Review Essay

Social Science and the Displacement of Law

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W. T. Murphy, *The Oldest Social Science? Configurations of Law and Modernity*. New York: Oxford University Press, 1997. xii + 269 pp. $60.00.

In one of his lesser known fictions, "Utopia of a Tired Man," Borges (1982) depicted the paradoxical image of a distant and sparsely populated society in which individuals could choose the time of their death. If one could live as long as one wished, then the moment of death was not to be determined by political, economic, medical, or legal considerations but rather according to the satisfaction or accomplishment of one's desires. Once individuals had fulfilled their projects, usually the practice of one of the arts, or philosophy, or mathematics, they would grow tired of life and choose to die: "When he wants to, he kills himself. Man is master of his life. He is also master of his death" (Borges 1982:68).

One interesting feature of "Utopia of a Tired Man" is the collective context of the sovereign individualism that allowed the subject a power of life and death over self. The utopian society was preceded by a period of breakdown in industrial urban culture and by the gradual disappearance of "collective ghosts" such as nation and city. Most particularly, social interest in political culture waned: "They called elections, declared wars, collected taxes, confiscated fortunes, ordered arrests, and tried to impose censorship, but nobody on earth obeyed them" (Borges 1982:69). As political ennui set in, the media began to stop following and photographing the activities of leaders, and equally

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ceased reporting the deeds and determinations of political bodies. In consequence, over a period of several hundred years, the political system died out by virtue of a complete lack of public interest in what it was saying and doing. Neither knowing nor caring about political events, individuals increasingly focused their attention on questions of lifestyle and the art of living and of dying. The culture of politics was displaced by a dispersed aesthetics of the everyday.

In a book of formidable learning and remarkable scope, Tim Murphy has addressed the long-term history or *longue durée* of law in Western society and has traced a comparable displacement of the role and function of law. Drawing heavily on the work of Foucault and the concept of the *episteme,* which term refers here to the way in which society knows itself and in consequence governs itself, Murphy argues that a dramatic shift has occurred in the form and logic of government.[1] In a series of detailed theoretical studies, he argues persuasively that law is increasingly marginal to the methods by means of which science apprehends and regulates society. It follows, in this view, that law as a form of knowing is no longer central to the exercise of power or governance of the social. If legal knowledge, based on experience and addressed to the ethical individual and to her rights and duties, or his innocence and guilt, no longer accurately reflects the modern bureaucratic state, its technologies of rule, and its systems of calculative governance, then new forms of analysis need to be developed. In short, law has been displaced as the paradigm of modernity, and its future is correspondingly fragmentary and uncertain.

The consequences of this broad argument as to the "escape from law" (Murphy, pp. 122–23) are initially spelled out in negative terms. The loss of the legal vision of sociality reflects the death of the classical model of law, "and the effect of this transformation is to leave law and its seemingly foundational role in instituting the relation between ruler and ruled in an obscure place. . . . Should we not let go of our memories? Should we not allow ourselves to be open to the future, and learn to live without the fantasy of security and paternity which the older vision" held out to us? (p. 34). In answer to these rhetorical questions, Murphy suggests a variety of means of coming to terms with the new positivities of the modern social sciences and the "anguish of the split between the individual and the statistical" (p. 159), which is

[1] The concept of the *episteme,* or system of knowledge, is spelled out most famously in *The Order of Things,* in which work Foucault depicts the transition from a classical *episteme,* in which representation corresponds to things in themselves, to a modern *episteme,* in which representation "is in the process of losing its power to define the mode of being common to things and to knowledge" (Foucault 1970:240). For a lucid commentary on this aspect of Foucault's work, see Rose 1984:170–207. See also Foucault 1991a:55: "The episteme is not a general stage of reason, it is a complex relationship of successive displacements."

their hallmark. Again taking a cue from Foucault, and specifically from his work on the disciplines and governmentality, Murphy argues for a plural analysis of power which concentrates on the disparate technologies and dispersed practices of government, so as to allow for the formulation and analysis of the conditions of possibility of the new sciences of society and the administrative exercise of power to which they gave rise. Law, it turns out in this argument, is both epistemically and practically irrelevant to the modern positivities of science and of government, and to the techniques of management through which their knowledges are applied.

What is in many respects most exciting and stimulating about *The Oldest Social Science?* is the sense of uncertainty or incompletion that marks its conclusions. Like the best of radical works, it charts a transhistorical course and maps out patterns of emergence and decay that are imperceptible to shorter-term histories of social institutions. Nonetheless, what we are left with is a nascent and as yet undeveloped set of protocols for attempting to make sense of the complex mixture of archaic beliefs and modern scientific techniques that define the postmodern era and its confused sense that something has happened, or that things are not going well. The advent of the new sciences, and of a sociality marked by systems theory, by communication networks, energy flows, and the various indicators of statistical fluctuation, suggests an increasing dispersion and alienation of the subject in the social. Murphy registers this split or separation by reference not only to the demise of the preexisting paradigm of law but also in terms of disappointment, dissatisfaction, anguish, amorphousness, and loss. The recourse to affectual states, and to a loosely Heideggerian language of moods, suggests an unresolved and productive tension in the work. To the extent that systems replace subjects as the objects of governance, the psychic and the social are abruptly torn apart. In what follows, I endeavor to trace that separation historically and theoretically before moving to address the open question of what the displacement of law means: "And so to the crux of the argument: in a slogan, how can we articulate a vision of law in society rather than law and society? . . . [of] law as a social practice and means of communication which stands alongside others without claiming a privileged position?" (p. 178).

