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REVIEW ARTICLE

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Law after dominium: thinking with Martti Koskenniemi on property, sovereignty and transformation

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To the Uttermost Parts of the Earth: Legal Imagination and International Power, by Martti Koskenniemi, Cambridge, Cambridge University Press, 2021, 1124 pp., £150.00 hardback/£74.99 paperback, ISBN: 978-0521745345

ABSTRACT

To the Uttermost Parts of the Earth describes the work of law and legal thought in the exercise of European power abroad. In focusing on the common features of the exercise of legal imagination across European traditions—on sovereignty and property—it presents the legal discipline with both the persistence of structure and the question of its transformation. In this review essay, I sketch how aspects of this work might open multiple fronts for scholarship, thought and action: through an insistence on holding onto the public and the private in law as two halves of a greater whole; through thinking about legal transformation as aesthetic practice rather than technical task; and through considering the contradictions of law as profession, and the relationship of that profession to past and future change, in a time of a massively changed and changing climate.

KEYWORDS Legal history; property law; law and profession; law and climate

'To know your discipline'[1]

At first heft, the reader might mistake this for an unapproachable book. This might be particularly true for those readers not engaged in the debates on the history and theory of international law which have carved out a certain disciplinary niche over the last three decades. And yet the reader need not be an

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[1] Martti Koskenniemi's *To the Uttermost Parts of the Earth: Legal Imagination and International Power* (Cambridge University Press, 2021) 842 (discussing the development of a historical sensibility in the Halle law faculty and curriculum, and its influence throughout Protestant Germany).

expert on Grotius, Gentili, or other figures of the received international legal canon. As is made clear from the outset, this is a book about 'legal imagination in its relationship to power abroad' rather than anything resembling international law as a bounded field or discipline.[2] The purpose of this focus on legal imagination is to learn how the structural features of that imagination have shaped our present reality, and confine our present endeavours: the specific ways in which imagination 'weighs like a nightmare on the brains of the living'.[3]

Although the reader will likely feel a sense of recognition in different moments, depending on the lawyerly registers in which they undertook their training or the imperial modes they have engaged in their scholarship, the structure of the book situates these within a larger whole. It begins at locations across Europe before proceeding through the French, British, and German traditions in turn. A core argument of the book is that the law that laid claim to being 'international' during the centuries under examination is best understood as an amalgam of local idioms through which Europeans working in the language of law appealed to the universal—and just as importantly, configured the interface between the universal and the local—in order to build enduring vocabularies, structures and rights.[4] For lawyers divided across the 'international' or different 'domestic' traditions, or separated across what lawyers have come to understand as public and private laws, it offers this larger frame within which to situate the politics and historical significance of their field.[5] The enormous breadth of this study and evident care for its scholarly interlocutors might also be taken as a reminder that the significant task it presents itself—the task of knowing our discipline—can neither be undertaken alone, nor be left entirely to others.[6]

According to the book, the principal way that modern legal imagination has been structured is through the division between private power and public authority: between property and sovereignty.[7] Law since the birth of the modern state is understood as performing a critical division of the world: first, through the 'elaboration of a constitutional architecture that both establishes and limits the sovereignty that the heads of political communities are assumed to exercise', and second, through 'defin[ing] and allocat[ing] the rights of property that underlie the structural hierarchies

[2] Koskenniemi (n 1) 954, and 8–9.
[3] *Ibid*, 956, paraphrasing Marx.
[4] *Ibid*, 9.
[5] See *Ibid*, 954 on the 'domestic', and see further Martin Clark, 'The "International" and "Domestic" in British Legal Thought from Gentili to Lauterpacht' (PhD Thesis, London School of Economics and Political Science, 2020).
[6] One use to which legal scholars have put history is to defer the political questions that have accompanied the erosion of formalism: Anne Orford, *International Law and the Politics of History* (Cambridge University Press, 2021) 9.
[7] Koskenniemi (n 1) 11. This reference to 'property' should not be read, however, as an entrée to technical debates about the classification and hierarchy of private rights, or 'property' and 'not-property'. I return to this theme below.

on which something like sovereignty can manifest itself'.[8] The categories of 'property' and 'sovereignty' are themselves so pervasive of contemporary legal thought that it is difficult to describe them without already taking a great deal, normatively speaking, for granted. The work of the book is to reposition and thereby defamiliarise them as two aspects of a mode of exercising power—a mode that is now relatively universalised but has a peculiarly European origin.[9] Rather than perceiving our contemporary problems of deprivation, militarism, or ecological collapse as problems of property *or* sovereignty, Koskenniemi urges us to 'scratch the surface' of what appears to us to be one or the other, so that we can discover the particular interrelationship of state and commerce by means of which the problem is constituted.[10]

