

Introduction: Beyond the ‘Degree Zero’ of Law after Modernity

Jurisprudentia

The aim of this book is to investigate the shape and character of law in the contemporary world. It argues for a pluralistic conception of law and focuses on the richness of law, its historical embeddedness and its cultural contingencies, rather than on a vision of law as singular, autonomous and systematic—a view that was more prevalent in some nineteenth- and twentieth-century jurisprudence and was characteristic of a certain type of modernity. However, this book aims for more than analysis. Several recent accounts of law have embraced legal pluralism as an appropriate paradigm for the twenty-first century. However, very few have gone further by enquiring whether pluralism is normatively attractive, and productive of justice. This is an important question, and I will argue that the answer to it must be, at best, equivocal. Law after modernity is liable to be no more just than its predecessors.

These opening remarks are in need of a caveat. The title of this book makes use of two key concepts—‘law’ and ‘modernity’—and moreover implies that we are now ‘after modernity’. All of these concepts are challenging. Undeniably, law has taken more than one form in modernity. Modernity itself has many meanings. Even the assertion that we are now in a ‘postmodern’ era is controversial. Therefore, although I believe that it is possible to identify particular understandings of law which became dominant during the modern period and are now being superseded, it should be acknowledged that any attempt to write about law in modernity and postmodernity as if these concepts possessed singular, straightforward meanings is doomed to fail.

Indeed, in order to capture the troubled, perplexing nature of this enterprise, I have found it best to start with a pictorial image of law, to proceed by way of metaphor, in the belief that this metaphorical expression of law crystallises some of my major concerns—for sometimes art can capture in a more immediate way that which becomes garbled and unclear in words. The work I shall use to do this is Gustav Klimt’s *Jurisprudentia* (Figure 1-1).

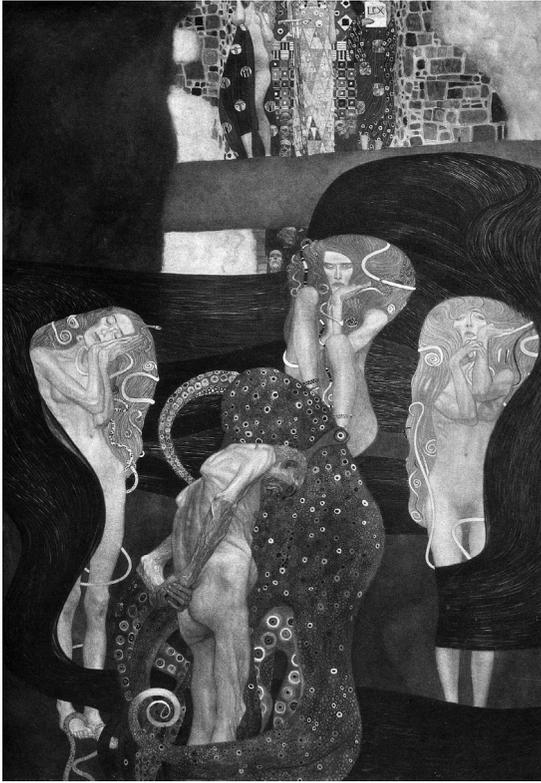


Figure 1-1: Gustav Klimt, *Jurisprudentia* (1903) (since destroyed)

The *Jurisprudentia* was painted by Klimt in 1903 as part of a series commissioned by the University of Vienna to represent the faculties of law, medicine and philosophy. These works were to be prominently displayed in the central hall of the University, and their overarching theme was to be 'the triumph of light over darkness'.¹ The *Jurisprudentia* was a large work that depicted Truth, Justice and Law in its upper section, looking down on an old, naked man who was enveloped in the tentacles of an octopus-like figure and was surrounded by three (also naked) women. The women have been interpreted as the three goddesses of Fate—Clotho, Lachesis and Atropos.

The painting's fate was closely entwined with twentieth-century history. In fact, the work was never displayed, as it (and the other two from the series) proved too controversial, and Klimt, while protesting his artistic freedom of expression, ended up buying it back from the University.²

¹ F Whitford, *Klimt* (London, Thames and Hudson, 1990); and E Pirchan, *Gustav Klimt, Ein Künstler aus Wien* (Vienna, Wallishauser, 1956).

² The paintings were requested for an international exhibition in St Louis, United States, in 1904, but the Austrian government declined, anxious of the reaction of a foreign public. The Austrian authorities initially refused to sell the series back to Klimt, asserting that the paintings were state property, but apparently handed them over when Klimt threatened the

Klimt died in the great flu pandemic of 1918, and the *Jurisprudentia* later became part of the collection of the Austrian Lederer family. However, the Lederers were of Jewish origin, and in another historical twist emblematic of the twentieth century, their entire collection was seized in 1938. Shortly after, the three faculty paintings were displayed in the Österreichische Galerie in Vienna. In 1943, because of the war they were moved for protection to the Schloss Immendorf in lower Austria, where all three were destroyed by fire two years later, when the retreating German forces attempted to prevent Allied occupation of the castle. There are no remaining good quality reproductions of the *Jurisprudentia*, only some old, rather obscure black and white ones, which, it is said, fail to bring out the rich gold and black of the original.

Apparently, Klimt had originally intended the work to represent Justice, as a symbol of the (perceived) liberal Austria of the time.³ In the late nineteenth century, the Austrian state had been receptive to cultural modernism, seeing in it a possible cosmopolitan, counter-phenomenon to the particular, ethnic divisions of the Austro-Hungarian empire.⁴ However, public antagonism to modern art had rendered state support for it politically unwise, and as a result, Klimt, reacting against this criticism, refused to affirm the rational, Enlightenment theme of a triumph of light over dark. Therefore, after earlier censure of the *Philosophy* and *Medicine* paintings, Klimt revised his conception.

Instead of a confident Justice enveloped in the security of law and order, Klimt presented a bleak representation of a very different character. At the top of the picture, Justice, in the centre, was not freestanding but rather flanked by Law on the right and Truth on the left. The emaciated old man before them appeared like a condemned prisoner, head lowered, hands (perhaps tied) behind his back. This painting therefore represented not the benefits of a legal system but rather the isolation of the human being, insecure in the modern world—a portrayal of law in which justice is uncertain and opaque, seemingly dependent on the fates. Moreover, the old man was trapped within the tentacles of the octopus-like figure, perhaps representing capricious societal forces. In such an environment, what hope could there be for Law, Justice and Humanity? This vision is dystopian,

removal staff with a shotgun! See G Fliedl, *Gustav Klimt* (Cologne, Benedikt Taschen Verlag, 1998); H Bahr, *Gegen Klimt* (Vienna, 1903), reprinted in CE Schorske, *Fin-de-siècle Vienna: Culture and Politics* (New York, Vintage, 1981); and P Vergo, 'Gustav Klimts Philosophie und das Programm der Universitätsgemälde' (1978–79) 22–23 *Mitteilungen der Österreichischen Galerie* 69–100.

³ 'Perceived', because many did not see Austria as liberal in the early twentieth century—some have interpreted Kafka's *The Trial* as a commentary on Austrian law and procedure of the time. See T Zjolkowski, *The Mirror of Justice* (New York, Princeton University Press, 1997) 224.

⁴ See further on this, Schorske (above n 2).

hellish, in sharp contrast to the usual, bland, confident, artistic expressions of Justice to be found in courthouses everywhere of that period.

I have chosen the *Jurisprudentia* because this work, painted just over 100 years ago, expresses the anxieties and insecurities of the late modern era, and it places law firmly at the centre of these anxieties, while at the same time universalising these themes through classical allusion. It might be seen as an attack on the very rule of law itself. Indeed, one interpretation of the *Jurisprudentia* reads it as explicitly demonstrating the gap between two different conceptions of law: namely a formal, rationalist, systematic conception of law, more prevalent in the modern era, offering certainty and clarity (these elements to be found in the upper part of the painting, with the three allegorical figures of Justice, Truth and Law); and a contrasting vision of law as it really is—irrational, chaotic and uncertain (these elements to be found in the lower part of the work).⁵ In this way, the work distinguishes its representation of law from associations of order and stability, foreshadowing the postmodern concerns of the later twentieth century in its attempt to demythologise and displace law's orderly role, as well as prefiguring some of the more sinister events to come in the twentieth century. These themes will be explored in the course of this book.