On the Rise and Decline of the Social Life of Law

The initial argument of *The Oldest Social Science?* is novel primarily for the manner of its presentation and verification. It is now some 20 years since Foucault, in a Nietzschean vein, argued famously that "in political thought and analysis we have not yet cut off the head of the king" (Foucault 1978:89). The crux of

Foucault's argument was that since the Middle Ages, power has been coded and presented as a juridical phenomenon tied ineluctably to the laws issued by a sovereign and his judicial delegates or representatives. In what is now a well-rehearsed analysis, Foucault simultaneously acknowledged the fantasmatic allure of the sovereign model of power and also emphasized the need to move beyond the centralized jural view of the social world: "One needs to be nominalistic, no doubt: power is not an institution, and not a structure; neither is it a certain strength we are endowed with; it is the name one attributes to a complex strategical situation in a particular society" (Foucault 1978:93).[2] In other words, the desire for power which manifests itself in the repetitious persistence of the antiquated model of a sovereign source of an exclusively juristic rule is at best a fantasm. In Foucault's view it was this fantasm of a central and sovereign point, this "noble drapery" of power, that was the principal means by which "power succeeds through hiding the mechanisms of its exercise."[3] The discourse of power had long ceased to reflect the materiality of its practices.

It is this story, and specifically its critique of the legal representation of power, that Murphy picks up and elaborates in the first half of *The Oldest Social Science?* Where Foucault had talked somewhat vaguely of a tradition that "was constructed in the Middle Ages," and also of a negative representation of power "dating back to the 18th or 19th century" (Foucault 1978:87), a more historically sensitive analysis would trace this juridical construction of power to its theological sources in Roman and canon law and their medieval reception.[4] The model of power within the medieval and Renaissance reception of Roman law was that of the dual polity and of its two laws, those of spirituality and temporality. The two laws were explicitly and hierarchically ordered according to the dictates of divine will. The monotheistic schema was ordained by and predicated on an ultimate source of all laws in the cause of causes (*causa causans*) or law of laws (*lex legum*), the deity itself. Within this juristic tradition, and irrespective of its local variations, the unity of the divinity—the uniqueness of the one God, and the correlative singularity of the sovereign—was mirrored by the unitary identity of the subjects of law.

The social order of legal power directly reflected—or was the shadow of—the spiritual hierarchy of divine governance, and

[2] In addition, see Foucault 1980:102 ff.; 1991b:87–104. For discussion of this aspect of Foucault's work, see, for example, Smart 1989:4–25; Goodrich 1986:184–92; Hunt 1992; Litowitz 1997:65–86.

[3] For commentary on this aspect of Foucault's work, see Halperin 1995:48–56 and also Zizek 1991:263 ff. See also Goodrich, ed. 1997.

[4] The leading scholar of this aspect of the reception is Pierre Legendre. For English translations of some of his work, see the essays collected in Goodrich 1997. See additionally Legendre 1988:part II. For commentary, see Schütz 1998. For an important variation on this theme, see Kelley 1979.

both sovereign and subject were equally fictions created by the dogma of Christian law and its positive manifestations. The subject, just as much as the sovereign, was a legal entity and owed its existence to the scriptural definitions of king and subject, majesty and subjection. The order of law was first and foremost an order of belief, and that order was spelled out in the great textual compilations of law, the Bible, the Decretals, the Digest, Domesday Book, and subsequent codifications. The significant point, from the perspective of the analysis of power, is that the fundamental substrate of the social order was a body of texts, and in consequence the subject belonged first and most directly to a textual order. It was the text, in other words, that defined subjection, both the identity and the duty of the subject, and it was within the text that this legal fiction of a person had its being. The real world, to borrow from Nietzsche, was quite literally a myth[5] (Nietzsche 1915:24–25). In a similar and equally inventive vein, Legendre elaborates that the essential civil law concept, that of a person, "literally derives from *persona*—referring initially to an actor's mask—and authorises me to translate the formula *de iure personarum* by 'of the law of masks'. In all institutional systems the political subject is reproduced through masks" (Legendre 1988:225–26).

Two consequences of this briefly sketched historical interpretation play a crucial role in the historical analysis and trajectory that is traced in *The Oldest Social Science?* First, the early modern social order is based on the categories of an explicitly legal order. The dogmatic categories inherited from the Bible, from the Church fathers, and from the subsequent juristic textual order defined by the reception of Roman and canon law, were literally the foundations and life of the social domain, or of what we would now term the public domain. Persons, actions, and things were legal categories and were defined by reference to the texts of law (Murphy 1989). Second, and correlatively, the human subject is a legal fiction or mask defined by law and in relation to its textual categories. In Murphy's elegant account of this duality, the subject is the product of a Christian tradition characterized in terms of "the penetrative scheme and the juridical soul" (p. 10).

