplace one's soul amongst the safekeeping of the soil to await resurrection.[26] By such a process the land was 'severed from human property' and returned to God. Since at least *AD* 750, such a spot was generally the yard surrounding the parish church, when a constitution was imported by Archbishop Cuthbert from the Holy See of Rome that required it.[27] Deviations threatened excommunication, such as Pope Boniface VIII's promulgation in *AD* 1300 which prohibited the disembowelment of human remains, and their boiling to separate flesh from bones.[28]

The sacred status of the burial spot, and the body emplaced in it, prohibited clergy from exhorting monies in consideration for the service of burial as it profaned what properly belonged to God (as *Locus Sacratus*). Selling land for burial also constituted 'a reaping of commodity out of carcasses of the dead,' which presented an impossible commodity in God since the human body was His as *imago Dei*.[29] The ecclesiastical 'office of burial' was devoted to furthering 'the Law of Nature and divine Law [of] bury[ing] the dead,' which required clergy to selflessly deposit the human dead in their parental earth and

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[25] Henry Spelman, *De Sepultura* (London: Robert Young, 1641), 12. *De Sepultura* concerns clergy exhorting monies in consideration for burial, which was contrary to the canons. The tract reproduces and comments upon canons pertaining to burial.

[26] Such eschatology was not universally shared across time or denominations. To suggest the soul could be emplaced in the soil was to suggest it had, or could have, a materiality, which was inconsistent with the theories of some. The eschatology to which I refer to was that relied on, albeit variably, by medieval and early modern ecclesiastics in England who countenanced the ecclesiastical law applicable to the English parish. See discussion in Caroline Walker Bynum, "Material Continuity, Personal Survival and the Resurrection of the Body: A Scholastic Discussion in its Medieval and Modern Contexts" in *Fragmentation and Redemption: Essays on Gender and the Human Body in Medieval Religion* (Brooklyn: Zone Books, 1992), 239-297; Caroline Walker Bynum, *The Resurrection of the Body in Western Christianity, 200-1336* (New York: Columbia University Press, 2017).

[27] *Gilbert*, 1347.

[28] William Devlin, "Cremation" in *The Catholic Encyclopedia: An International Work of Reference on the Constitution, Doctrine, Discipline, and History of the Catholic Church (Volume 4)*, ed. Charles Herbermann et al. (New York: The Encyclopedia Press, 1908), 481-483.

[29] Spelman, *De Sepultura*, 11. In early mediaeval England, Christian eschatology permitted different bodily cultures where the dead bodies of saints, and parts thereof, were commodified and exchanged, *because* of saints' proximity to God. There were periods where significant trade was undertaken with respect of relics. However, relics were not practised under the Church of England. See Caroline Walker Bynum, "The Female Body and Religious Practice in the Later Middle Ages" in *Fragments for a History of the Human Body: Part 1*, eds. Michel Feher, Ramona Naddaff and Nadia Tazi (Brooklyn: Zone Books, 1989), 160-219; Patrick J Geary, *Living with the Dead in the Middle Ages* (Ithica: Cornell University Press, 1994).

to ensure they remained deposited.[30] Whilst 'no positive rule of law or of religion […] prescribe[d]' the 'way the mortal remains [were] to be conveyed to their last abode'[31]—such matters instead arose from sentiment and use—the law did provide for a right to burial.

But with respect to the parishioner's claim, Dr. Scott complained that the parishioner misconstrued the right to burial, giving it a content unfamiliar to the 'original abstract right' and without due regard for what was 'necessarily involved in it': '[t]hat right, strictly taken, is to be returned to his parent earth for dissolution, and to be carried there for that purpose in a decent and inoffensive manner'.[32] To demand an iron casket may develop out of 'natural feelings' toward the dead, specifically the want to have those remains treated with care, but the right narrowly pertained to being deposited in and returned to the earth (although ecclesiastical law did not prohibit it).[33] Further, the parishioner's argument that 'the ground once given to the interment of a body is appropriated forever to that body' failed.[34]