Law and the Image

This book is somewhat unusual for a work of legal scholarship in that it makes frequent use of images—very often of works of art—to aid and clarify the points it seeks to make. Their use is grounded in the view that the study of law is enlightened by reflection on other socio-cultural norms that create and enable laws and legal meaning. Cultural influences play a vital role in the forging and fashioning of law. The use of cultural images in particular, far from conflicting with or having nothing to say about legal meanings and arguments, actually helps us to refine and amplify them. Law is a creature of culture, with as much claim to be an art as a science, and it is grounded in and composed of images as much as of rules. Yet this relationship is sometimes missed or denied. A strong connection is usually asserted between law and reason, science and deduction, rather than with art and the imaginary, the latter being perceived as imprecise, overly creative and imbued in subjective emotions, in the face of law's perceived need for certainty. Indeed, certain types of jurisprudence such as legal positivism (or legal realism) have made specific connections between law and science, often invoking a correlative separation of law from art, as well as from morality.

⁵ For this interpretation, see A Likhovski, 'Czernowitz, Lincoln, Jerusalem, and the Comparative History of American Jurisprudence' (2003) 4 *Theoretical Inquiries in Law* 621.

Yet art may function in a role of rescue and deliverance of law.⁶ The reference to art reveals other criteria by which law may be improved and can expose covert assumptions that underpin the law and shape and structure law's work—values and concepts that, though taken for granted, favour some modes of being and work to the detriment of others. A turn to art provides another language with which to address and assess the experience of law and to resist law's sometimes coercive fabrications. It provides an imaginative empathy, by which the self, with its very human attributes, may be recovered from the more formal, rational language of the law.

In this cultural context, the image is particularly powerful: 'In its ability of disclosing things, the image is promiscuous and forceful.'⁷ In its organisation of our mental representations, the firing and underpinning of our imagination, and in its reinforcement and support of all types of experience—poetic and prosaic—the image is potent and all-encompassing.⁸ We may be disturbed, perplexed, overwhelmed or provoked to violence by images.⁹ Plato wished to banish painters and poets from his ideal republic, believing the influence of art to be both far-reaching and potentially subversive.¹⁰ Images can evoke powerful reactions—ranging from a formal ban on tobacco advertising to the toppling of a statue of a former dictator—and for that reason, society will over time seek to use, misuse and censor them. The image creates both an emotional experience and a force in society. It not only addresses the viewer but also imposes a relation on the viewer.¹¹

The notion of image is given a very broad remit in this book, and a wide variety of examples will be used, encompassing not only the 'high' art of Klimt, Giotto and art galleries but also images as they are found in everyday life—advertisements, photographs and other images that are all around us. The question of what art is, is every bit as difficult to resolve as the question of what law is (the latter to be addressed in chapter two), and I shall not attempt to answer it. Instead, I will note the omnipresent, pervasive, presence of images as a particularly powerful, cultural reference for and influence on law, as on all other forms and aspects of life. Although

⁶ See, eg, J Boyd White, *The Legal Imagination* (Chicago, University of Chicago Press, 1973).

⁷ C Douzinas, 'A Legal Phenomenology of Images' in O Ben-Dor (ed), *Law and Art* (London, Routledge, 2011) 248.

⁸ Cf D Freedberg, *The Power of Images* (Chicago, University of Chicago Press, 1989); and A Young, *Judging the Image: Art, Value, Law* (London, Routledge, 2005).

⁹ For example, on the opening day of a notable exhibition of 'Young British Art', named 'Sensation,' at the Royal Academy in London, a portrait of the notorious child murderer Myra Hindley, entirely compiled in paint using the handprints of small children, was attacked, and a can of paint thrown at it. As a result, it had to be removed from the display.

¹⁰ Plato, *Republic*, Desmond Lee (trans) (Harmondsworth, Penguin Books, 1983) 10.424b–c.

¹¹ See, eg, J Berger, *Ways of Seeing* (London, Penguin Books, 1972) 7: 'It is seeing which establishes our place in the surrounding world; we explain that world with words, but words can never undo the fact that we are surrounded by it.'

Western law has tended to oppose reason to emotion, it is the case that images, often strongly grounded in our emotions, may provide the most compelling motivation for action—regardless of whether the images are in fact trustworthy or whether they form the basis of sound argument, as the power of advertising illustrates.

Further, law is itself a 'deeply aesthetic practice'.¹² Law institutionalises images, as well as other notions, as official ways of seeing,¹³ creating and approving particular domains of visibility—ways of living that we constantly experience. Indeed, it has been suggested that 'Law's force depends partly on the inscription on the soul of a regime of images. . .'.¹⁴ The practice of law is enclosed and manifested in images, its history marked and traced in images as custom, usage, practice, tradition or precedent, and publicised through visual depictions, or notions, that persist due to the power of the images. To give more specific examples, law's ardour for images is expressed by means of an iconography of justice, illustrated in the architecture of the law, of courts and their organisation and design, which reproduce and uphold an appearance of official authority, equity, symmetry, drawing on an aesthetic of harmony and order. Law depends and builds on a panoply of images to create and enforce its authority, as well as to implement its reasoning and judgement: wigs, robes, the sword and scales of justice, gavels, black caps, prison bars—these are all constitutive of a particular sensory perception of the world which law itself has brought into being and worked upon. Familiar concepts of the law—the 'reasonable man', 'the officious bystander'—form and present themselves as images impressed by and within the legal consciousness. Therefore, should law deny any explicit connection with images or with art, such a denial is undermined by the pervasiveness of law's own aesthetic.

But notably, any relationship that law *openly* acknowledges with the image is one of assertion, of control, of image as object and subject to manipulation, in the same way that religion has manipulated images—banning them or strictly controlling them, as Judaism, Islam and the Catholic Counter-Reformation have all done in the past. Medieval Christian art, with its unique iconography, is a clear case in point: every element has a specific permitted meaning, every saint an allotted 'attribute'. Likewise, law polices its own image by filtering it through its own iconography: the forms of authority, sovereignty, rationalism, legality and order. Law manipulates its images rather than permitting a dialogue with them or establishing any other more equal relationship. Yet why should we allow law to dominate the relationship in this way?

¹² C Douzinas and L Nead (eds), *Law and the Image: The Authority of Art and the Aesthetics of Law* (Chicago, University of Chicago Press, 1999).

¹³ See again Berger (above n 11).

¹⁴ C Douzinas and L Nead, 'Introduction' in Douzinas and Nead (eds) (above n 12) 9.

Law’s relationship to the image is therefore complicated. Law may be interpreted as an art form, one of the liberal arts, but that is not all that it is. It makes use of images but is not reducible to images. Nor can art be straightforwardly compared to law. There exists no unambiguous analogy between art and law, and there are of course many points of distinction between them. Alison Young identifies the relationship between art and law as one of *co-implication*, ‘in which law and image are enfolded within each other, their contours and substance passing through and around each other’, a relationship that ‘interrupts any straightforward story of legal governance’.¹⁵ This relationship is one of entanglement and implication, ‘a responsive dance’.¹⁶ Such a relationship of co-implication is adopted in this book as the basis on which law and art interact, the argument being that, while law’s own management of images must be scrutinised with care, law itself may be illuminated, enhanced or attenuated by the work that images do and our own understanding of law thus enriched, or even undermined.

‘Modernity’

To get beyond modernity and to understand the contemporary legal age, we must first have some sort of conception of modernity itself—to make sense of the present, we must first understand the past. Yet ‘modernity’ is an ambiguous, over-broad term, spanning too extensive a period of time for any unified description. Indeed, the question arises as to whether modernity should be understood as a period of time, a state of mind or a concept or series of concepts. Indeed, perhaps it is capable of being all of these things.

If we see modernity in its simplest, temporal sense, then it is absolute contemporaneity—for example, Rimbaud’s *‘il faut être absolument moderne’*.¹⁷ But in this sense, modernity is not an historical era; it is *now*, this minute, no time past, and its content is always changing. What was absolutely contemporary in 1900 will obviously be very different from the contemporary of 2000 or 2100. This sense is captured by Walter Benjamin’s notion of the *Jetztzeit*, namely ‘the present as a moment of revelation’.¹⁸ Understood in this way, it could also be seen as a state of mind—one does not *have* to be modern in this sense; one can choose to be old-fashioned. In this book, modernity will not be understood in this sense but rather in the sense of the two understandings of modernity outlined below.

The second usage of modernity occurs when we make reference to the ‘modern’ era, by which we do not necessarily mean now, this very minute,

¹⁵ Young (above n 8) 14.

¹⁶ *Ibid.*

¹⁷ A Rimbaud, *Une Saison en Enfer*, 1999 reprint (Paris, Gallimard, 1873).