The legal subject was a Christian construction. It was built from a dualistic moral theology in which the subject was formed through interiorizing and submitting to the law of the divine Father. The penetrative scheme thus refers to a hierarchical division and relation between inner and outer, a relation modeled on that between God and Man, and repeated in that between sovereign and subject, father and family: "It is . . . the relation

[5] For a schematic interpretation of this text and of its jurisprudential significance, see Constable 1994:551–60. See also my "Law's Emotional Body," in Goodrich 1990:260–70.

between ruler and ruled, where law (as rule or institution) is the medium of that relation" (p. 11). In theological terms, it is the soul that is the object of divine rule: "the surface—the body—must be penetrated to get at this soul," and the aim of such penetration is to secure "belief, obedience, loyalty, and love, all of which require the active movement and consequent involvement of the soul" (ibid.). Law is thus first a matter of inner assent to an outer authority. Crucially, that authority both rules the soul by precept and also promises, within the eschatolgical scheme of Christianity, to judge the soul. The exemplary judgment, the Last Judgment, was that in which the soul will receive its final accounting according to the degree to which it lived by the precepts of God's law.

What Foucault termed the classical model of law is built around the basic concepts of subjectification developed within Christian institutions. While it is not clear that the borrowing—this "elective affinity, emulation or imitation"—from the religious realm was a one-way street,[6] it does seem irrefutable that the dual polity and its two laws established the categories and the structure of the early modern legal order. Like the Christian deity, the legal order propounded and systematized by the post-Reformation sages of the common law, by Coke and those that followed him, was both jealous and judgmental. Whether founded on divine right, social contract, or custom and use, the social order was intrinsically a legal order, and the exercise of power, and so the very constitution of the social, was in consequence to be understood in juristic terms: "Law was at one and the same time the unifying and the constitutive principle of society" (p. 35). More than that, because government was legally defined and circumscribed, the exercise of power had to take the form of legal rule, that is to say, it was judgmental. The legal state was an adjudicative state in which truth was defined by judgment, by the determination of what is good and what is evil, and correlatively who is guilty and who is innocent, what is proven and what is not.

The penetrative scheme and the juridical soul founded government on adjudication, and the bulk of what modernity has recognized as law has developed from the categories that emerge from the process of adjudication. What is perhaps most original in Murphy's thesis is the recognition that these categories of legal rule, specifically those that relate to the definition and defense of individual rights—covenants, contracts, oaths, actions, duties, and deeds—also constitute an epistemology or way of knowing, and so too governing, the social world. The law was both a plan for, and in time an expression of, the ordering of society.[7] It was not simply, as Weber was to put it, that "what the

[6] For development of this argument, see Legendre 1964. Cf. Berman 1983.

[7] For diverse historical depictions of this point, see Vinogradoff 1929; Ullmann 1975; Stein 1966; Kelley 1990.

jurist cannot conceive has no legal existence" (Weber 1978:854) but also that law was the way in which society both pictured and knew itself. Individuality and community, family and sociality, were juristic concepts and, in the common law tradition in particular, they were demarcated and guaranteed "by judgment in court, at first hand, person-to-person, a knowledge of society constituted through its pathology" (p. 118).

The critical feature of legal order was that it was not simply a way of knowing the world but also a way of being in the world. The epistemology of common law, on which Murphy principally focuses, was predicated on experience, on custom and use as the lawful expression, or "the abridgement of intimations relating to a concrete manner of living" (p. 92). The epistemology of modern law was spelled out initially in terms of precedent and establishment as the repetitive bulwarks of a highly particularistic justice. The temporal accretion of legal rules and the decision of disputes according to the established patterns of precedent were alike ways of seeing and knowing the world through observation and the "realistic" induction of its proper or judicious forms of being. Law provided both the idiom and the image of subjectivity and so also its modes of social interaction. Psyche and socius were bound together as inverse and obverse of a shared identity:

> The common law creates a common past, a common point of orientation for the present, a common world around which community can form. Whether "in fact" it does is a different question, the point at which we switch from the study of "epistemology" to the sociological discourse of "ideology" and "legitimation." (P. 91)

Where Foucault argued that we have yet to behead the king, Murphy is more sanguine and claims that the counter-factual dream of a common law has been wholly displaced by new systems of social regulation. The classical world of particularistic justice and individual right has given way to a sociality embedded in economic aggregates, statistical methodologies, and strategies of governance. The epistemology of common law, the agonistic truths forged in adjudicative government, are irrelevant to and incompatible with the new empiricism of modern social and calculative sciences; indeed law knows nothing of the modern positivities that form the objects of the economic and statistical study and regulation of society: "In economics, a new way of imagining the social was brought into existence. With the emergence of modern statistics and a sociology constructed under their impetus, a new way of mapping and measuring the co-ordinates of 'society', so understood, came into being" (p. 119). Law no longer provides either the language or the conceptual structure of subject and sociality. Its displacement is effected by systems and technologies of communication that are independent of individual subjects and that are regulated by manipulation of eco-

nomic and statistical indicators rather than by ethical criteria or subjective right. The principle of paternity gives way to that of providence, legal rationality to actuarial calculus, and subjects to autopoietic systems.[8]