> [I]t seems to be assumed that the tenant [of the grave] himself is imperishable; for surely there cannot be an inextinguishable title, a perpetuity of possession belonging to a perishable thing: but obstructed in a portion of it by public authority, the fact is, that 'man' and 'for ever' are terms quite incompatible in any state of his existence, dead or alive, in this world. The time must come when his posthumous remains must mingle with and compose a part of the soil in which they have been deposited. Precious embalmments [sic] and splendid monuments may preserve for centuries the remains of those who have filled the more commanding stations of human life: but the common lot of mankind furnishes them with no such means of conservation. With reference to men, the *domus aeterna* is a mere flourish of rhetoric. The process of nature will resolve them into an intimate mixture with their kindred earth, and will furnish a place of repose for other occupants of the grave in succession.[35]

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[30] Spelman, *De Sepultura*, 3.
[31] *Gilbert*, 1347.
[32] *Gilbert*, 1348.
[33] *Gilbert*, 1350.
[34] *Gilbert*, 1350.
[35] *Gilbert*, 1349-1350.

Accordingly, an iron casket could be requested, but was not guaranteed. If iron was allowed, churchwardens were entitled to charge more to maintain the grounds, since iron was likely to slow the process of decay and thereby delay the plot's reversion to common use of the parish.[36]

Jurisgenerativity of the corpse

At least in my reading, the Consistory Court incorporated the process of decay into legal reasoning. The dead body 'mingle[d] with and compose[d] a part of the soil,' which, for Dr. Scott, aligned title to a grave with the temporality of the dead body. Title thereby extinguished once the body fully churned and disassembled, and '[t]he process of nature […] resolve[d] [the body] into an intimate mixture with their kindred earth.'[37] At this juncture clerical duties to burial were fulfilled, in that no meaningful trace of the person remained, lying vulnerable to disturbance or defilement where it was deposited. The soul was preserved amongst that spot of soil, to await resurrection, as the physical body was taken in by worms, becoming, once again, one with the earth: dust to dust, just as God sentenced.[38] For clergy, upon the extinguishment of title the land became amenable to subsequent use which, in the context of a consecrated churchyard, was restricted to further burials as the land reverted to common use of the parish. If not a churchyard, it would have reverted to a natural state, awaiting appropriation for any lawful use.[39] In *Gilbert*, with consequence to the parish, the iron casket prolonged 'the process of nature' to which title was indexed; however, the body would still decompose and so the title, like the body, was perishable and so could not be prohibited. But delayed decomposition, arising from a parishioner's choice of material, entitled the churchwarden to charge more to ensure the churchyard's upkeep over a longer period.

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[36] *Gilbert*, 1354.
[37] *Gilbert*, 1350.
[38] Worms consuming the corpse is a motif common among discourses on sepulchre in the eighteenth and nineteenth centuries.
[39] Prue Vines, "Bodily Remains in the Cemetery and the Burial Ground: A Comparative Anthropology of Law and Death *or* How Long can I Stay?" in *Courting Death: The Law of Mortality*, ed. Desmond Manderson (London: Pluto, 1999), 111-127, 122.

The physical matter of the decomposing corpse—its materiality—functions here as an intermediary between legal statuses where one status, and the relations that comprise it, become another once decomposition is complete. The material presence of the decomposing dead, and its eventual absence, orders how others—churchwardens, undertakers, parishioners—lawfully relate to each other and the burial place. The ordering is spatial, in that *Locus Sacratus* excludes others and prohibits conduct at that spot where the corpse is placed. It is also temporal, in that bit by bit the corpse vacates that spot, becoming indistinguishable from the soil, which conditions upon completion further iterations of use. Elsewhere, Marty Slaughter describes that which 'lies outside law,' as 'chaos, fragmentation, hybridisation, and decomposition' in contrast to 'law belong[ing] to and creat[ing] an order of things' that connects, unifies *and* 'survives the individual parts.'[40] Slaughter looks to the cutting up, decomposition and admixture of bodies and bodily materials as evincing this point of 'non-Law.' Likewise, the decomposing corpse may be said to perform a duration of non-law between two points of law separated in chronological time: the grave site as *Locus Sacratus* exists as an order of things that encases and preserves the dead's repose; and once decomposed that place assumes another order, becoming property again or at least available for such lawful uses. The duration between creates a space of non-law, of chaos, needed to bring about another law where the prior law perished.