¹⁸ See J Habermas, ‘Modernity v Postmodernity’ (1981) 22 *New German Critique* 6.

but rather a period in time spanning many years. Yet *which* period in time modernity comprises is not so clear. In this sense, modernity is not a state of mind but a professional periodisation, and professional opinions differ. Inevitably, the choice of any historical period as 'the modern era' will be controversial. With an awareness of this controversy, in this work, I take the modern era to span the period from the Peace of Westphalia Treaties (1648)—itself a contentious starting point—up to the later twentieth century. There are of course many other candidates for the modern period. One could arguably start earlier, with the Renaissance and growth of humanism. Michel Foucault, on the other hand, dates modernity from a later point, distinguishing it from the 'classical' age (which he saw as stretching from the late sixteenth century to the second half of the eighteenth century). For Foucault, the main characteristic of this earlier classical age was the monarchical state, constructed round the integrity of law and the sovereign.¹⁹

I justify the identification of the onset of modernity with the Peace of Westphalia by the fact that these treaties are often characterised as the birth of the era of the nation state, and as will be seen, this book identifies 'modern' law with state law to a large extent.²⁰ The Peace of Westphalia, which ended the Thirty Years War,²¹ one of the most brutal wars in history, marked the end of the Holy Roman Empire as an effective institution and initiated huge power shifts in Europe, with worldwide ramifications, inaugurating the modern state system, which is founded on the notion of sovereignty, as well as the beginning of some religious toleration in the West.²² The Peace of Westphalia has been described as marking 'the end of an epoch and the opening of another', as well as representing 'a majestic portal which leads from the old world into the new',²³ a turning point in European history and 'the genesis of the inter-state order'.²⁴ Indeed, it has been argued that references to the crucial nature of Westphalia for the international order of states dates back at least to mid-nineteenth-century law treatises.²⁵ The notion of a Christian

¹⁹ See M Foucault, *The Order of Things: An Archaeology of the Human Sciences* (London, Routledge, 1974).

²⁰ For example, Neil MacCormick has written, 'The world of modernity owes much to the epoch of reformation and religious wars in the 16th and 17th century Europe. . . . Not until the Peace of Westphalia in 1648 was it settled that the new order would prove durable.' See N MacCormick, *Questioning Sovereignty* (Oxford, Oxford University Press, 1999) 123.

²¹ CV Wedgwood, *The Thirty Years War*, 1990 edn (London, Jonathan Cape, 1936).

²² V Gerhardt, 'On the Historical Significance of the Peace of Westphalia: 12 Theses' in *1648: War and Peace in Europe I*, Council of Europe Exposition (Münster, Osnabrück, 1998/99); and W Spellman, *European Political Thought* (Basingstoke, Macmillan, 1998).

²³ L Gross, 'The Peace of Westphalia, 1648–1948' (1948) 42 *American Journal of International Law* 28.

²⁴ A Eyffinger, 'Europe in the Balance: An Appraisal of the Westphalian System' (1998) 45 *Netherlands International Law Review* 164.

²⁵ See, eg, S Beaulac, 'The Westphalian Legal Orthodoxy: Myth or Reality?' (2000) 2 *Journal of the History of International Law* 148.

commonwealth, governed by the spiritual and temporal leaders of Pope and Emperor,²⁶ was to become a thing of the past, gradually to be replaced by principles of religious equality as part of the peace under an international guarantee. For the first time, Europe received ‘what may fairly be described as an international constitution, which gave to all its adherents the right to interfere to enforce its engagements’.²⁷ It thus became the starting point for modern, international law and also for the growing secularisation of law, separate from any religious source, and ‘the unravelling of concepts and institutions’ that had given guidance for centuries.²⁸ The ‘balance of power’ (namely, the principle that enemies were not to be obliterated, as this would lead to an unbalanced vacuum and a threat to peace) rather than Christendom therefore became the key organising concept.

Around this time, one of the first notably ‘modern’ accounts of law was published by Thomas Hobbes, who wrote, ‘It is not wisdom but authority that makes a law’,²⁹ arguing that reason dictated that men seek the protection of law in a well-organised community. The Peace of Westphalia was notably the first European peace to be concluded not militarily but by diplomatic means.³⁰ Article II of the 1648 Treaty of Münster (one of the key Westphalia treaties) declared, ‘That there shall be on the one side and the other a perpetual Oblivion, Amnesty or Pardon of all that has been committed since the beginning of these Troubles.’

The Peace of Westphalia was also significant in being pictorially represented on an unprecedented scale. Works of art were exchanged as gifts and used as diplomatic instruments to proclaim power, and copies and prints were widely circulated as a means of propaganda to a wider public, spreading images of the diplomatic negotiations, their personnel and the peace process itself. One such well known pictorial representation is ‘The Swearing of the Oath of the Treaty of Münster’ by Geraert ter Borch,³¹ one of the greatest artists of the Dutch Golden Age. Ter Borch’s famous 1648 canvas (a popular choice for the cover of international law textbooks) represents the actual swearing of the oath—the culmination of the whole Westphalia peace process. Law itself becomes critical and central

²⁶ On which see further Gross (above n 23).

²⁷ DJ Hill, *A History of Diplomacy in the International Development of Europe, Vol II* (London, Longmans, Green and Co, 1925) 602. But for a contrary view, see Beaulac (above n 25); and A Osiander, ‘Sovereignty, International Relations and the Westphalian Myth’ (2001) 2 *International Organization* 261.

²⁸ Eyffinger (above n 24) 165.

²⁹ T Hobbes, *Leviathan* (Oxford, Oxford University Press, 1998 reprint).

³⁰ It involved the participation of thousands of diplomats, 145 delegations, 55 different jurisdictions and three years of hearings and bargaining. See further Eyffinger (above n 24).

³¹ The painting is part of the collection of the National Gallery London but was recently on loan to the Peace Palace in The Hague. See also SJ Gudlaugsson, *Geraert ter Borch* (The Hague, Martinus Nijhoff, 1959–60); and SJ Gudlaugsson, *Geraert Ter Borch* (Münster, Landesmuseum für Kunst und Kulturgeschichte, 1974).



Figure 1-2: Geraert ter Borch, *Swearing of the Oath of Affirmation of the Treaty of Münster* (1648), collection of the National Gallery, London

in this performative act. It is a complex group portrait in which we see the exchange of copies of the treaty, richly encased in velvet covers with silver clasps, between the Dutch (who are behind the table in the centre) and Spanish delegations (who are to the right) in the Town Hall of Münster, known ever since as the 'Friedensaal'.³²

Ter Borch's image conveyed the importance of the Peace of Westphalia to a much wider European public than that of the royal courts when it was very exactly reproduced as a print by Jonas Suijderhoef. The only change was that Suijderhoef substituted for ter Borch's signature high up on the left hand side the adage 'Pax Optima Rerum'.³³ One could therefore say that the onset of modernity in Europe (in its particular legal manifestation) literally became a vision that entered the popular psyche.

³² I.e., 'Hall of Peace'.

³³ I.e., literally 'peace, the best of things'. See further J Israel, 'Art and Diplomacy: Gerard ter Borch and the Munster Peace Negotiations 1646–1648' in J Israel, *Conflicts of Empires: Spain, the Low Countries and the Struggle for World Supremacy 1585–1713* (London, Hambledon Press, 1997).

Yet modernity connotes more than a period of history; it may also be conceived in a different, third sense, which has been subject to very different interpretations. For even within even a 350-year timespan, it is impossible to settle upon a single agreed concept or definition of modernity. For Kant in *What is Enlightenment?*³⁴ Enlightenment was a process of maturity, of thinking for oneself. Modernity is often connected with this notion—with modernity came Enlightenment and a reluctance to rely on traditional authority, ritual and magic. Instead, Kant proposed his now famous injunction to dare to think for oneself: ‘Sapere Aude!’ With this process came the recognition of an ability to reason in clear and distinct perceptions, a breaking down of beliefs into components and scrutiny of Lockean ‘atomic bits’,³⁵ a thinking that claims to be objective, to grasp the world as it is, from a disengaged perspective. ‘Modernity’ also spans and overlaps with other concepts related to the Enlightenment, such as scientific method, positivism,³⁶ secularism, foundationalism, individualism and capitalism, as well as the process of industrialisation, although is not necessarily coterminous with them.

However, for many prominent theorists, modernity is identified with capitalism.³⁷ This involves a perception of capitalism as a particular social form and the product of specific historical circumstances, such as the onset of Western liberalism, the classical school of economics, the industrial revolution and the growth of colonialism. In this process, the concepts of the rational individual and the protection of private property, along with equal and free bargaining power, are necessarily linked with the growth of a market-based organisation of society. Contract law is seen as enabling new varieties of relationship between individuals, extricating the free, rational individual from the fixed, status-bound forms of pre-modern relational organisation.³⁸

Max Weber interpreted modern history as the advance of rationalisation, both of the state in the form of bureaucratic organisation and of the economy

³⁴ I Kant, ‘An Answer to the Question “What is Enlightenment?”’ in I Kant, *Political Writings*, HS Reiss (ed) (Cambridge, Cambridge University Press, 1991).