From Adjudication to Autopoiesis

Modern law bore within itself the seeds of its own demise. In a remarkably incisive critique of the legacy of Max Weber's sociology of law, Murphy spells out five "conditions of the possibility of modern law" (p. 62). These conditions all concern the material means of production of law and move from rhetoric or the art of speaking, through the art of disputing, the architecture or organization of courts,[9] to the invention of print, and finally the computer and informatics. Each new technology produced new possibilities for the exercise of power, but it is in relation to the stark contrast between scribal culture and the new and virtual materialism of the computer age that the shift from legal text to balance sheet, and from law to economics, can best be comprehended. Each practice of communication bore with it a style of subjectivity and a practice of governance. The printing press, for example, made possible the systematizations of law that characterized the early modern legal treatise and its increasingly linear and decontextualized vision of law. The computer, however, made the statistical generation of social knowledge the new norm or measure of power, and it is this that must be accounted for in the development of a pluralistic concept of contemporary governance.

In whatever manner one chooses to depict the new positivities by means of which science and government manipulate modern social systems, certain negative characterizations seem evident. Knowledge of the social does not derive from direct experience, nor does it depend on the shared understandings or the practices of judgment that were the defining features of common law jurisprudence. The hierarchical model of legislator king and of sovereign judge comes to be displaced by the horizontal model of matrices of power and knowledge. Power, in other words, is political and not legal, and its justification is correspondingly strategic rather than ethical or moral. Law thus loses its privileged place in relation to the diverse material practices

[8] The details of this story of displacement are not always that novel. The general thesis was propounded in Simon 1988; and for a case study, see Simon 1994. On the implications of autopoiesis for law, see Schütz 1994.

[9] At a later point in the discussion, Murphy cites Wilson 1988 to the effect that "a building is a diagram of how the system works" and then goes on to observe, "Adjudicative government was not 'homeless' or *in nubibus;* it lived, quite concretely, in the forecourts and interiors of the palaces of kings" (p. 112). In this regard, law was most precisely defined as what was said by "the king in Parliament" or the judge in his court.

and strategic technologies of postmodern governance.[10] The new forms of imagining or picturing society do not depend on the legal idiom and hence the irrelevance of law to the measurement or nomos of social systems.

Murphy insists not only on the irrelevance of law to the essential business of the exercise of power but also on a new understanding of its lesser and essentially administrative role in relation to strategies of governance whose knowledges are derived from calculation, probability, averages, and statistical variances. In the language of autopoiesis, law is no more than a differentiated subsystem "the 'autonomy' of which is, as it were, an effect of its differentiation and an attribute of its systemic character, rather than an 'essential' quality possessed or claimed by law 'as such'" (p. 163). Translated, this would seem to mean that law exists alongside other disciplinary knowledges and maintains what can at best be termed a professional distinctiveness—a historical and institutional autonomy—as a system of communication amongst other and more powerful systems of social intervention.

The critical notion of "law in society," as distinct from "law and society," thus in part refers to the emergence of new criteria for the attribution of communicative authority within the maintenance of the social system and so also in part to the independence of a "dejuridicalized" notion of society which "contains within it the seeds of its own disappearance. . . . Not the least of the reasons for [which] is that the term 'society' has ceased to refer to anything useful" (p. 36). Paradoxically, however, the theory of social systems of communication points both to what Murphy terms the "banalization" of law—its displacement from sovereign social science to the status of one network amongst others in a complex and detotalized whole—and to the persistence of distinctively legal forms of political and social representation of the ordering of the chaos of national and global relations. The irony toward which this argument points is that the demise of law would seem to be mirrored by the disappearance of society, and each in turn, both legal and social systems, take on new and proliferating forms, plural identities that attach to the specific strategies being pursued in any given institutional context or, more properly, environment. To follow this argument to its conclusion, just as society breaks up into subsystems, so the unity of law is dispersed into the epistemically distinct yet socially expansive forms of legislation, adjudication, administrative regulation, and the diverse other systems of actuarially dominated institutional governance.

In Murphy's terms:

[10] For an excellent exposition of what can be made, in terms of power and knowledge, of Foucault's unsystematized remarks on law, see Minkkinen 1997.