That duration also participates in creating the order that follows. Borrowing from Robert Cover, the duration may be described as 'jurisgenerative' in that immanent to its expression is the genesis of normative worlds which supply a sensory and narrative repertoire for law.[41] Cover was writing on diverging constitutional interpretations, far afield from dead bodies, but I think his comments on the formation of an interpretive community, namely through the exertion of an 'insular autonomy'[42] or a 'principle of separateness [as] constitutive and jurisgenerative,'[43] can be extended by analogy to the

[40] MM Slaughter, "Sacred Kingship and Antinomianism: Antirrhesis and the Order of Things" *Law and Literature* 4, no. 2 (1992): 227, 228.
[41] Robert M Cover, "*Nomos* and Narrative" *Harvard Law Review* 97 (1983): 4.
[42] Cover, "*Nomos* and Narrative," 26.
[43] Cover, "*Nomos* and Narrative," 29.

physical matter of decomposition. Cover described the jurisgenerative as akin to 'juridical mitosis,' where:

> New law is constantly created through the sectarian separation of communities. The 'Torah' becomes two, three, many Toroth as surely as there are teachers to teach or students to study. The radical instability of the paideic *nomos* forces intentional communities—communities whose members believe themselves to have common meanings for the normative dimensions of their common lives—to maintain their coherence as paideic entities by expulsion and exile of the potent flowers of normative meaning.[44]

Different cultural and institutional configurations thereby proliferate *nomoi* by conditioning peoples' separation from a prior community—allowing another to intentionally form in contradistinction[45]—or maintain nomoi through apparatuses of enforcement that pre-empt separation.[46] Those worlds suppress the possibility of others in the fact of their unity, as an enforcement of that which is already present or as inspiration toward what is imagined to be.[47] Returning to *Gilbert*, we might see a similar movement at play where a prior unity in *Locus Sacralas*, analogous to Cover's Torah, was disemboweled by the appearance of difference divined through the body's decomposition. The integrity of the prior unity channeled through the body in repose was dissolved as the body decayed, setting the occasion for another unity to take place. The movement was repeated with each burial, with each process of decomposition, which nested the space of non-law within a pattern or choreography that formed a superior unity or structure. The difference produced by the jurisgenerative functioned *for* that structure as opposed to against it, enabling a change in state necessary for its performance. Here, that structure was created through narratives of Christian eschatology, of which the parish and the parishioners formed part. An iron casket portended the narrative's destabilization by protracting the decompositions upon which it relied. The Consistory Court attempted to re-incorporate the jurisgenerative within the higher unity supplied by

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[44] Cover, "*Nomos* and Narrative," 15-16.
[45] Cover, "*Nomos* and Narrative," 12-13.
[46] Cover, "*Nomos* and Narrative," 13.
[47] Robert M Cover, "Violence and the Word" *Yale Law Journal* 95 (1985): 1601.

the eschatological narrative by admitting iron if churchwardens could still maintain the grounds for their holy purpose.

Antinomian bodies

Elsewhere I have characterized bodily processes as jurisgenerative in that flesh and other viscera necessarily exceeds the grids law imposes on the human, creating space in their transgression for different legalities to emerge.[48] I have located these 'leaky bodies' in contests of the medico-legal prescription of death,[49] in speculations of the jurisdictional effects of post-mortem organ and tissue donation,[50] and, with Roxanne Mykitiuk, in appraising the imaginaries that could arise from 3D bioprinting.[51] In these cases, I (or, in the last instance, we) have taken Mykitiuk's argument about 'recalcitrant' bodies and bodily fragments further;[52] the body and bodily parts are not only a corporeal remainder to law's discourses, but also formative spacings for law.[53] Law can be made through the physical processes of bodies—processes which are 'antinomian' in that such bodies test the nomoi they form part of—with new orders forming as nomoi stretch, perforate and heal over.[54] And like many scars, a trace of that wound indelibly brands the flesh as the new nomos settles. Antinomian bodies, as I have called them, can mediate both law's dissolution and formation, as sinews connecting normative possibilities.[55] The human dead functions similarly: as the integrity of the body falters, the nomos carried by the body does too, transforming, taking on a new figure, with each decomposition. Although, unlike my prior investigations of the jurisgenerative, the antinomian body disappears—it becomes absent or other—which is suggestive of a different form to law.[56]