³⁵ J Locke, *An Essay Concerning Human Understanding* (Oxford, Clarendon Press, 1975).

³⁶ John Gray has written, ‘For Positivism, modernity is the transformation of the world by the use of scientific knowledge’. J Gray, *Al Qaeda and What It Means to Be Modern* (London, Faber, 2003) 38.

³⁷ It should be noted, however, that for many recent authors, modernity is to be associated with only a particular type of capitalism. For Fredric Jameson, the postmodern era is distinguished from the modern era and identified with ‘late capitalism’ (F Jameson, *Postmodernism, or, The Cultural Logic of Late Capitalism* (Durham, Duke University Press, 1991), while David Harvey identifies a transition from Fordism to ‘flexible accumulation’ in capitalism (D Harvey, *The Condition of Postmodernity* (Oxford, Blackwell, 1990). For a theory of ‘disorganised capitalism’, see also S Lash and J Urry, *The End of Organised Capitalism* (Cambridge, Polity Press, 1987). See also EM Wood, ‘Modernity, Postmodernity or Capitalism?’ (1997) 4 *Review of International Political Economy* 539.

³⁸ On which see further, H Sumner Maine, *Ancient Law*, 1976 edn (London, John Murray, 1861).

in the form of industrial capitalism. Weber also perceived European law as contributing to this rationalisation process by virtue of its particular features (which Weber identified as law's differentiation from other areas of society, as well as its more general nature), which he believed rendered it more 'rational' than law in other civilisations and thus particularly conducive to capitalism.³⁹ Weber, however, believed this process to have both positive and negative effects: while the progress of reason and freedom associated with Enlightenment enabled the freeing of humanity from traditional constraints, on the other hand rationalisation promoted a new form of oppression—the 'iron cage' of modern bureaucratic organisational forms and structures.

Capitalism and modernity of course also came together in Karl Marx's historical materialism, which characterised the historical process as a series of modes of production, proceeding through the dialectic of class struggle, eventually to culminate in the classless society of communism. Karl Polanyi also viewed the process of modernisation as one of capital development, of the subjection of society to economy, of Maine's progress from status to contract, a distinctly modern form; but along with Marx, he was highly critical of its negative aspects, identifying it with a destructive violence of accumulation. Polanyi argued that 'however natural it may appear to us . . . a [market] system is an institutional structure which, as we all too easily forget, has been present at no time except our own.'⁴⁰ Polanyi saw in market capitalism a singular moment in history, in which was to be found:

...a motive only rarely acknowledged as valid in the history of human societies, and certainly never before raised to the level of justification and behavior in everyday life, namely, gain. The self-regulating market was uniquely derived from this principle. The mechanism that the motive of gain set in motion was comparable in effectiveness only to the most violent outbursts of religious fervor in history...⁴¹

Therefore, modernity, or at least the later modern era, has been less positively identified with the downsides and flaws of capitalism. Modernity has also been associated with disenchantment and with suppression of the sense of wonder of life. Weber's perception of the negative effects of rationalisation has already been mentioned, and Weber also stated, 'The fate of our times is characterised by rationalisation and intellectualisation and above all, disenchantment of the world.'⁴² One response to rationalisation

³⁹ M Weber, *On Law in Economy and Society*, M Rheinstein (ed) (Cambridge, MA, Harvard University Press, 1954).

⁴⁰ K Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (Boston, Beacon Press, 1957) 40.

⁴¹ *Ibid*, 31.

⁴² M Weber, 'Science as a Vocation' in HH Gerth and C Wright Mills (trans and eds), *From Max Weber: Essays in Sociology* (New York, Oxford University Press, 1946) 156. Weber conceived rationalisation, namely the instrumentalisation of reason, using practical knowledge to achieve a given end, as part of a larger theory of bureaucracy.

and disenchantment was the late eighteenth- and early nineteenth-century Romantic movement, which prized aesthetic experience and irrationalism even, as well as looking to custom and ethnicity as sources of authenticity—as exemplified by the works of Johann Gottfried Herder and Johann Gottlieb Fichte. Such romanticism censured modernity for being dominated by instrumental reason, preferring instead to look to a romantic-expressive notion of authenticity as the way to recover one’s true nature.⁴³ Romanticism also engaged in a melancholy belief that, with modernity, something important had been lost, involving the alienation of important values—a sort of nostalgia of the soul. Indeed, for Isaiah Berlin, Romanticism was part of a larger tendency of counter-Enlightenment.⁴⁴

Kantian optimism about Enlightenment has also been derided as a desire for mastery and control of the environment rather than a more innocent autonomy and freedom from medieval superstition. Even as early as 1818, Mary Shelley’s *Frankenstein* presented a negative image of modernity and Enlightenment as an overwhelming desire for knowledge and a dangerous attempt to master nature, devoid of ethical context. Shelley portrayed Dr Frankenstein as an enlightened scientist who views magic and alchemy with contempt, and yet his creation, the awful, nameless monster, causes terrible harm and finally destroys him. Theodor Adorno and Max Horkheimer, presenting their *Dialectic of Enlightenment*, wrote, ‘Enlightenment behaves towards things as a dictator toward men. He knows them in as far as he can manipulate them.’⁴⁵

These approaches ultimately link Enlightenment and modernity with destruction and self-destruction. They perceive modernity as at risk of degeneration into the pathological, or even as a suicidal impulse.⁴⁶ According to Jacques Derrida, the post-war conflicts of the twentieth and twenty-first centuries—the Cold War and the more recent ‘war on terror’—are ‘auto-immune’ responses generated by modernity itself.⁴⁷ Derrida has noted that an auto-immune condition is one in which ‘a living being, in a *quasi-suicidal* fashion, “itself” works to destroy its own protection, to immunise

⁴³ See further, C Taylor, *The Ethics of Authenticity* (Cambridge, MA, Harvard University Press, 1991).

⁴⁴ I Berlin, ‘The Counter-Enlightenment’ in H Hardy (ed), *Against the Current: Essays in the History of Ideas* (London, Hogarth Press, 1979).

⁴⁵ T Adorno and M Horkheimer, *The Dialectic of Enlightenment*, (London, Verso, 1979).

⁴⁶ This perception was already prefigured in Romanticism with Goethe’s depiction of the suicide of the melancholic Werther. Goethe’s own synopsis, sent to a friend, of *The Sorrows of Young Werther* reads as follows: ‘I present a young person gifted with deep, pure feeling and true penetration, who loses himself in rapturous dreams, buries himself in speculation, until at last, ruined by unhappy passions that supervene, in particular an unfulfilled love, puts a bullet in his head.’ *Werther* has been interpreted as representative of certain young Germans of his time, jaded and sickened by a futile, stagnant and spiritless social order. See, eg, JM Coetzee, ‘Storm over Young Goethe’, *New York Review of Books* (26 April 2012).

⁴⁷ See the interview with Derrida in G Borradori (ed), *Philosophy in a Time of Terror* (Chicago, Chicago University Press, 2003).

itself *against* its own immunity.⁴⁸ John Gray, for example, sees Al Qaeda as uniquely modern: 'Like Marxists and neo-liberals, radical Islamists see history as a prelude to a new world. All are convinced they can remake the human condition. If there is a uniquely modern myth, this is it.'⁴⁹

Given these substantial definitional problems,⁵⁰ it might be safest to understand modernity by what it is not—not medieval, not the Dark Ages—thereby reaching a sort of 'degree zero' of modernity.⁵¹ Admittedly, this does not take one very far, although in its element of negation this notion of modernity carries a late modern or postmodern twist that is itself redolent of Derrida or Martin Heidegger: instead of **Being**, we have **Medieval**.⁵² I suggest, however, that there is some accuracy in both the 'Enlightenment' and the 'pathological' visions of modernity. Indeed, it is the complex, contested nature of modernity that provides tensions within and problematises much of modern law.

'After' Modernity

The title 'Law *after* Modernity' implies some sort of transformation or rupture—if not of law, then of time, perhaps of both. If law has moved beyond modernity, what does that mean? Where are we now, and how has law altered? Where does modernity end? Has it ended yet?

According to Jürgen Habermas, modernity is still an 'unfinished project'.⁵³ For Fredric Jameson, it is over and buried.⁵⁴ Millennial times have indeed produced some momentous features and events, which signal or threaten huge changes in culture and society: the Internet, global warming, global terrorism, failed states and the threat of deadly pandemics. For some, modernity might seem to have waned or metamorphosed around the time of the first Gulf War (1991) (described by Jean Baudrillard as a 'virtual'

⁴⁸ Derrida continues, 'For let us not forget that the US had in effect paved the way for and consolidated the forces of the "adversary" by training people like Bin Laden, who would here be the most striking example, and by first of all creating the politico-military circumstances that would favour their emergence and shifts in allegiance.' *Ibid*, 94 and 95.