> The particular achievement of neo-systems or autopoietic theory is to help us develop a language in which to conceptualise totality not as hierarchical encompassment but as horizontal plural effects of the operations of parts of the whole, of which one part, ranged alongside the others, has inherited the legacy of encompassing hierarchy and the penetrative scheme and which may continue to understand its role, purpose and function in those terms. (P. 163)

In other words, at the level of ideology law clings to its antique function of structuring the social order and providing the language within which civic and national governance is effected. The dogma of law persists and so too does its social visibility, even though its role in reality is now to follow events rather than to mold them. The paradox of this somberly scientific depiction of the new social order lies in the fact that whatever the actual role of law in the strategies of governance, the legal order persists and indeed gains in cultural importance and status at the same time as its epistemic significance is eclipsed. Law is displaced by a myriad of laws, the legal system by ever expanding normative subsystems. At the same time that the classical model of law disappears, the plurality of laws forces the legal model of governance into the center of the social stage. It is this irony of the autopoietic project that is most interesting and most open to criticism. It suggests a certain ambiguity or uncertainty to the (religious) metaphor of systems. It could also be argued that the concept of law as a system tends to lead the autopoietic theorist back to a somewhat uncritical acceptance of the notion of law as a system—albeit a subsystem amongst others—rather than as a plurality. The tendency to portray the legal system as marginal to the analysis or apprehension of the social could in the end be no more than a reflection of a theory that clings to an antiquated and dogmatic conception of law.[11]

In positive terms, there would seem to be two striking advantages to the horizontal and pluralistic conception of law as a system of communication which Murphy characterizes in the mixed argot of autopoietics and network theory. First, and as some of the preceding citations may already have indicated, the new language of social description tears the analysis of power and of governance out of the dogmatic grasp of an outmoded juridical terminology. In the same way as the new vocabulary of social description reflects an attempt to escape the dogma of legal sovereignty, of law "and" society, it also presages a displacement and diminution of the role of lawyers in the public sphere of government. In this regard, the value of an autopoietic vocabulary of

[11] Is it perhaps a matter of "the king is dead, long live the king," even if he now lives in retirement, as an archaic irrelevance, a nostalgic symbol? While Murphy occasionally seems to slip back into this concept of law, his more radical instincts tend to lead him to the stronger conclusion, which is that the study of "law in society" requires a dramatic rethinking of the plural forms and practices that law now embraces.

social description is that it allows for a characterization of the legal profession as no more than a subculture, a decentered and self-referential communicative system, with a limited role to play in the apprehension and manipulation of the statistical positivities on which government is predicated. In its new "polycentric setting" (p. 171), law is returned to a minor role within the plurality of social systems. Laws are framed and judgments continue to be made, but rather than being conceived as the central mechanism of the exercise of power, they are rather to be understood as unfolding within an ethical space that bears only a marginal relation to the exercise of social power: Legal institutions increasingly take on the role of making (frequently uninformed) ethical judgments on the conduct of others according to vaguely defined normative criteria set out in legislation, precedent, or codes of practice. To the extent that law is detached from politics, it can play an autonomous role as the conscience of the social with little direct relation to any social reality beyond that of the self-sustaining jargon of law and subjective rights. By way of distinction, the strategies of power and of governance unfold in relation to aggregates and largely free of the encumbrances of legal terminology.

If the first contribution of an autopoietic analysis of law is to cast law back into the limited and traditional frame of what the medievals termed the theater of justice and truth (*theatrum veritatis et iustitiae*), its second insight relates to the symbolic or, more properly, the imaginary function of law.[12] Conceived horizontally, rather than hierarchically, as a system amongst systems, law takes its place amongst the disciplines. Reading the modern history of law autopoietically, Murphy interestingly juxtaposes the dogmatics of law, legal science in its axiomatic form, to the particularistic practices of agonistic judgment. Law was at most a contingent knowledge of the concrete, and the lawyer was simply a "bricoleur," an artisan who would piece together the haphazard materials thrown in his path by legal abridgments and by experience:

> This is perhaps most essential of all: there is no project, except, sometimes, that of the maintenance and consolidation of law itself. . . . Law is a way of being, not an instrument of manipulation. In this precise sense, law does not have "policies"; it seeks to do justice but not to create a "just society," if by that is meant something more than a society in which justice is administered by and according to law. (Pp. 112–13)

[12] The distinction between the imaginary, the symbolic, and the real is taken from Lacan (1977). For present purposes, the relevant distinction is between the imaginary, which relates to images, and to the ego and its identifications, and the symbolic, which refers to the order of language. For discussion of this problematic distinction, see Rose 1990, and in a legal context, see Schroeder 1998.

In other words, the legal vision of society, of the beauty of order and of the virtue of rules, bore no necessary relation to the real world; they were at best the retentive imaginings of pettifoggers and legal pedagogues and belonged within the closed walls of the courtroom and the schoolroom.

There is, however, another way of reading the virtuality of common law reason and the correlative fictions of continental legal method. Whether the question was that of imagining a place for the legal subject in the written text of law or that of reasoning by images, by metaphor or likeness, between factual situations, there was always an essential dimension of virtuality to legal order. That the labored resemblances by means of which legal method reasons or justifies its interventions in the social world of the courtroom are based on approximations, on fantasms and other simulations of communal mores and institutional practices, does not of itself differentiate the legal from other branches of the political. The imagistic worlds evoked by the institution of law are not so much epistemically different from, as competitive with, the visions or pictures by means of which economists and statisticians imagine their collective environment. Where Murphy hurls the bromide of truth at the new scientific positivities of government, it is by no means clear that these new regularities fall outside that dimension of legality that was always concerned with approximating and translating the material of other disciplines into the framework and vocabulary of law. That the dictates of policy make it easiest or most effective to justify governance through audits and other species of economic calculus does not necessarily elevate a pragmatic device into an effect of truth.

