

Alexandre Lefebvre, *The Image of Law: Deleuze, Bergson, Spinoza*. Stanford: Stanford University Press, 2008; 305 pages. ISBN 978-0804759847.

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In an earlier issue of *Symposium* (Spring 2011), I welcomed Laurent de Sutter's *Deleuze: La Pratique du droit* as the book that broke the long silence surrounding Deleuze's reasons for holding the practice of jurisprudence as the only alternative to Law and Judgment. I was critical, in that review, of de Sutter's invitation that we liberate the Right from law and philosophy if we are going to allow jurisprudence to flourish. This time, I present Alexandre Lefebvre's *The Image of Law: Deleuze, Bergson, Spinoza*, a book published in 2008 in the series "Cultural Memory in the Present" of Stanford University Press, as one more book that broke the silence. In it, the author sets out to demonstrate that the tools that Deleuze made available to us suffice to articulate an *ontological pragmatism*, capable of freeing jurisprudence from the dogmatic image of Law and Right, that holds it in its grips. The author believes that this may be achieved without giving up judgment altogether, as de Sutter's reading of

the “*pour en finir avec le jugement (de Dieu)*” prompts us to do. Truth to tell, Lefebvre warns his readers not to take his book as a commentary on Deleuze’s reflections on jurisprudence. Indeed, he agrees with de Sutter that Deleuze had precious little to say of real use to a philosophy of Right. His own work, Lefebvre tells us, is not a book *on* Deleuze but rather a book *with* Deleuze. (xiv)

The Image of Law focusses on the function of jurisprudence that we call adjudication or legal judgment. Thinking *with* Deleuze, Lefebvre claims, one is able to generate a theory of adjudication that shows judgment to be creative—creative of law—or even better, a theory that shows that the law is constantly modified in order to make the case confronting the judge a legal case, in the first place. Lefebvre is no less aware than de Sutter was of Deleuze’s misgivings with Law and rights. (1, 82–87) Law treats its subjects as substitutable, mistaking their singularity for particularity, and confronts the future as if it were predictable. As for the dominant discourse on human rights, it either treats these rights as a closed system, promoting the very forms of representation and recognition that Deleuze attempts to deconstruct or, whenever it ventures past the so-called basic rights and enters the domain of derivative rights, it endlessly multiplies propositions that are deprived of context and devoid of sense. Laws, in the dogmatic image, are contrivances designed to limit harm and preserve a closed set of rights. The image promotes the assumption that everything encountered can be recognised and sustains itself with the help of three postulates: that everything that exists can be subsumed under covering concepts (8); that encounters which resist subsumption are doomed to be invisible (7); and that their invisibility rests on the belief that only conceptual differences can be cognitively accounted for, that is, on the belief that difference is always a mere difference between concepts. But then, given these three postulates, the dogmatic image of Law leads inescapably to the conclusion that genuine novelty and creativity cannot be seriously entertained. Hoping to deconstruct this image, Lefebvre tries to show that laws can be enabling, inventive and creative of new solutions to old and new problems alike.

The task then that Lefebvre chooses for himself is the study of the conditions for the making of legal judgments. Faced with a legal case requiring adjudication, what is the role of the judge? How is the law mobilised in order to treat a case? Does the judge apply pre-existing laws to the case, in such a way that the application makes no difference to these