⁴⁹ Gray (above n 36) 3.

⁵⁰ Fredric Jameson has written, 'The words "modernisation" and "modernity" have been degraded to fashionable concepts under which you can think anything at all.' F Jameson, *A Singular Modernity* (London, Verso, 2002) 9.

⁵¹ The term 'degree zero' derives from R Barthes, *Le degré zero de l'écriture* (Paris, Seuil, 1953), a work that starts with a series of definitions to show what writing is not.

⁵² The strikethrough was a device often used by Heidegger to signify 'inadequate but necessary' (see M Heidegger, *Being and Time* (New York, Harper & Row, 1962)) and was also used by Derrida as *sous rature*—'under erasure' (see, eg, J Derrida, *Writing and Difference* (London, Routledge, 1978)).

⁵³ J Habermas, 'Modernity: An Unfinished Project' in MP D'Entrèves and S Benhabib (eds), *Habermas and the Unfinished Project of Modernity* (Cambridge, Polity Press, 1996).

⁵⁴ Jameson, *The Cultural Logic of Late Capitalism* (above n 37).

and thus possibly the first 'postmodern' war).⁵⁵ For others, the change came ten years later with September 11 and the new world order.⁵⁶ David Harvey sets an actual date for the change: 'There has been a sea-change in cultural as well as in political-economic practices since around 1972.'⁵⁷ Yet we can go further back in search of transformation—highly significant change predates the millennium by a considerable period of time. The English historian Alfred Toynbee described the First World War as the first postmodern war.⁵⁸ Since earlier in the twentieth century and certainly by the end of the Second World War, the post-Westphalian order had started to break down. In a now famous speech at Humboldt University Berlin in 2000, then German foreign minister Joschka Fischer suggested:

The core of the concept of Europe after 1945 was and still is a rejection of the European balance-of-power principle and the hegemonic ambitions of individual states that had emerged following the Peace of Westphalia in 1648, a rejection which took the form of closer meshing of vital interests and the transfer of nation-state sovereign rights to supranational European institutions.⁵⁹

Robert Cooper also sees 1945 (but additionally 1989) as a key date. He writes:

What happened then was more far reaching than the events of 1789, 1815 or 1919 because it wrought a fundamental change in the European state system itself ... [H]istorically the best point of comparison is 1648 ... In both cases, 1648 and 1945, the result was a recognition that there had been a radical failure and the system was changed.⁶⁰

Some writers assert that there has been a shift seismic enough to be called paradigmatic or, in Foucaultian terms, an 'epistemic' break. In his novel *Atomised*, the French writer Michel Houellebecq discusses the 'metaphysical mutations' that have transformed the way people think, writing:

Once a metaphysical mutation has arisen, it moves inexorably towards its logical conclusion. Heedlessly, it sweeps away economic and political systems, ethical considerations and social structures. No human agency can halt its progress—nothing but another metaphysical mutation.⁶¹

⁵⁵ J Baudrillard, *The Gulf War Did Not Take Place* (Bloomington, Indiana, 1995).

⁵⁶ For example, at a speech to the Labour Party conference in October 2001, then UK Prime Minister Tony Blair announced, 'In retrospect, the Millennium marked only a moment in time. It was the events of September 11 that marked a turning point in history.'

⁵⁷ Harvey (above n 37) vii.

⁵⁸ A Toynbee, *A Study of History*, vol 8 (Oxford, Oxford University Press, 1954).

⁵⁹ J Fischer, 'From Confederacy to Federation: Thoughts on the Finality of European Integration', speech given at Humboldt University, Berlin (12 May 2000).

⁶⁰ R Cooper, *The Breaking of Nations* (London, Atlantic Books, 2003) 2–3.

⁶¹ M Houellebecq, *Atomised* (London, Vintage, 2001) 4. Houellebecq's fictional 'metaphysical mutation' concerns the elimination of human desire and the creation of a new

As Houellebecq highlights, such transformations are rare in the course of history. The emergence and spread of the Christian and Islamic religions was one such seismic shift, the Enlightenment and growth of scientific method another. The environmentalist George Monbiot cites Houellebecq's theory of 'metaphysical mutation' in his own book, *The Age of Consent*, suggesting that we are on the verge of another such mutation, this time caused by globalisation, which tears down old barriers and bonds, forcing states to relinquish nationhood.

Similarly, Michael Hardt and Antonio Negri, in their grandly titled *Empire*, refer to a new 'logic and structure of rule—a new form of sovereignty'—proclaiming that 'the sovereignty of nation states has declined' and that 'sovereignty has taken a new form . . . what we call Empire', which they envisage as a sort of planetary 'Gestalt' of flows and hierarchies of networks of power on a global scale with its own constitutional system.⁶² Hardt and Negri make further ambitious claims for 'Empire', suggesting its creative forces may be directed toward emancipatory ends.

Hardt and Negri are not alone in boldly claiming a new legal order (in their case, constitutional and economic) for a new era. Boaventura de Sousa Santos provides another manifesto, with the perhaps less grandiose title *Towards a New Legal Common Sense*.⁶³ For de Sousa Santos, modernity (by which he means the dominant mode of thought from the sixteenth century to the mid-twentieth century) has broken down and is in the process of being replaced by a postmodern paradigm in which a constellation of different legalities operate in local, national and transnational time spaces. De Sousa Santos' vision is, however, also utopian, calling for a 're-enchanted' common sense.

Of course, writers have been claiming paradigm shifts long before Hardt, Negri and de Sousa Santos came up with their millenarian theories. Postmodern writers have been announcing the onset of a new legal era for quite some time. But what does such postmodernism amount to? The term 'postmodern' has been as contested as 'modernity'.⁶⁴ A key theme in the literature on postmodernism is taken from Jean-François Lyotard's *The Postmodern Condition*, which identified postmodernity with an absence of grand narratives. For Lyotard, 'grand narratives' were linked to modernity and Enlightenment and portrayed humanity as an heroic agent of its own

world in which 'a new, rational species' relies on cloning rather than sexuality as a means of reproduction, as part of an attempt to achieve immortality.

⁶² M Hardt and A Negri, *Empire* (Cambridge, MA, Harvard University Press, 2000) xii.

⁶³ B de Sousa Santos, *Towards a New Legal Common Sense: Law, Globalisation, and Emancipation*, 2nd edn (London, Butterworths, 2002).

⁶⁴ See, eg, S Connor, *Postmodernist Culture: An Introduction to Theories of the Contemporary* (Oxford, Blackwell, 1989); and Harvey (above n 37) for a discussion of the problems of identifying and defining postmodernity and postmodernism.

liberation through the advancement of knowledge.⁶⁵ In contrast, Lyotard’s postmodern condition is defined by the loss of credence in these meta-narratives, which have been replaced by a plurality of different types of story and argument, a proliferation of paradoxes, a fragmentation and dispersal of knowledge and of ‘language games’ and the recognition that science is just one more language game among others. Indeed, according to Lyotard, even science, through new concepts such as microphysics, fractals and chaos, is ‘theorising its own evolution as discontinuous, catastrophic and paradoxical’.⁶⁶

The ‘postmodern’ as a concept also has important roots in the arts. In the 1972 work *Learning from Las Vegas*,⁶⁷ the architect Robert Venturi and his associates criticised the purist orthodoxy of modernist architect Mies van der Rohe. In 1977, the first edition of Charles Jencks’ *Language of Postmodern Architecture*⁶⁸ appeared. According to Jencks, this ‘language’ employs a radical eclecticism and hybrid forms of modern and historical syntax, providing a tribute to the past, yet in a new form. Since the publication of these architectural works, a primary association of the term ‘postmodern’ has been with new forms of built and designed space. Indeed, the spatial has been a key element of the postmodern in other disciplines as well—a theme that will be picked up in later chapters of this book.

However, translated into legal theory, postmodern work seems to be not so much exemplary of a new paradigm as constituting a body of critique of existing legal theories, which takes the following form: it is suspicious of ‘reason’, hierarchies and unity, and is therefore often identifiable as much for its *methods* as for any substantive new way of visualising law. Postmodernism can be whimsical, poetic, averse to ‘hard’ legal language, disrespectful or metaphorical. However, very often much of its message is nihilistic or negative.