The argument can be taken further. The desire to attribute the status of knowledge, if not directly that of truth, to the object domains of the economic and actuarial discourses of modern government is also itself a political identification. The manipulation of communicative systems, and the management of institutions through numerical indexes of profit and loss, nonetheless carries with it a heavy baggage of the imagery and terminology of juristic and ethical decisionmaking. In one sense, the regularities that politics governs still impact on the mobile communities and fluid subjectivities of the empirical world. What Sartre termed the alienated "seriality" of the groups to which the subjects of mass culture belong have long been recognized as being both imaginary in their constitution and real in their effects: Patterns of group usage of web sites, airports, or credit cards may be irreal, but they can be manipulated and regulated effectively.[13] Our sense of the existential implications of governmental inter-

[13] See Sartre 1976:256–80 discussing the bus queue and the radio audience as typical serial groups within the practico-inert ensemble, as would be claimants of welfare, patients of a hospital, television or cinema audiences, or users of a particular credit card,

ventions into these virtual forms of community may be less stable and less unified, yet the budgetary languages within which calculations are made are themselves still determined according to criteria of equality and inequality, opportunity and destitution, performance and failure. The legal rights of such communities may be as evanescent as the momentary subjectivities that they constitute, but all of this argues as much for an analysis of the manner in which the objects of legal regulation have changed, and hence for a more contemporary and plural conception of law's relation to the disciplines, than it does for the desuetude of legal epistemology, of the fiction of justice and the drama of law, as such.

Murphy's choice appears to be that of siding with the sciences, with the machismo disciplines that generate the knowledge, and so too the wealth and political influence of the business schools and the management consultancies. This identification is spelled out in the slightly melancholic tone of an encounter with the real, in terms of a positivity about which nothing can be done. Underlying this somber and seemingly Weberian subtext of disenchantment and abandonment, of the discarding of incompatibilities, corrosions, irrelevancies, archaic chimera, and other forms of unknowing, is a sense of clinical splitting. To put it in an oedipal tone, the law has made us blind, and now science takes away what is left of our souls. Entry into the iron cage of social knowledge here seems to require a docile body and divestment of all the subjective trappings of desire. In which case, Roberto Unger was probably correct when he concluded his first work by remarking that all that remained was for God to speak (Unger 1975). A more radical position, and one to which Murphy lends a certain amount of support, would be to rethink the materiality of law, the blindness and the insight of its knowledge, in terms of the modern media of communication, and the transmission of social affects and effects that do not immediately meet the legally trained eye.

Cool Theories of the Banal

That reality has never been reducible to law does not mean now, any more than it did historically, that legal rites are peripheral to the life of the polity. If anything, and whether for better or worse, law is now as crucial to the identity and self-image of the social as it likely has ever been. In a material sense, legal doctrine struggles ineloquently to devise a framework for regulating cyberspace, for demarcating intellectual property, and for determining the rights of quantitatively constituted and, in both positive and negative senses, legally recognized groups, such as con-

or a site on the web. Interestingly, Sartre concludes that impotence is the primary bond of such groups.

sumers, hackers, homosexuals, the elderly, AIDS sufferers, people with disabilities, foetuses, people of color, professions, trades, and futures. What is important is that these and other "imagined communities" or virtual groups are not only the sites of quantitative subjection or simple numerical regularity but are also the sites of the positive assertion of political identities, ethical schemes, and subjective rights (Brigham 1996).

In a similar vein, the continuous if dispersed presence of law in the public domain, in the media, and in entertainment also bespeaks a desire for law that does not seem greatly affected by the schism Murphy maps between the subjectivity of law and the sciences of power. It may be that, particularly in relation to systems of communication and the transmission of power and knowledge, we need to think again in terms of affective forms of knowing and the plural sites of the application of such knowledge. Following Foucault, the unthought—both image and other—is the condition of knowledge, and it is precisely that unspeakable or traumatic truth that society enacts in the repetitious drama of the trial.[14] The social—and social-scientific—fascination with law here reflects the fundamental and essentially spiritual enigma of legality, namely, its appeal to an imaginary order of collective truth. In this sense, law presents the images of order to which subjects attach. The specific images of law at play in any given era and in any given institutional domain will vary with the perception of the threat or dispersion of the social that law is called to address, but the malleability of the images of law should not be confused with the absence of law altogether.