laws? Or does the act of adjudication impact decisively on the open whole of the Law? Such questions, of course, according to de Sutter, miss the whole point of Deleuze's turn to jurisprudence, which has nothing to do, so he claims, with judges and courts and everything to do with "speculative jurisprudence" (whatever this may be) and with the innocence of the Law (*le droit*) in its taxonomic and associationist coordination of cases. They represent the debasement of transcendental empiricism to the level of classical empiricism and the abuse of whatever we could still call "Deleuzian politics." *Pour en finir avec le jugement* must mean what it says or be nothing at all. Departing from this "radicalism," Lefebvre focusses his writing on Deleuze's critique of Law and of the human rights discourse insofar as this critique targets the dogmatic image of adjudication and its insistence on the subsumption of cases under pre-existing rules. Subsumption of cases under rules is Kantianism and, indeed, the Kantianism of the subsumptive theory of legal judgment ("a case only falls under the law when the law speaks of it" [13]) is all-too-pervasive. Lefebvre easily shows that it puts its stamp on the legal theory of H. L. A. Hart (5–21) for which the Kantian doctrines of the subsumption of cases under categories and concepts as well as the doctrine of schematism of the *First Critique* are indispensable enabling premises. Similarly, Lefebvre shows convincingly that, in Ronald Dworkin's work, adjudication is modelled on the reflective teleological judgment of the *Third Critique*. (22–36) Here, the case for the subsumption is made with the help of the assumption that our principles can be ordered into a coherent assemblage, permitting thereby members of the community to recognise themselves as members of a collective of ordered principles. Finally, the author shows that, in the case of Habermas' appropriation of Kant's *Doctrine of Right* in his discourse ethics, norms and rules, once agreed upon in open and fair discussion, are ready to function as covering concepts in adjudication. (37–49) Lefebvre's point is that whether with Hart or with Dworkin or with Habermas the Image of thought remains subsumptive and, therefore, inhospitable to creativity and innovation.

To this dogmatic image of subsumptive adjudication, Lefebvre-Deleuze juxtaposes a different reading of jurisprudence, according to which, in its encounters with new cases and new litigations, jurisprudence in fact creates law. (55) Encounters resist recognition and work as stimuli for the generation and formulation of problems, which will be

singular, transcendental and levers of invention and creativity. Far from subsuming cases under rules, a judge, upon encountering a case, is moved to formulate a problem, and it is through the formulation of the problem that concepts are being created for the adjudication of the encounter. With the encounter, pre-existing laws are being modified in order to turn what is new into an intelligible legal case. (72–77) Deleuze's claim that problems come closer to their solution as they progressively achieve a better and better determination means that adjudication is never an answer to a ready-made problem. Rather, solutions give a sense, that is, determination, direction, specificity and meaning, to the problem that makes them pertinent in the first place. Problems are the transcendental condition for judgments that are not straightforward application of rules. (212–13)

All these claims, states Lefebvre, would have remained empty and ungrounded were it not for Deleuze's skilful appropriation of Bergson's theory of perception and judgment. That memory is the *sine qua non* of perception to the point that Bergson was prompted to say that the primary function of perception is to motivate the manifestation of memory makes sense if our philosophical anthropology adopts a praxiological point of view. If action and response to the case we encounter is what we want, then either we recognise the case as unproblematic and familiar, in which case we select appropriate habits and recollections in order to act; or, in case of encounters that we do not recognise, that is, in cases for which we have no ready-made habits or recollections, the search for the construction and for the intelligibility of the new will be a task that we have to undertake. Bergson's pairing of the familiar with the inattentive and the unfamiliar with the attentive follows from these claims. Familiar encounters call forth inattentive perceptions and judgments; unfamiliar encounters, on the other hand, require attentive perceptions and judgments. The latter interrupt recognition by suspending the spontaneous linkages between perception and recollection and teach us how to perceive to the extent that perception and memory mutually explore each other. In attentive judgments, as we shuttle back and forth between the plane of perception (the actual) and the plane of memory (the virtual), we create the perceived object and engender the encounter; but we are also creating the past—since the recollection is actualised in a new situation. (117–26) No one should conclude that inattentive judgments have no role to play in the domain of jurisprudence. In fact, they

perform a crucial regularising function in adjudication to the extent that litigants legitimately expect that the judge respond to the present case just as she has responded in the past. We are, in other words, reminded that clothed and bare repetitions go *in tandem* in Deleuze's *Difference and Repetition*, even if the clothed is the *raison d'être* of the bare. It is the improper elevation of inattentive judgment to a centrepiece that mistakes adjudication for subsumption and becomes insensitive to the creative and the new.