The term ‘postmodern’ is in any case inextricably linked to the concept of modernity—dependent on it and shadowing it. Therefore, it may be difficult to ascertain how postmodern thinking can lead to a postmodern way of life, although it is likely that those urging such a lifestyle might invoke the recognition of incommensurable differences, inclusion of the

⁶⁵ Examples of such thought might be found in Kant’s *Idea of a Universal History with a Cosmopolitan Purpose*, as well as in the work of the nineteenth-century English Whig historians, such as WEH Lecky, Lord Acton and JR Seeley, which illustrate the tendency to present history as an ineluctable progress toward advancement and Enlightenment; or additionally, in those theories of nineteenth-century social evolutionists such as Auguste Comte and Herbert Spencer.

⁶⁶ J-F Lyotard, *The Postmodern Condition* (Manchester, Manchester University Press, 1984).

⁶⁷ R Venturi, D Scott Brown and S Izenour, *Learning from Las Vegas: The Forgotten Symbolism of Architectural Form*, revised edn (Cambridge, MA, Massachusetts Institute of Technology Press, 1977).

⁶⁸ C Jencks, *The Language of Postmodern Architecture* (New York, Rizzoli, 1977).

marginal, or empowerment of the excluded⁶⁹—which sounds somewhat Christ-like, imposing demands that only a messiah might fulfil. However, I prefer to take 'postmodernism' not as a paradigmatic or accurate description of twenty-first-century law but rather as a methodology that presents useful insights, but whose methods should not be followed slavishly. Therefore, the project of this book is not, strictly speaking, 'postmodern'.⁷⁰

Nevertheless, there exists evidence to indicate some sort of shift with a past, 'modern' era, even if it does not take the form of a clean break or rupture. The present age might be described as a transitional, rather ambiguous era, which continues with some of the trappings of the past. The changes in legal form will be closely detailed in later chapters of this book, and they involve the growth of informal, flexible, private or non-state 'governance' organisations and networks, as well as a growing awareness of the pluralism and plurality of legal orders. One further characteristic of the present age is its loss of confidence and of certainty. During modernity, however we characterise it, there existed greater confidence in the ability to deliver a persuasive, comprehensive account of law, or of society in general.

'Law'

The starting point is therefore the assumption that there is an era identifiable as 'modernity' (albeit 'modernity' understood in a complex way), and during this era, law was conceived and theorised according to the various ideational structures of modernity; but that era is coming to an end, and both law itself and theories about law are changing in this new post-millennial age. Benjamin sought to capture the nineteenth-century arcades at the moment of their decay and thereby developed a theory about history—that you can best understand the present from the standpoint of the immediate past, whose fashions are just a little out of date.⁷¹ Similarly, the nature of twenty-first-century law may become clearer if we consider what might be meant by law in 'modernity' and how law—or our perceptions of law—appear to be changing. In other words, what is law changing from? Is it possible to identify a recognisably 'modern' conception of law? What

⁶⁹ As advocated, for example, in the works of Lyotard (see, eg, above n 66) or those of Emmanuel Levinas (for example, *Time and the Other* (Pittsburgh, Duquesne University Press, 1990).

⁷⁰ For a similar approach, see W Twining, *Globalisation and Legal Theory* (London, Butterworths, 2000) ch 8, which includes an interesting discussion of Susan Haack's views on postmodernism in her book *Manifesto of a Passionate Moderate* (Chicago, University of Chicago Press, 2000).

⁷¹ W Benjamin, *The Arcades Project* (Cambridge, MA, Belknap Press, 1999), cited by F Jameson, 'Future City' (2003) 21 *New Left Review* 66.

is unworkable or outdated about this conception, and how then should we shift our perceptions of law?

At first this seems an impossibly over-ambitious task. 'Modern' law is not a unified body of doctrine. As Nigel Simmonds has suggested, 'Legal thought of any period is likely to resemble an ancient palimpsest. Modern law contains layers of meaning, one superimposed on and partially obscuring the other.'⁷² Within the long period of time that could be said to constitute 'modernity', there have existed a wide variety of candidates for the concept of law, seemingly with little in common. No complex legal order ever forms a fully coherent legal system in any case. We are again faced with the problem of getting beyond the definitional degree zero. These definitional problems of providing a unified concept of law in modernity are well illustrated by the following sample of theories, all of which are candidates for a 'modern' concept of law.

One (perhaps somewhat obvious, in Western Jurisprudence at least) starting point is the relentlessly schematic *Province of Jurisprudence* by John Austin,⁷³ formulated in the nineteenth century and further formalised as an object of doctrinal study by his successors, including TH Holland.⁷⁴ Seen from this perspective, law is not only a domain, or province, with somewhat imperialist connotations, but also an expression of a nineteenth-century desire for a scientifically organised study of living things and concepts. Austin believed he could establish a 'science of jurisprudence'. Austin's theory was positivist in that it identified law on the basis of its sources only (in this case a sovereign) with the aim of keeping law as it is separate from law as it ought to be. 'Positivism' is of course a term of multiple meanings. John Gray has described the nineteenth-century French positivists Henri de Saint-Simon and Auguste Comte as 'the original prophets of modernity', as they believed in the power of science to organise society.⁷⁵ Scientific positivism focuses on empirical observations and the making of regular connections. Austin exhibited some of these techniques but was generally more conceptual. Weber and HLA Hart, on the other hand, while also being positivist, were more interpretative in method.

A later nineteenth-century investigation of law is to be found in Max Weber's 'The Sociology of Law', which forms part of his larger work

⁷² N Simmonds, *The Decline of Juridical Reason* (Manchester, Manchester University Press, 1984) 23.

⁷³ J Austin, *The Province of Jurisprudence Determined* (Cambridge, Cambridge University Press, 1995).

⁷⁴ Of course, Austin was himself a disciple of Jeremy Bentham, who was a more original legal thinker. Yet, as much of Bentham's work on law remained unavailable for so long, it was Austinian positivism that was disseminated in the Anglo-Saxon legal world and its colonies. See, for example, TH Holland, *Elements of Jurisprudence* (Oxford, Clarendon Press, 1880).

⁷⁵ Gray (above n 36) 27.

Economy and Society.⁷⁶ Weber's study is also an explicit reflection on the relationship between law and modernity. Weber saw modern law as made up of a formal legal system that presents itself as universal and a class of professional technocrats whose task is to apply the system. Law thereby epitomises the modern by its techniques of rendering things calculable, its strategies of control, its measure, systematisation, and bureaucracy—to the exclusion of non-rational elements such as religion, aesthetics and ethics. So, like Austin, Weber separated law from morality, but he did so as part of a broader investigation of modernity. Weber's methodology and theorising about law also influenced twentieth-century positivists such as Hart and Hans Kelsen, whose theories have also played a very important part in modern theorising about law.

A third item in our sample of 'modern' theories of law takes us to the United States in the 1930s. The American legal realists were also positivists in that they sought to locate law in social fact, but their social science-driven legal theory focused not on abstract notions such as Austin's trilogy of command-sovereign-sanction or Weber's formally rational law but on empirical research—what courts actually do in practice. Therefore, the realists' work was scientific and positivist in an empirical or statistical way rather than in the more conceptual sense in which Austin's theory was positivist, but it very clearly aspired to be 'modern' and scientific. William Twining has located the roots of legal realism within a broader attempt to come to grips with modernity and to address the problems of rapid societal and legal change in late nineteenth- early twentieth-century America—and the related problems of trying to achieve a unified system of modern doctrine.⁷⁷

Jumping forward in time almost 70 years but staying with a writer who consciously places himself within the paradigm of modernity (although he anticipates many of the anxieties and problematics of postmodernity), we find a self-conscious attempt to provide a theory of law that, as its title states, locates it *Between Facts and Norms*.⁷⁸ The German theorist Jurgen Habermas presents law as neither an object of doctrinal study nor empirical research but instead focuses on the problem of the legitimacy of law in an era Weber characterised as 'disenchanted'. The search for legitimacy has become one of the most pressing problems of modern law. In modern times, when neither religion nor morality are part of the fabric of everyday life for every citizen, how may law be legitimised and become something other than brute force of the powerful or a soulless bureaucratic rationality, which seems to embody nothing other than good order? Habermas'

⁷⁶ Weber, *On Law in Economy and Society* (above n 39).

⁷⁷ W Twining, *Karl Llewellyn and the Realist Movement* (London, Butterworths, 1973).

⁷⁸ J Habermas, *Between Facts and Norms* (Cambridge, MA, Massachusetts Institute of Technology Press, 1996).

solution derives law's legitimacy from the democratic process itself, a democracy that is understood as a powerful consensual process in which citizens accord each other a range of both public political rights and rights of private autonomy. Habermas, however, stresses not only the democratic process but also the productive power of reason or rationality (so, in this way, he remains self-consciously modern, although Habermas invokes a communicative, intersubjective rationality), itself a concept derided by some postmodern writers.