The book begins, in part I, by an illustration of the deeply theological dimensions of late medieval European law. Lawyers and theologians are depicted as central players in the articulation of the authority and bases of kingly rule, and its relationship to a hierarchical vision of society and intensifying forms of commercial exchange.[11] Here the reader is introduced to the idioms of *dominium proprietatis* and *dominium iurisdictionis* that came to structure the development of legal vocabularies within the royal court and the academy, and that would be positioned as a natural frame capable of being supplemented for European needs.[12] Part I then traces the shift from European law as a primarily theological or confessional discipline to the emergence of law as a historically and philosophically oriented field of study, based on the presentation and interpretation of imperfect facts (in the work of the Protestant lawyer Gentili);[13] or, a bounded and relatively 'autonomous system of obligations' that 'would organise public power and private rights in a system of principles' capable of withstanding the vagaries of European conflict (in the work of the Dutch lawyer and *Vereenigde Oostindische Compagnie* advocate Grotius).[14]

In part II the reader is introduced to the different idioms through which 'autonomous statehood' beyond royal rule and the ideals of a European public law came to be visible in France. First, the Bodinian idiom of *droit governement*, or the princely management of resources and populations in the interests of the state, in which jurisprudence was primarily understood as counsel or practical advice.[15] Second, the search for a 'rationalist vocabulary' of law as science that drew on empirical observation of human behaviour and could serve as secular foundation for Physiocratic visions of a

[8] *Ibid*, 11.
[9] *Ibid*, 957–9.
[10] *Ibid*, 959.
[11] *Ibid*, 23–24.
[12] *Ibid*, 22–39; 138–43.
[13] *Ibid*, 222–4.
[14] *Ibid*, 282–3.
[15] *Ibid*, 361–71.

'natural and essential order of society'.[16] This was an order that embraced new forms of racial hierarchy as well as embedding them in what lawyers might today understand as 'private' legal relations—administering the colonies through arrangements in which the king retained suzerainty while granting companies trading monopolies and the authority to make war, and charging them with 'subordinating the lands and their surroundings and securing the obedience of their people'.[17] The language of political economy, property rights and the management of national interests served as fortification for slavery in the French colonies and then subsequently as a limitation on the emancipatory potential of revolutionary ideals.[18]

Part III moves from a civilian to a common law-oriented style of universalism, in which law is understood through the peculiarly British idiom of a series of 'accumulating adjustments by successive generations'.[19] We first follow the legal evolution of Commonwealth sovereignty at home, understood as a relationship between crown prerogative and private right and, more gradually, through the Hobbesian vocabulary of protection.[20] Rather than emanating from human sociability, this constitutional arrangement is depicted as a kind of grand bargain for the domestic obedience of the English upper classes in exchange for the protection of British maritime trade and the commercial exploits of empire.[21] The reader is then introduced to the British law of nations as a dual tradition that dealt both with the high politics of 'inter-sovereign interactions in peace and war', and with what would come to be seen as the *lex mercatoria*—the common law rights of property, merchant exchange, and the conduct of the large trading companies that acted as a vehicle for the consolidation of English fortunes.[22]

Part IV addresses the transformations of natural law through the German search for a 'non-confessional language of state power' that would allow for the regularisation of the state and the science of its administration: what Koskenniemi describes as the 'banalisation of the alliance between public law and *raison d'état*'.[23] Regularisation is the name of the game also in the negotiation of the relationship between imperial jurisdiction and territorial laws within the German–Roman empire, which Koskenniemi argues forms the 'grammar' for international legal argument as contemporary practitioners have come to know it.[24] The perceived need for public authorities to properly

[16] *Ibid*, 420–3, 499.
[17] *Ibid*, 504–5, 553–4.
[18] *Ibid*, 458–61, 499, 532, 545–7.
[19] *Ibid*, 561–2.
[20] *Ibid*, 581–3, 607–17.
[21] *Ibid*, 564, 611–12.
[22] *Ibid*, 574–5.
[23] *Ibid*, 798, 812.
[24] *Ibid*, 800. See also Anne Orford, 'Jurisdiction without Territory: From the Holy Roman Empire to the Responsibility to Protect' (2009) 30 *Michigan Journal of International Law* 981; Martti Koskenniemi,

assess the 'economic and political situation of the nation' and the 'skilful management of … exports and imports' led to new disciplinary formations of political science, economics and philosophy through the German university, and their splitting off from law so-called.[25]