We cannot account for attentive judgments by imagining a judge with actual rules either in his books or in his head, having the luxury to visit them one by one before choosing. For a case to be at hand, an event has already been joined to a rule. It is not a question of having an actual rule catalogue for the judge to choose. In order to use a rule in the discernment and the adjudication of a case, a judge must formulate that case in terms of the rule and incarnate the rule in terms of the case/event. Judgment requires the actualisation of recollections in the present. "A case," writes Lefebvre, "is always a composite of perception and memory, such that, in the presentation of a case, it must already be joined to rules." (158) The subsumptive image of Law distorts the real process of adjudication, limits creativity to a mere recombination of previous decisions (or of elements thereof) and (mis)conceives the latter according to the model of bare repetition. We never have laws and cases external to each other sitting and waiting for an *ex post facto* schematism and mediation. (146–47) The case is a legal case because the law speaks of it. The schematism is automatically activated in the case of inattentive perceptions and judgments but then constructed in the case of attentive perceptions and judgments, with both arbitrariness and necessity presiding over its construction. The encounter that triggers the process of adjudication, writes Lefebvre, is arbitrary but, once the formulation of the problem leads to the construction of the concept, necessity exists in the way the new concept affects and reshapes the archive of the law. (160–61) There is perfect agreement here between Bergson and Deleuze, and leading hermeneuts—Gadamer and Ricoeur would not have said anything different. But the agreement ends here because Deleuze's next move has only Bergson willing to prop it up.

And the move is this: Adjudication consists in actualising the virtual past of the law in coordination with a present perception of the case. The use of an actual rule of law always presupposes the virtual ex-

istence of that rule in order for it to be actualised and embodied within a case. (146) What the actual fails to explain is how an event and a printed rule could ever meet. “*The judge as judge*,” for Lefebvre-Deleuze, “exists *within* a pure institutional past, which I call the *pure past of the law*.” (144) This means that rules of law have a double existence. They are found inside books; they are actual. But they also exist as the pure past of the law; they are virtual. Without the pure past of the law, the case could never be perceived. Nor would there be a way of explaining why a present case leads to such and such a rule rather than to another. (158) The adjudication of a legal case prompted by an encounter requires the pure, virtual past in the sense that a new case may uncover or create implications and connections, senses and directions (inmates of the pure past) never before actualised. In this sense, the decision of the judge is no longer arbitrary and her adjudication, not a creation *ex nihilo*. The construction of the new actualises, in a novel way, virtual elements that had not been made to coalesce before.

That the construction of the new actualises always in novel ways hinges on the fact that the Deleuzian virtual is an open whole. It can not be given all at once—at least not as long as we subscribe to the Bergsonian view that time is duration and endless invention. Creativity is not possible as long as the future can be calculated from elements of the present. Adjudication actualises a virtual law—which means that, in being actualised, the law is being modified to fit the encountered situation. The modification impacts on and transforms the actual assemblage of laws: without it, the assemblage would have acted on its tendency to close upon itself.

The concluding chapter of *The Image of Law*, “Three Spinozist Themes in a Deleuzian Jurisprudence,” traces the origin of Deleuze’s theory of concepts back to Spinoza’s physics of bodies and to his doctrine of mind/body parallelism. Like bodies, Lefebvre claims, concepts are composite multiplicities, veritable events and singularities, being created whenever parts previously extrinsic to one another enter into a relation of compatible motion and rest. (202) They are destroyed whenever the assemblage of their parts is decomposed. Like bodies, concepts are generated and die through enabling or disabling encounters. Using then the Canadian Supreme Court’s 1997 *Delgamuukw* decision as a hermeneutic toolbox, the author is able to show how legal concepts, not unlike philosophical concepts, are both created and composite. In this case, the