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[48] Joshua David Michael Shaw, "The Spatio-Legal Production of Bodies Through the Legal Fiction of Death" *Law and Critique* 32, no. 1 (2021): 69.
[49] Shaw, "Spatio-Legal Production of Bodies."
[50] Shaw, "Confronting Jurisdiction."
[51] Shaw and Mykitiuk, "Jurisgenerative Tissues."
[52] Mykitiuk, "Fragmenting the Body".
[53] Shaw and Mykitiuk, "Jurisgenerative Tissues."
[54] Shaw and Mykitiuk, "Jurisgenerative Tissues."
[55] Shaw and Mykitiuk, "Jurisgenerative Tissues."
[56] Regarding the importance of absence to embodiment generally see Drew Leder, *The Absent Body* (Chicago: University of Chicago Press, 1990).

Marty Slaughter makes a similar observation when counterposing the genealogy of law—the sacred body that is the King's common law—to the 'antinomianism' of decompositions, fragments, adulterations, among other agents of chaos. Law is the binding of 'an individual to a name and gather[ing] [of] dispersed isolated things under a sign,' of a filial unity, which 'relates the individual to an order that survives the individual parts.'[57] Slaughter relates metaphors of physical, bodily processes to the law of 'Antinomians,' the seventeenth-century movement of protestants that rejected the King's Law, claiming instead that the 'law [lying] within' the individual would, through the achievement of 'inner perfection,' allow the King's '[L]aw [to] wither away.'[58] The antinomian position is one of 'an outcast individual without language and syntax, with only a private language, babbling to himself with words that in their detached state are pieces of copper rather than pennies, that have no social meaning and make no contact—that decompose and vanish like the body.'[59] Antinomianism potentiates the fulfillment of chaos, the fulfillment of disorder, through the individual's withdrawal and separateness. But whilst Slaughter's reference to decompositions is metaphorical, I see it as real, materialized in the flesh. The decomposing corpse—as conduit of a space of non-law—works analogously to Slaughter's 'Antinomians,' withdrawing from the nomos of the body, creating the possibility of a new nomos as tissues separate, bones disintegrate, and residues mix with the earth.

My claim relates to, but is different from Prue Vines' comments on *Gilbert,* who straightforwardly argues that 'once the body […] decompose[s] it […] *disappear[s],* and the land is no longer a burial ground—it […] [loses] that character.'[60] Vines continues by saying 'the body is defined as separate from the soil in which it is buried, and after decomposition seems to have legally and culturally 'disappeared'. The site of burial is then available to be used again.'[61] She contrasts *Gilbert* with practices among Indigenous peoples in Australia, for whom 'the body when [it] decompose[s] would seem not to

[57] Slaughter, "Sacred Kingship," 228.
[58] Slaughter, "Sacred Kingship," 233.
[59] Slaughter, "Sacred Kingship," 234.
[60] Vines, "Bodily Remains," 122.
[61] Vines, "Bodily Remains," 123.

[…] "disappear[…]" or "evaporate[e]" but […] merge[…] with the land.'[62] With that comparison, Vines concludes the ecclesiastical legal system, and the common law which has inherited its principles, 'can only conceive of death as personal silence or absence.'[63] But the corpse does not merely evince an absence nor does it merely separate the body from land; there is a productive quality to the dead, expressed through its relations with others, which Vines leaves undertheorized, in that its process of decomposition bears on, and constitutes a form for, law. There is an architectonics to the corpse, in the sense of a spacing and movement to the corporeal form which grafts onto and creates physical and social space including the law and normativities of such space.[64]