Habermas' account is optimistic—he sees a possible emancipatory role for law. He also introduces something not to be found in the three earlier accounts—the issue of law's legitimacy and its problematic relationship with morality. All is not optimism, however. Our final choice of a 'modern' theory of law presents law in a less positive light. Marxist writings aim to expose law, or at least Western law, as ideological. The Marxist critique is premised on the claim that supposedly liberating doctrines such as the rule of law and human rights in fact justify or mask a legal regime that is based on the self-interest of a few. In other words, Marxists claim, law is not transparent, not to be taken at face value, but a key bearer of ideological messages, which, because of law's (wrongly) generally assumed legitimacy, serve to reinforce its ideology. Such visions of law are still to be found in contemporary writings (eg, the critical legal studies movement and critical race theory) and by no means died with the demise of Soviet communism. Indeed, they are enjoying a resurgence in an era in which there exists censure of the power and dominance of global capital.

I have deliberately chosen the above five 'modern' visions of law (which I shall continue to deploy throughout this book) to illustrate the varieties of legal thought over the period of time characterised as 'modernity'. They provide diversity—historically, geographically and theoretically—although all are the product of white Western males, most of them dead, not all of whom were, strictly speaking, lawyers. All could with accuracy be called modern, and yet they exhibit very different visions of what law is, what its role must be. This diversity is to be expected, especially since no universally acceptable conception of the term 'modernity' itself can be identified. However, part of the explanation of their diversity lies in their historical and cultural contexts—a theme that I shall explore throughout this book.

Beyond the 'Degree Zero' of Law in Modernity

My attempt to summon up law in modernity (and thus provide a starting point for the differentiation of law after modernity) aims at least to take us a little further from what I have termed the 'degree zero'—the 'not-medieval'—definition of law in modernity. This book does not seek to

provide a concept of law, nor to define law. Nor does it propose only one way of theorising law, one path for jurisprudence. It proceeds instead by setting out a short list of features that seem salient, or paradigmatic, of law in modernity. Most attempts to characterise law, including the five accounts of Austin, Weber, the legal realists, Habermas and Marxism, feature at least some of the items on the list, but not necessarily all, which is why the accounts of law discussed above seem different, although if one follows the logic of this list, one begins to see some sort of Wittgensteinian 'family resemblance'. The items of the list are clearly not comprehensive, but they are enough to take us beyond the 'degree zero' of law in modernity.

The argument is that theorising about law within the modern era—loosely understood as the period from the mid-seventeenth century to the late twentieth century—exhibited the following traits:

1. a belief in the relative autonomy or 'closure' of law;
2. a characterisation of law as systematic, fairly orderly and capable of existing in the context of separate 'legal systems'; and
3. a tendency to identify law with the nation state, or at least to stress the importance of state law, and a reluctance to delve too deeply into the multidimensionality or pluralisms of law, whether on a global, regional or sub-national level.

Chapters two through four of this book examine these three features and aim to demonstrate their problematic nature.⁷⁹ Although few legal theorists would these days unreservedly promote a jurisprudence based on law's autonomy and systematic quality, this orthodox view continues to have a relatively strong normative pull. The aim of this project is therefore to move beyond a prevailing orthodoxy in the modern period and to investigate the nature of a legal theory with which to replace it—which will be a theory of a more complicated, nebulous nature. The remaining chapters of the book continue with this task.

It will be argued that the contemporary legal space is becoming a space of overlapping jurisdictions, segmented authority and multiple loyalties, characterised by the growth of informal, flexible, private or non-state 'governance' organisations and networks, as well as by an increasing number of transnational and supranational legal orders. In a landscape in which national legal sovereignty is weakened and jurisdictions compete (and overlap) globally, there is a risk of conflict and of officials being compelled

⁷⁹ See, by contrast, de Sousa Santos' selection of what he takes to be the '3 structural features of modern law': rhetoric, bureaucracy, violence. See de Sousa Santos (above n 63). Alternatively, Nonet and Selznick suggest three classic paradigms—or, in their preferred terminology, 'postures'—of law, in modern legal theory: repressive law, autonomous law and responsive law. See P Nonet and P Selznick, *Law and Society in Transition: Toward a Responsive Law* (New York, Harper Colophon, 1978).

to choose between their loyalties to different institutions. This raises the prospect of untidy collisions, legal tangles and apparently irresolvable dilemmas. These developments will be discussed in subsequent chapters. This legal landscape also has a tendency to display some attributes that have been commonly identified as postmodern: namely, a fragmentation, indeterminacy and discontinuity of form; the growth of multiple and different discourses; an acceleration of time and compression of space and chaotic flurry of change; a tendency to heterarchical rather than hierarchical relationships; and the strengthening of globalism at the expense of national sovereignty. Undeniably, this contemporary legal landscape is challenging.

In the face of this prospect, how to conceptualise law? It appears impossible to categorise such complex legal landscapes by a neat, self-contained conception of law, such as those associated with various legal theories of the modern era. Is law now better conceptualised as 'postmodern? Rather than taking this path, this book affirms a theory of legal pluralism. Many contemporary theorists believe legal pluralism to be the most convincing and workable theory of law, and this book is sympathetic to many of these claims. Legal pluralism describes a state of affairs in which two or more legal orders occupy the same legal space, sometimes peacefully coexisting but sometimes in direct competition with each other.⁸⁰ Chapter four argues that the notion of legal pluralism better captures the nature of law in the contemporary era.

This book therefore presents contemporary law as a complex, pluralist phenomenon not readily capable of systematisation, in contrast to an earlier paradigm of a more formal, autonomous, systematic law. Yet is this a transformation to be welcomed? While I believe legal pluralism empirically workable, I have reservations about its normative attractions. Later in the book I argue that in the contemporary landscape, where 'formal' law may sometimes be thin on the ground, the most crucial and often unanswered questions are of justice and accountability. In particular, there are many situations in which there is either a weak or, indeed, no functioning rule of law. Such environments undermine accountability and the possibility of justice. Justice is further compromised in the global arena, where there exists either little or no trace of formerly familiar mechanisms of state accountability.

Justice therefore becomes a key issue for law in the era of legal pluralism. Rather than, or at least in addition to, exploring questions of ordering⁸¹ and attempting to interpret pluralism, we should ask how justice

⁸⁰ For further on legal pluralism, see, eg, J Griffiths, 'What Is Legal Pluralism?' (1986) 24 *Journal of Legal Pluralism* 2–55, 2. The origins of legal pluralism lie in anthropology, sociology and colonial experience. See, eg, E Ehrlich, *Fundamental Principles of the Sociology of Law*, WL Moll (trans) (New York, Russell and Russell, 1936).

⁸¹ See, eg, M Delmas Marty, *Ordering Pluralism* (Oxford, Hart Publishing, 2009).

is achievable, given this complexity and the wide variety of legal forms and experiences. Ultimately, how is justice possible? The later chapters of this book focus on this issue.

In the present age, the notion of justice has often been overshadowed by other concepts. For example, human rights, democracy and accountability tend to be used as frequently as the concept of justice as conceptual tools for diagnosing, treating and solving the normative problems that arise in the legal domain. Yet perhaps we should remember the plea for the priority of justice as articulated by John Rawls:

Justice is the first virtue of social institutions, as truth is to thought. A theory however elegant and economical must be rejected or revised if it is untrue; likewise laws and institutions no matter how efficient and well-arranged must be reformed or abolished if they are unjust.⁸²

While I will not argue for the application of Rawls' actual theory of justice to law after modernity, I do argue that justice—or perhaps rather *injustice*—raises especially salient issues for the contemporary legal world. Analysing contemporary law's actions in terms of justice highlights their impact on its peoples and accentuates law's imbalances of power. However, the solutions to these instances of injustice are not readily apparent; nor may answers easily be found in the other concepts such as human rights, democracy or accountability.

My argument is that some solution to the problem of justice may be found in the particular relation of justice to law, in a concept I name 'critical legal justice', which is explored later in this book, particularly in chapter eight. However, justice is not confined to legal justice. While justice in a broader sense may be so elusive as to be an ideal or utopian, it is the diagnosis of *injustice* that is crucial, as justice is more likely to move people in its absence than it is as an academic or rhetorical exercise that fails to convince. It is *injustice* that motivates and propels action, and the highlighting of injustice does its own work.

Methodology

This book is, to a certain extent, interdisciplinary and historical. This is also characteristic of much postmodern writing,⁸³ which turns away from the more abstract scholarship of the modern era, although as already stated, this book is not intended as another contribution to the postmodern genre

⁸² J Rawls, *A Theory of Justice* (Cambridge, MA, Harvard University Press, 171) 3.