Law was never a science, it was a religious knowledge, an object of faith, and its practice was marked correspondingly as much by ceremony as by reason, as much by mystery as by fact. Just as Christian theology struggled with what was termed the impossible "dual nature" of Christ as both man and god, legal doctrine fought with the impossible duality of the *arcana imperii*, the mysteries of government. The dual nature of the polity gained legal expression in the concept of a tradition that was both written and unwritten, known and unknown, or in Legendre's more colorful terminology, both rational and mad.[15] As Murphy acknowledges, the sovereign was, like Christ for whom he stood in, a sacrificial figure whose own life was given up for that of the law. In more practical terms, it was and remains the task of law to bridge the unbridgeable, to mask, or cover over, the abyss between different subjectivities and different groups. And it is this fantasmatic dimension of law that needs to be recognized if the sociology of law is ever to understand how such a cold, prosaic,

[14] On the unthought, see Foucault 1970:236–37. On the historical and social function of the trial, see Felman 1997.

[15] On the *délire* or delirium of the legal institution, see, for example, Legendre 1988:246 ff.

and dry discipline can also become the object of recognition and identification, "the object of passionate attachment, a strange scene of love"[16] (Butler 1997:128–29).

The highly unscientific and yet pervasive role of law within the media culture of contemporary Western democracies at the very least attests to the persistent "imaginary" significance of law. So, too, the legal form of the war against the virtually constituted figures of crime (Young 1996), as much as the legal constructions within which the American presidency is impugned for sexual misconduct; the legislative vocabulary addressed to the prospects of cloning, as much as the social enactment of gender and race in the "trial of the century"—all these are alike suggestive of the legal frame within which virtual communities are presenced, and new forms of juristic subjectivity—of social identity—are made. In a formula coined by the later Foucault, there is "a double political relation constituted by the simultaneous totalisation and individuation of the structures of modern power" (Foucault 1994:229–32). It is undoubtedly the case, as Murphy well argues, that the study of law in society should move from a definition of law as judicial practice toward a more complex and multifaceted analysis of the role of law within what Foucault termed the matrices of power and knowledge. It is much harder, however, to argue convincingly that the positivities of modern social science have a special epistemic status that wholly separates them from law and the formation of legally regulated institutions. Such ontological dualism denies "the possibility of a common matrix or that they both derive from a 'juridico-epistemological' process of formation" (Foucault 1977:28).

In one respect the role of law is that of providing a representation of the social in language. In giving the social its symbolic form, law necessarily mediates subjectivity and desire. Just as it is impossible to separate subjective and political technologies, so too the psychic and the political are bound together in the formation of the subject. The unity of law, indeed law as a system, was always an imaginary enterprise, an image or fiction that covered and ideally legitimated the diverse practices of power and the plural domains of its application. That this fiction is so continuously and persistently necessary merely reflects the subjective need for a social place of reference, for an impossible image of social identity and truth against which the fragments of individual experience can be judged. The point can be formulated in a variety of different ways. Thus, for example, following Luhmann (1986:172–74) in his analysis of intimate relationships, we might endeavor to think of legal subjectivity as a system constituted by, and reproduced through, its "interpersonal interpenetrations," its fragmentary and fluid experiences of diverse environments. In

[16] This point is also made at length in Zizek 1991.

other words, the plurality of contexts or "temporary resting places" of legal subjects, individuals as adjuncts of systems and so as bearers of rights, and also as "workers, citizens, consumers, believers, genders, ethnicities, sexualities" (p. 218) all gain a representation and momentary identity or hope in the field of law.

Another way of formulating the same point can be achieved by reference to the work of the later Foucault and his shift in focus from the economics of governance to "the other economy of the body and its pleasures" (1976:159). What is most immediately and forcefully at issue is the tension between techniques of power and technologies of the self, in which the latter must be understood, at least to some degree, as the self-actualization of the process of subjection. The economy of the body, indeed care of the self understood precisely as cultivation of the soul through new forms of relationship and community, cannot exist outside of a more or less intimate link to the techniques of government that attach the subject to an identity and conscience that are unmistakably marked by law.[17] As Murphy himself at one point rather uncharitably observes, "only idiots are anarchists" (p. 176), and one might add that only the profoundly self-estranged would abandon the category of the subject in their analysis of regulatory schema, or that of the psyche in their search for the truth of the political.

Phrased differently, or rather in more psychoanalytic garb, Murphy's fear of idiots and anarchists reflects the proximity rather than the distance of those threats. In its purest form, for all its abstraction and its reverie of self-completing systems, autopoiesis comes close to reflecting *an-archos*, "an order without origin," or a plurality of orders without any one governing principle and without any one hierarchically imposed criterion or measure of law. This chaos of systems, of competing knowledges operating within vague and virtually defined systems of social circulation or collective communication, may not fit the classical image of the idiotic or anarchistic, but in a disciplinary or epistemic sense it is frequently not far from idiocy and in an ethical sense it often comes close to anarchy. It is a tribute to the rigor of his thought that although he clearly deplores the innumerate and subjective character of such a notion of laws without law, Murphy comes close to acknowledging the parlous irony of its possibility through a concept of a contemporary law that is increasingly characterized by "uninformed" exercises of judgment and by ethically irresponsible methods of adjudication. The unraveling of the profession may threaten to make an idiot—albeit an idiot savant—of the lawyer and an anarchist of the judge. It transpires, in other words, that the epistemic gap between law and other