Those architectonics are also elided by political theorist James Martel in his recent analysis of the dead.[65] Martel and I share in arguing that the corpse, especially as it decomposes, is subversive to the Law and that, through that subversion, participate in authorising another law.[66] However, we appear to differ in how we conceive this subversion taking place. Martel describes the corpse as 'exert[ing] a kind of counteragency,' because the corpse—like any object—'inherently resist[s] projection' of the Law's phantasms.[67] In doing so he draws on Walter Benjamin to argue that the dead may lack language (at least as humans know it by speech and sound) but nonetheless 'emit "the magic of matter" among themselves' forming a 'material community' of affects which 'rebel[s] against the false names and fetishistic projects—and especially commodity fetishism—to which [humans] subject them.'[68] The corpse as object evinces a limit to law through its unmaking of language—of law's mythic violence—which gives room for other forms of law (or the Law's rearticulation).[69] On the surface, our accounts resemble each other, but there are differences (which, due to constraints of space, require explanation elsewhere). For now, it is

[62] Vines, "Bodily Remains," 122.
[63] Vines, "Bodily Remains," 122.
[64] Henri Lefebvre, *The Production of Space* (London: Blackwell, 1989); also see Shaw, "Spatio-Legal Production of Bodies."
[65] James R Martel, "Interrupted by Death: The Legal Personhood and Non-Personhood of Corpses" *Studies in Law, Politics and Society* 87A (2022): 103.
[66] Martel, "Interrupted by Death."
[67] James R Martel, *Bodies Unburied: Subversive Corpses and the Authority of the Dead* (Amherst: Amherst College Press, 2018), 137.
[68] Martel, *Bodies Unburied*, 139.
[69] Martel, *Bodies Unburied*, 140-141; also see Martel, "Interrupted by Death."

adequate to say I see Martel as having a negative account of the corpse (as lack, silence, object, etc.), counterposed to law as belonging only to a symbolic domain, whose relation is achieved principally through a dialectic of opposing forces. By contrast I attempt a non-dialectical materialism where certain distinctions (absence/presence, subject/object) are not fundamentally opposed to one another, but are generated together on an immanent plane of 'differential elements and relations.'[70] As literary theorist Erin Edwards put it, the '"live human" and "corpse human" part ways, not according to a more traditional divide between vitalism and mortalism but according to different modes of *doing*.'[71] It is through the latter I think the jurisprudent can better sense how the dead have capacities for law without reinscribing the familiar problematics of conventional legal theory.

Toward a materialist theory of law and the dead

The legal status of the human dead has constantly challenged scholars. But I try to overcome the challenge by following Ngaire Naffine and Margaret Davies, who called on jurisprudents to look beyond conventional theories of personality and property.[72] Instead, the jurisprudent should analyze the socio-material conditions through which human bodies, living or dead, take form, inhabit, and obtain meaning[73]—it is in our attention to 'the historical and discursive processes which shape our socio-legal environment,' including our relations with the physical and social world, where the legal status and function of the human dead may be understood (or at least understood with different effect).[74] Whilst personality and property are not irrelevant to the common law, they are mere fragments of a social process, '[n]either […] possesses a unitary, stable meaning'[75] and fail to account for all factual elements

[70] Pheng Cheah, "Non-Dialectical Materialism" in *New Materialisms: Ontology, Agency, and Politics*, eds. Diana Coole and Samantha Frost (Durham: Duke University Press, 2010), 70-91, 85.
[71] Erin E Edwards, *The Modernist Corpse: Posthumanism and the Posthumous* (Minneapolis: University of Minnesota Press, 2018), 6.
[72] Margaret Davies and Ngaire Naffine, *Are Persons Property? Legal Debates About Property and Personality* (Farnham: Ashgate, 2001); Naffine, "But a Lump of Earth."
[73] Naffine, "But a Lump of Earth."
[74] Davies and Naffine, *Are Persons Property*, 184.
[75] Davies and Naffine, *Are Persons Property*, 181.

(like those in *Gilbert*). It is that thesis on which my reading of *Gilbert* necessarily depends. It is also the thesis my reading potentially confirms and elaborates, albeit with a materialist theory of law. By materialist theory of law, I mean to describe law as the effect of a socially imbedded, embodied and ecologically mediated practice of action that *matters* in experience and existence including that of the non-human.[76] But in addition to confirming and elaborating Naffine and Davies' sociolegal thesis, and in so doing observing how the body's decomposition can factor in the genesis of law and norms, my approach raises a question for a materialist theory of law that warrants comment.