⁸³ For example, de Sousa Santos in the first edition of *Towards a New Common Sense: Law, Science and Politics in the Paradigmatic Transition* (New York, Routledge, 1995) spends much of the earlier part of the book discussing modern scientific developments.

as such. Rather, it proceeds on the basis that it is impossible to achieve an adequate understanding of law unless some attempt is made to situate it within its historical, societal, cultural and political context. I conclude this introductory chapter, therefore, by reflecting in a more general form on the argument already made for the relevance of art and the image to law, to stress once again the role that cultural influences play in fashioning law and the ways in which we understand it. Law is as much a matter of culture as it is a system of rules.

Law has been interpreted as a symbolic form that attempts to construct its own ostensible domain of meaning.⁸⁴ It asserts its intrinsic ways of seeing and, in so doing, structures our consciousness and creates ways of being in the world—a myriad of complex, intricate forms and traditions. Yet it is not the autonomous discipline it sometimes asserts itself as, bound and influenced only by its own forms and creations. The permeability of law to other areas of knowledge has long been recognised in the course of a deep, historical relationship between law and the humanities, and many of the most famous philosophers—Plato, Aristotle, Hobbes, Kant and Hegel, for example—have either been students of law or possessed a rich knowledge of it and understood law as irrevocably tied to society and morality, as both productive of culture and shaped by it.⁸⁵ The study of law also played its part in the curricula of medieval universities, in the *trivium* of the liberal arts, and more generally, law has been approached as part of a broader exploration of human civilisation, culture and tradition, both in the context of accepted orthodox beliefs but also within critical, dissident and irreverent traditions. Law cannot be understood only in terms of doctrinal science. The increasing recognition of interdisciplinary approaches and the growth of interdisciplinary journals acknowledge this.⁸⁶ Law itself has its own aesthetic and may be envisioned as a creative art form as much as a science. Most importantly perhaps, ‘the study of law as a human discipline is concerned with the capacity of humans to engage with the environment and to reform it through the use of the imagination’⁸⁷—to ensure that law is not investigated only in terms of its own, self-chosen forms of understanding.

But we may ask again, what does this relationship amount to? Many things. Surely not just the simplistic understanding of law itself as literature

⁸⁴ P Kahn, *The Cultural Study of Law: Reconstructing Legal Scholarship* (Chicago, University of Chicago Press, 1999); cf E Cassirer, *The Philosophy of Symbolic Forms* (New Haven, Yale University Press, 1965).

⁸⁵ See further Douzinas (above n 7).

⁸⁶ For example, the following journals: *Yale Journal of Law and the Humanities*, founded in 1988; *Law, Culture and the Humanities* (Sage), founded in 2005; and *Law and Humanities* (Hart), founded in 2007. There also exists a Law and Humanities blog at <http://lawlit.blogspot.co.uk/>.

⁸⁷ *Law and Humanities*, ‘Editorial’ (2007) v.

or art, nor merely a study of the way law has been portrayed in literature or art. For theorists such as James Boyd White, the study of literature and its relationship to law enriches the legal imagination.⁸⁸ This is no anodyne, trivial function. Understanding law in this broader way and relating it to literature or art expands our sympathetic identification with those in very different contexts and experiences. Some scholars have used a narrative jurisprudence or storytelling, or even offered personal accounts of their own experiences,⁸⁹ often with great immediacy and abundance of detail. The voices expressed in such narratives are not those of the judges, lawyers or lawmakers who more usually occupy scholarly attention; they are often from those who are dispossessed, for example, on account of gender, race or poverty. Thus an interdisciplinary approach has beneficial counter-hegemonic effects, bringing to our awareness the impact of power and the effects of exploitation and oppression. It retrieves and rescues the law, becoming a means through which we learn to improve the law and become better lawyers. We could take this further. In the view of Matthew Arnold, culture could be seen as a bulwark against anarchy.⁹⁰ For Sir Philip Sidney, poetry is the best means of inspiring readers to virtuous action—it possesses a unique power to demonstrate social and political desires, to evoke disaffection with government: 'The poet with that same hand of delight doth draw the mind more effectually than any other art doth'.⁹¹

To be sure, one should not make inordinate claims for an approach that seeks to understand law in terms of a relationship between law and the humanities, culture and art. We cannot equate the creative process for judges, who write judgments, with that of literary authors, who write fiction. Rhetoric and cultural issues bestride these two domains, but artists are not practising law, nor are great judgments literary novels. *Bleak House* may enhance our knowledge of the Victorian legal system, but Charles Dickens was not a legal scholar. Lord Denning's legal opinions often tended to be narrative in style, but he was not a novelist. As suggested earlier, the relationship between law and culture is a complex one, of co-implication, not simplistically causal but rather one that illuminates and enriches our understanding of law.

Law is continuous with and a reflection of other aspects of social and cultural practices. This is of course a two-way process, for laws also organise the way in which we see the world. As Roberto Unger has written, 'A society's law constitutes the chief bond between its culture and its

⁸⁸ Boyd White (above n 6).

⁸⁹ See, eg, P Williams, *The Alchemy of Race and Rights* (Cambridge, MA, Harvard University Press, 1992).

⁹⁰ M Arnold, *'Culture and Anarchy' and Other Writings*, S Collini (ed) (Cambridge, Cambridge University Press, 1993).

⁹¹ Sir Philip Sidney, *The Defence of Poesy*, 1595 (London, Penguin Classics, 2004). See also *Law and Humanities*, 'Editorial' (2007) vi.

organisation: it is the external manifestation of the embeddedness of the former in the latter.⁹² An appraisal of the broader cultural context reveals all sorts of interesting connections and correspondences that can enrich our understanding of law and bring fresh perspectives to bear on old puzzles and problems. It may also illuminate, as Philip Selznick suggests, ‘how legal rules and concepts . . . are animated and transformed by intellectual history; how much the authority and self-confidence of legal institutions depends on underlying realities of class and power.’⁹³ William Twining has pointed out how the term ‘discipline’ usually connotes visions of solid physical structures that enjoy relative autonomy. These disciplines occupy and defend separate territories in which ‘each seems to have its own quite distinctive culture’, forming ‘an aggregation of sovereignties connected by a common heating plant’.⁹⁴ But so much is lost if we take the ‘separate physical structures’ approach. EP Thompson wrote of history that it was ‘a discipline of context and process’ in which ‘every meaning is a meaning-in-context’.⁹⁵ I believe this to be just as true of law.

It is often said that the postmodern condition entails a crisis of values and a loss of faith,⁹⁶ which are created by the dissipation of traditional forms of value. In this situation, an economic, instrumentalist logic, a creature of capitalism, has tended to dominate and function as a place marker for legitimacy. Law has frequently adopted this logic, as well as its technical reason, its reliance on contract and property (the attributes of commerce) and its belief in the ‘rational actor’ of the law and economics doctrine, while often presenting them in the guise of law as doctrinal science. While a well functioning economy may help create the prosperity necessary for human freedom and well-being, there are many types of human flourishing and other understandings of law that do not rely on market relations, and this reductionist (albeit far from neutral) model, which limits complex human behaviour to the maximisation of preferences, must be rejected. This book will examine this often unhappy alliance between law and capitalism. An interdisciplinary approach, looking to law’s undeniable relationship with a broader culture, is a way of resisting both this reductionist approach to law and the acontextual and unhistorical view of law as doctrinal science.

⁹² R Unger, *Law in Modern Society* (London, Macmillan, 1976) 250.

⁹³ P Selznick, ‘“Law in Context” Revisited’ (2003) 30 *Journal of Law & Society* 177. See also Robert Cover, who uses the concept of ‘Jurisgenesis’ to explain how the creation of legal meaning always ‘takes place through essentially cultural meaning.’ R Cover, ‘Nomos and Narrative’ (1983) 97 *Harvard Law Review* 4.

⁹⁴ W Twining, *Blackstone’s Tower: The English Law School* (London, Hamlyn Press, 1994) 64, quoting RM Hutchins from M Mayor, *RM Hutchins: A Memoir* (Berkeley, University of California Press, 1993) 97.

⁹⁵ EP Thompson, *The Poverty of Theory* (London, Merlin, 1978).

⁹⁶ Eg, Lyotard (above n 66).

Therefore, while this book is not an excursus into law, art and the humanities, it does employ much of the methodology of such approaches, believing that an interdisciplinary, contextual approach that shapes our understanding of law in its cultural context not only provides an important form of resistance against a contemporary drift but also provides a richer understanding of law—indeed, as argued later in this book, it aids us in our search for justice.

And I keep Klimt's *Jurisprudentia* in mind—its provocative images are a reminder of the uncertainties, complexities and contradictions of law, as well as of the elusiveness of justice.