[17] For a striking discussion of this aspect of Foucault's work, see Agamben 1997:11–15.

social systems, the widening divide between legal and social knowledge, is reflected more in what might be termed the ethical dissonance of law rather than in its irrelevance. In Murphy's own words,

> the more law is detached from politics in systemic terms—i.e. the further we move away from the era of adjudicative government—the more "irresponsible" both lawyers and judges become, or at least the more they can claim (and perhaps feel) that their primary responsibility is to "the law itself," or "the rule of law," or "legality," self referential labels or, in other terms, myths. (P. 207)

Conclusions

The Oldest Social Science? offers an important and salutary corrective to the adjudicative model of social governance. It is undoubtedly true that knowledge of society and of the practices of power has been transformed by new technologies and the scientific data that they are capable of producing. As Murphy puts it, "we need a cooler, more banal vision in which it is recognized explicitly that 'society' is a term which holds together all the provisional and fluctuating data and analyses which are constructed and maintained for administrative purposes" (p. 174). Law no longer exclusively governs that object domain of statistical knowledge; it is one system of communication amongst others. In that regard it may also be true that "we should think more about transportation or telecommunications and less about mutual feeling or community" (p. 166). At the same time, however, the ethical space within which the legal representation of the social unfolds remains a primary site of the formation of political identities and the acting out of group conflicts. In a sense, the future challenge that faces "law in society" thus remains that of addressing the ethics of power as measured through the constitution and regulation of new social aggregates and the forms of subjection, the equalities and inequalities, tolerance or exclusion, that they imply.

In Borges's "Utopia of a Tired Man," the political collapsed into the aesthetic and the collective into the individual. In Murphy's brave new world, law is displaced by science and the subjects of law by the numerical objects of statistical knowledge. It follows from this, in theory at least, that the new science of law in society must address the "fluid, amorphous, and expansionary" (p. 204) practices of governance and so begin to map the new forms of regularity that have displaced the hierarchical conception of normative rule. The concept of sovereign or collective will as the determinant of law and of the exercise of power is displaced by a model of energy, and correspondingly society is depicted in terms of sources, transmission, grids, networks, and

flows of energy, and with it, information. The metaphor of energy and the image of networks capture well the crucial sense in which the objects of the sociological study of law have been transformed by technologies of governance. Indeed few sociologists of law would now dispute the plural nature of regulation or the diverse sites and strategies of the exercise of power. What remains to be resolved, however, is whether the breakup of the unitary concept of law genuinely bespeaks the exhaustion of law as the site of social and subjective expressions of attachment and identity.

It might be argued that *The Oldest Social Science?* is most eloquent and persuasive at those points where it charts a transformation in the sociological conception of law. It is here that Murphy most valuably thinks through the implications of Foucault's "beheading" of the king, and of Luhmann's systemic concept of the closure and self-referentiality of law. What is more open to dispute is the notion that the social-scientific displacement of law should lead us to mourn the passing of the era in which legal dogmatics was king. The scientific melancholia with which the work is imbued, as also its profound resistance to psychoanalytic and feminist conceptions of knowledge, perhaps expresses the impossible project of mourning a law that never existed and so cannot properly be grieved and buried. The classical legal conception of sovereign and subject was always an impossible fiction, a simulation of a divine or natural order that played itself out in the extraordinarily diverse practices and plural jurisdictions of positive law. In other words, the incoherence and plurality of legal history allows for numerous other readings and projects in relation to the role that law should play as one of the principal languages, or systems of communication, for framing and expressing the many faces of sociality. The diverse and confused past of law can at least be used to admit that legal doctrine has developed as much through its borrowings from other disciplines and knowledges as it has through any claim to being a science in its own right. Equally important, the diversity of that history allows for the observation that the scientific objects of governance are not and cannot be all that there is to be said of the exercise of power. In that sense, the new social sciences not only consign the hierarchical model of law to the graveyard of feudal concepts but also open up the possibility of diversifying the methods and the objects of the social and cultural study of law.

In conclusion, the uncertain future prospects of the social study of law can perhaps be elaborated best through a play on the figure of energy which Murphy so persistently manipulates. According to the Renaissance rhetorician Puttenham (1589), the figure of energy or *energeia* was the most forcefully persuasive of linguistic devices. In a tradition that dates back to Quintilian, the figure of *energeia* refers to the use of language to illustrate vividly

the topic being depicted, a usage that would ideally bring the subject described before the eyes of the auditor. The new numerical empiricism that is the focus of *The Oldest Social Science?* is amongst other things a new rhetorical schema, a way of picturing or imagining social relays and future economic patterns. Its claim to truth is in the end contingent both on the technologies that produce its object domain and on the persuasive force of their manipulation. There is, in other words, a certain playfulness, a potential liberation or "ecstasy" (Baudrillard 1987) in the possibilities unleashed by the new systems of communication, and the new forms of symbolic order. If we are to avoid the exhaustion of the "Utopia of a Tired Man," then it is to the freedom of association and the potential of the new media of communication that law in society should turn.

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