A useful concept to a materialist theory of law is the lawscape, which Andreas Philippopoulos-Mihalopoulos defines as 'the tautology between law and space/matter [that] unfolds as difference' in physical and social existence.[77] The lawscape 'is co-determined with the space between bodies […]; the space that is produced and is occupied by bodies; the movement of bodies; the desire of bodies; and the withdrawal of bodies for another law.'[78] Bodies which compose the lawscape can be human, non-human, material and immaterial.[79] The lawscape can be thought of as being 'held up' in social practice, in that physical and social spaces extend from witting and unwitting acts of bodies that converge in place, figuring whom and what belongs in a place and that which is excluded.[80] The lawscape also enfolds time, sustaining durations, flows and rhythms between and within the practices of bodies.[81] The resulting

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[76] See e.g., Grear, "Foregrounding Materiality"; Alain Pottage, "Introduction: The Fabrication of Persons and Things" in *Law, Anthropology, and the Constitution of the Social: Making Persons and Things*, eds. Alain Pottage and Martha Mundy (Cambridge: Cambridge University Press, 2004), 1-39.
[77] Andreas Philippopoulos-Mihalopoulos, "Lawscape" *International Lexicon of Aesthetics* (2020): http://doi.org/10.7413/18258630100.
[78] Philippopoulos-Mihalopoulos, "Lawscape."
[79] See Gilles Deleuze, *Foucault*, trans. Seán Hand (Minneapolis: University of Minnesota Press, 1988); also see Andreas Philippopoulos-Mihalopoulos, "Law, Space, Bodies: The Emergence of Spatial Justice" in *Deleuze and Law*, eds. Laurent de Sutter and Kyle McGee (Edinburgh: Edinburgh University Press, 2012), 90-110.
[80] Sarah Keenan, *Subversive Property: Law and the Production of Spaces of Belonging* (Abingdon: Routledge, 2015); also see Joshua David Michael Shaw, "Transcarceral Lawscapes Enacted in Moments of Aboriginalisation: A Case-study of an Indigenous Woman Released on Urban Parole" *International Journal of Law in Context* 16, no. 4 (2020): 422.
[81] Sameena Mulla, "Topological Time, Law and Subjectivity: A Description in Five Folds" in *Law and Time*, edited by Sian Beynon-Jones and Emily Graham (Abingdon; Routledge, 2020). Also see Mariana Valverde, *Chronotopes of Law: Jurisdiction, Scale and Governance* (Abingdon: Routledge, 2015).

spatio-temporalities of living flesh thereby exude law, as the lawscape, as they form patterns (and thus normativities) for physical and social action.[82]

With the dead, however, the space between, produced and occupied by bodies (the cadaver itself, its constituent parts and that which the corporeal becomes) tends to subtraction in the loss of corporeal integrity and identity, eventually leaving little to no trace—an absence that appears totalizing. Here, the body does not so much hold up the law; rather by decomposing the body appears to *drop* the law as flesh *wastes* away, *withdrawing* from extant unities of life/law/order.[83] From this vantage, decomposition appears thoroughly anarchic in the total absence of law that it portends—an annihilative spacetime of non-Law.[84] The flesh is atomized, sublimated as autonomous particles that refuse communication with (or at least comprehension by) others, given up entropically to disorder against the unity promised by Law.[85] But in flux, the space between, produced and occupied by bodies also tends to accretion, creating excess matters and substrates for other things. Those excretions enable new relations as different forms are assumed, and in this way hold up further iterations of lawscapes: as humic foundations for whatever law is to come. Despite Harrison, these humic foundations need not be cultivated as relations of memory, debt or inheritance (such as in traditions of burial).[86] Rather relations of the dead are potently multiple, which a materialist theory of law may attune to and shape.[87]