legal concept of the aboriginal title to the land was created as a result of common law encountering the many dimensions of this title (its inalienability to anyone else but the Crown; its existing between traditions; its being held communally; the historic occupation and possession by Indians of their tribal land)—dimensions that had remained, until that moment, separate from one another and unrecognised. Given the fact that Lefebvre accepts Deleuze's claim that the creation of a concept is the process of the solution of a problem, his subsequent search for the problem that will make these many dimensions coalesce and turn them into components of the concept is to be expected. The search leads him to the formulation of the problem in Justice Lamer's resolve to achieve "*the reconciliation* of the pre-existence of aboriginal societies with the sovereignty of the Crown." (210) Here is Lefebvre: "There is an encounter with an aboriginal land claim (as unrecognizable to the common law, *sui generis*); there is the problem of the aboriginal title (how to achieve reconciliation and live together); and there is the concept of aboriginal title (which spells out its precise content)." (210) His allegiance to one more Deleuzian principle, this time to the principle that problems are not independent of, or indifferent to, their solutions, facilitates his conclusion (for the sake of which Lefebvre's turn to the *Delgamuukve* decision was undertaken) that "adjudication is creative because, on occasion of an encounter, it must actualize—and thus invent by way of determining—problems in order to adjudicate the situation." (213)

In the sequence, focussing on Spinoza and Deleuze's theory of joyful and sad affects and on their doctrine of adequate ideas, Lefebvre is able to conclude that, only when the *sui generis* relationship between problems and solutions (problems and adjudications) is respected, thinking is joyful, adequate and critical (because then and only then the construction of the requisite problem dissipates the fogs of *doxa*). (226–38) Only then thought is really thought, which, in the case of legal adjudication, means that only then law and its power can go as far as they can.

This conclusion and the argument leading to it come after a short chapter where the author discovers in Spinoza, contrary to the received readings of his work and to his own claims, a theory of duration that anticipates the doctrine of Bergson. (218–26) In the absence of duration, the continuous experimentations, without which the formation of adequate ideas and the infusion of bodies with affects cannot be conceived, are impossible. Comparing the initial British Columbia *Delgamuukw*

trial with, and contrasting it to, the appeal heard by the Supreme Court of Canada, the author opines that the Supreme Court of Canada found the Court of British Columbia wanting, for choosing to abide by a sad image of the law—one that prevented jurisprudence from being creative and transformative. Here it is: “If aboriginal jurisprudence is set into motion by an encounter with the *sui generis* nature of aboriginal rights...and if the motivating problem of this jurisprudence is to promote and clarify the manner in which reconciliation is to take place, then...[the B.C.] judgment separates law from its potential and capacity.” (235) Only a *prudent experimentation* with common law concepts allowed in the *Delgamuukw* case the resolution of the basic facts of the encountered case. (237)

The last section of the final chapter explores the possibilities that Spinoza’s notions of expression and immanence hold for a creative jurisprudence that would replace the dogmatic, subsumptive image of law. Expression and immanence, maintains Lefebvre, are concepts capable of sustaining creativity and novelty. “What the term ‘expression’ affords Deleuze is the opportunity to characterize an active, genetic, and above all constructivist substance that expresses itself without reserve in or as a nature of finite modes with which it shares all its form of being. On the other hand, univocity [the necessary condition for immanence] eliminates all trace of transcendence...by sharing in common the forms of being between substance and modes.” (241) Spinoza, it is true and Lefebvre-Deleuze does not leave it unnoticed (242–43), opts for an “incomplete immanence” because, in the last analysis, his substance does not depend on its modes. But Deleuze’s theory of time, his own notion of the “open whole” and his acceptance of *natura naturans* and *natura naturata* (open and closed) as two *tendencies* of the plane of immanence (without separate ontological hypostasis), eliminate the last vestiges of transcendence from what is now a “flat” ontology. Such total elimination will demand of course the out-performance of Spinoza, and Lefebvre discovers this out-performance in Deleuze’s appropriation of Bergson: “[T]he reading of Bergson in *Cinema 1* pushes the concept [immanence] past its limitation in the Spinoza commentaries. With Bergson, there is no eternal substance that may or may not reserve itself from the modes and put immanence and univocity in jeopardy. The whole is not supplementary to what transpires upon it, and the whole does not pre-exist its movements.” (249) It is in accordance with Bergson’s model of immanence that Lefebvre conceives of a plane of immanence of law—open

ended and always becoming modified—that jurisprudence presupposes and entails. “[A]n attentive judgment,” he writes, “is a creative judgment and the movement of the parts of law that it initiates is inventive, and, as such, expresses the open whole of law. With every new judgment the law grows and expands, and over time it locally constructs a plane of immanence with ever more parts able to be actualized in ever more judgments.” (254)