Whilst Philippopoulos-Mihalopoulos' concept of lawscape is abundant with relation—bringing seemingly disparate bodies together on a singular ontological plane to trace the complex entanglements generative of difference in the physical and social world—he emphasises that the lawscape is conditioned by withdrawal: there is an ontological need of all bodies to 'succum[b] to […] ruptures,' retreating from

[82] Shaw, "Confronting Jurisdiction"; Shaw "Spatio-Legal Production of Bodies"; Shaw and Mykitiuk, "Jurisgenerative Tissues"; also see the discussion of biogenesis and jurisgenesis in Davies, *EcoLaw*.
[83] Jean-Luc Nancy, *Corpus*, trans. Richard A Rand (New York: Fordham University Press, 2008), 105.
[84] Nancy, *Corpus*.
[85] Slaughter, "Sacred Kingship."
[86] Harrison, *Dominion of the Dead*. Certainly, memory, debt and inheritance are familiar modes of relating to the dead, and often central to the juridification of the earth within common law traditions. See Barr, *Jurisprudence of Movement*.
[87] See e.g., Shaw, "Confronting Jurisdiction."

the lawscape and turning inward.[88] In turning inward, withdrawal instantiates a duration of non-relation, of a retreat to the law of the individual. The need to withdraw allows for difference, the emergence of striations and separateness in the lawscape, which are fundamental to a lively law that frames, creates and orders meaningful action.[89] The conditions of withdrawal then shape the desire and attainment of one's return to a lawscape to become part of its atmosphere,[90] where atmosphere is 'the excess of affect that keeps bodies together; and what emerges when bodies are held together by, [through] and against each other.'[91] Decomposition appears to not only imitate the ontological condition of withdrawal, but actually realises it in the flesh, ever widening the reach of annihilation until the remains are physically overtaken and gone. In so doing decomposition appears to take the thesis of withdrawal to its extreme: the law of the individual (autonomy or 'the capacity to give oneself one's own law by one's own means')[92] otherwise enabled by withdrawal is evacuated upon the destruction of the physical body, which may be uniquely felt by those for whom that individual's life/law/order was meaningfully affective (for whom awareness of, and care for, the finitude of relation—relative to the place of law—can inaugurate a feeling of loss).[93]

Withdrawal by decomposition may occasion the end of the individual body—at least relative to that lawscape—but it is not the end of law. As critical legal theorist Stewart Motha stresses: law is not only autonomy (of the individual), law is also heteronomy in the sense of the 'presence of an external or different law: of myth, extraneous forces, drives, legal institutions and history.'[94] The law of the other. Even with the destruction of the individual (archive, actor, corpse, etc.), in its wake there seeps an heteronomous carriage whose retrieval from the pits of what is no longer there supplies meaning for new forms. Most clearly, as bodies decompose, excrements 'throw' their presence open, exceeding the

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[88] Andreas Philippopoulos-Mihalopoulos, "Withdrawing from Atmosphere: An Ontology of Air Partitioning and Affective Engineering" *Society and Space* 34, no. 1 (2016): 150, 154.
[89] Philippopoulos-Mihalopoulos, *Spatial Justice*; also see Grosz, *Chaos, Art, Territory*.
[90] Philippopoulos-Mihalopoulos, "Withdrawing from Atmosphere."
[91] Philippopoulos-Mihalopoulos, "Withdrawing from Atmosphere," 158.
[92] Stewart Motha, "My Story, Whose Memory: Notes on the Autonomy and Heteronomy of Law" *Studies in Law, Politics and Society* 87B (2022): 1, 15.
[93] Harrison, *Dominion of the Dead*.
[94] Motha, "My Story." Motha (p. 19) notes resonances between the jurisprudential concept of heteronomy and 'recent strands of new materialist thinking and attention to *affect* in legal studies,' like Philippopoulos-Mihalopoulos' lawscape.

body/law of the individual, defying the signs of order and intelligibility incarnate in the human form, enabling the possibility of new worldings, or lawscapes, in the resulting tangle of worms, mycelia and soil-kinds, among other bodies.[95] But absence too throws itself, felt knowingly or unknowingly on others, whose traces supply 'heteronomous determinants'[96] for future lawscapes.

Conclusion

I close this chapter as I began: with Harrison and the humic foundations of the life-world. Harrison writes that as 'humans dwell, the dead, as it were, indwell—and very often in the same space.'[97] The humic foundations result from this 'indwelling' of the dead among and in the living, forming part of, and structuring from within, institutions of social and cultural life. Importantly for Harrison this is firstly an ontology *of the dead*, in that 'the corpse [and our disposal of it] is one of the most primordial of human institutions.'[98] Disposing of the dead establishes place, and 'mortalises' time, in a mode of being rehearsed later by statues and gravestones, among other objects, all of which demand awareness of humanity's finitude and memorialization of and care for what has passed.[99] I do not inherit his thought uncritically. As critical theorist Ewa Domańska observes, Harrison writes in a register that is 'humanistic, anthropocentric, and Eurocentric, essentialist, and Christian.'[100] But I think it is possible to rehabilitate the *humus* in postmodern directions: to, as Erin Edwards put it, encounter the dead as 'materializing (and often decomposing) […] heteroglossias, necroglossias, and object-oriented *res*glossias that problematize the binary between body and discourse, matter and information.'[101]In the polyphony of the lawscape the humus can be understood to do more for law than impose (for Harrison), or bemuse and resist (for Martel), or represent silences (for Vines). In a materialist theory, the *humus* participates in the making and

[95] Nancy, *Corpus*.
[96] Motha, "My Story," 12.
[97] Harrison, *Dominion of the Dead*, ix.
[98] Harrison, *Dominion of the Dead*, 92-93.
[99] Harrison, *Dominion of the Dead*.
[100] Ewa Domańska, "Necrocacy" *History of the Human Sciences* 18, no. 2 (2005): 111, 117.
[101] Edwards, *Modernist Corpse*, 41.

unmaking of law, much like other cultural formations, through both presence *and* absence, law *and* non-law, autonomy and heteronomy, all of which messily, fractiously and uncontrollably, compose (and decompose and recompose) differentiations within the lawscape.[102]

As a cadaver is taken up by worms, its material presence—and rights, duties and powers indexed to the corpse—alters, resulting in changes to how others lawfully orient and relate to a physical and social space. A burial spot may require additional care until the iron-clad corpse falls apart into the soil, becoming fit for re-use once decomposed; decay may effect a pestilence (or, depending on the theory of contagion, a miasmatic atmosphere) that necessitates closing intramural facilities displacing them without the city limits;[103] sanitation, decency and the preservation of coronial evidence may require the prompt and secure retrieval, transfer and storage of the dead prior to an inquest.[104] Concurrent to these changes is the re-composition of physical and social space, and the normative worlds staged in and through that space.[105] But irrespective of the particular lawscapes a corpse challenges and sustains, decomposing bodies resist and open up the lawful as it is spaced through the craft of disposal, potentially authorizing novel and different ways of relating to the dead and the spaces they occupy.[106] Here lies the lawscape of the human dead, awaiting use by the jurisprudent attuned to its capacities.

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[102] Harrison, *Dominion of the Dead*.
[103] With respect of animal bodies and miasmas, and the institutional response to these apparent dangers, see Marc Trabsky, "Institutionalising the Public Abattoir in Nineteenth Century Colonial Society" *Australian Feminist Law Journal* 40, no. 2 (2014): 169.
[104] See Trabsky, *Law and the Dead*.
[105] See Andreas Philippopoulos-Mihalopoulos, "Law is a Stage: From Aesthetics to Affective Aestheses" in *Research Handbook on Critical Legal Theory*, edited by Emilios Christodoulidis, Ruth Dukes and Marco Galdoni (London: Elgar, 2019), 201-222. Also see Shaw, "Minor Jurisprudence of Play."
[106] With respect of jurisdiction and authorisations of the lawful in instances involving the dead, see Barr, *Jurisprudence of Movement*; Shaw, "Confronting Jurisdiction"; Trabsky, *Law and the Dead*. Also see Shaunnagh Dorsett and Shaun McVeigh, *Jurisdiction* (Abingdon: Routledge, 2012).

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