I recommend to all those interested in the ongoing debates between so-called “activist” and diehard “conservatives” in matters of jurisprudence to read *The Image of Law*. It goes a long way towards showing that jurisprudence cannot but be creative—indeed, be creative of law. The book must also be read by all those who seek to better understand Deleuze’s interest in jurisprudence— especially by those who look for an alternative to de Sutter’s “radical jurisprudence.” The new image of jurisprudence that Lefebvre proposes seems to give us the tools necessary to deconstruct the dogmatic, subsumptive image of adjudication but also to offer us an adequate protection against the dead ends of the incommensurable language-games of Jean-François Lyotard and Jean-Loup Thébaud’s *Just Gaming*. Provided that we heed the author’s warning that his book is thinking *with* Deleuze, rather than attempting to explicate his work, its readers will not fail to appreciate his skilful building with Deleuze’s blocks of an assemblage that, in the end, cannot be Deleuze’s own.

If I am forced to place upon this book a demand of my own, it will be the following. We know that the daring nature of Deleuze-Bergson’s move towards the virtual and its cogency and plausibility for a theory of creativity and innovation are still being vigorously debated. The jury is still out deliberating on the verdict. That Lefebvre’s reasons for his appeal to the virtual, in the context of legal adjudication, still leave something to be desired in terms of clarity and persuasion does not, therefore, come as a surprise. More, I feel, has to be said on the question of the judge’s process of adjudication that finds itself crossing the pure past of the law if the indispensability of that process is going to be firmly established. But let us suppose that the reasons for the appeal to the virtual of law have been made clear and that the advantages accruing to the jurist for reshaping it and making it suitable to the encounter and the case are there for all to see. We can still ask: does this theory of adjudication that Lefebvre defends permit the distinction that must be made between

correct and incorrect adjudications? Lefebvre himself asks: What would prevent “Deleuze’s call to a creative jurisprudence” from turning into “an irresponsible fantasy” sanctioning “global violence”? What would it prevent a creative jurisprudence of “disenfranchisements and show trials”? (87)

It would be unfair to let the reader conclude that Lefebvre has not at least tried to give an answer, although I do not think that he has been all that successful. “To see,” he writes, “that judgment is, under certain conditions, necessarily creative...undermine[s] evaluation of this fact as either good or evil.... How creativity is or is not exercised can certainly give rise to good or bad judgments...but, given the conditions of adjudication, criticism or praise of its creativity per se is senseless.” (253) Perhaps. But, still, the distinction between good and bad judgment cannot be left to an afterthought. And as far as I can see, it is so left as long as the Kantian emancipation of the Right from the Good is our starting point. (“It is the Good which depends on the law, and not vice versa.”) I do think that the optimism that Lefebvre expresses in the lines that follow is a bit premature. To the question, “what would prevent a monstrous jurisprudence?” Lefebvre responds: “Although the theme of prudence is not one usually associated with Deleuze, it is one of his most recurrent themes....” (238). “No doubt this experimentation must be prudent. [But] what the limit might be is unclear.... The limits of and the need for prudence can be judged only by the problems to which they are internal.” (237) This optimism strikes me as premature because prudence used to be the practical virtue of the *phronimos*—the man (yes, sadly, *the man*) of practical wisdom—who was supposed to flourish inside the old image of thought, where the Good was still the voice from up high. Is an appeal to prudence still possible, after the Kantian reversal? Is it potent enough to do the job? Whether it is or it is not, I will leave for another occasion. I will also leave for another occasion the question as to whether or not Deleuze can consistently be the post-Kantian philosopher for whom the Good is subordinate to the Right while still tapping the resources of a Spinozist ethic of joy. Joy, after all, may easily be taken as one of the names of the Good.