Throughout, the book eschews the kind of legal argumentation in which its protagonists engaged, in favour of a kind of foundational rereading of the traditions of legal thought that have been dominant in forming what is now a relatively integrated global system of law. This rereading centres the role of property, commercial exchange and violent extra-European expansion in building that system. Although the implications of this for present political struggles are left for the reader to take up, the book can be placed in historiographical conversation with the choice that some scholars have made to centre the mid-twentieth century period of decolonisation in international legal scholarship (where decolonisation is understood as the end of formal colonial rule).[26] One task of that scholarship has been to locate a drama within which the possibility of a better world appeared open.[27] A focus on the trajectory of the European legal tradition is thus also an effort to understand how by the time that moment of decolonisation arrived, aspects of that tradition had already been put in place—had already built a world—that helped to foreclose its larger possibilities.[28]

The narrating of property and sovereignty as a contingent set of social and historical formations complicit in the expansion of European rule provides the reader with a sense of standing at a crossroads. If existing taxonomies and traditions are so thoroughly implicated in the project of European enrichment, and the replication of that project in the world at large, what remains for legal thought that seeks to build a new kind of world—for law after *dominium*?[29] The answer given here is no less than to do away with the property–sovereignty distinction as a construct through which we can

'Between Coordination and Constitution: International Law as a German Discipline' (2011) 15 *Redescriptions* 45.

[25] Koskenniemi (n 1) 798, 866–7, 877.

[26] See, eg, Philipp Dann and Jochen von Bernstorff (eds), *The Battle for International Law: South–North Perspectives on the Decolonization Era* (Oxford University Press, 2019); Luis Eslava, Michael Fakhri and Vasuki Nesiah (eds), *Bandung, Global History and International Law: Critical Pasts and Pending Futures* (Cambridge University Press, 2017); Ingo Venzke and Kevin Jon Heller (eds), *Contingency in International Law: On the Possibility of Different Histories* (Oxford University Press, 2021).

[27] On the stakes of narrating decolonisation, see Sundhya Pahuja and Anna Saunders, 'Rival Worlds and the Place of the Corporation in International Law' in Jochen von Bernstorff and Philipp Dann (eds), *The Battle for International Law: South–North Perspectives on the Decolonization Era* (Oxford University Press 2019) 171–4.

[28] See Cait Storr, 'The War Rages On: Expanding Concepts of Decolonization in International Law' (2020) 4 *European Journal of International Law* 1493.

[29] 'With decolonization, the material limits to economic liberalism have become international rather than colonial questions': Anne Orford, 'International Law and the Populist Moment: A Response to Martti Koskenniemi's Enchanted by the Tools? International Law and Enlightenment' (2020) 35 *American University International Law Review* 427, 437.

allocate the tasks of legal thought and practice.[30] In this sense, the work is best understood as an exercise in canonical reframing at a moment when not only international lawyers but the legal discipline as a whole, and the societies of the deeply unequal and rapidly warming world that it has helped to form, are facing existential choices. In what follows, I will sketch how this reframing opens multiple fronts for scholarship, thought and action. The first is an insistence on holding onto the public and the private in law as two halves of a greater whole. The second is thinking about legal transformation as aesthetic practice rather than technical task. I conclude with some reflections on law as profession, and the relationship of that profession to past and future change, especially in a time of a massively changed and changing climate.

Configuring the interface between property and sovereignty

Presenting habitual distinctions between public and private power as a 'burden[] weighing on historical analysis', the book seeks instead to explore the specific ways that the interface between them has been configured.[31] We might understand this exploration as being conducted along two major lines. The first is how the framing of public authority, and the selective exercise of public power, facilitated private enrichment abroad. Particularly in the British tradition, lawyers positioned the duty of the state as being to create 'avenues of profit-making', including through consenting to the early colonisation of Ireland by private persons.[32] We are asked to think of the broad and open-ended authorisations of 'discovery' through letters patent, and the mandates of improvement given to colonial companies in the Americas, not as a kind of claim to sovereignty but as a means through which settlers would acquire and then seek to enlarge 'property rights and some set of jurisdictional powers'.[33] That violent enlargement was facilitated by the broad authorisation of just war against those violating the 'natural' rights of property.[34] At other times, such as with prize courts, public power worked specifically through a reliance on the device of property as a means of preserving British imperial interests in commercial exchange.[35] Both the articulation of property as a natural right and the British tendency to view government as an assemblage of institutions offered a means of portraying this as a rule-governed system while extending British commercial power.[36] Here the perceived identity between the interests of merchants

[30] Koskenniemi (n 1) 958–9.
[31] *Ibid*, 957.
[32] *Ibid*, 571.
[33] *Ibid*, 714, 720.
[34] *Ibid*, 637–8.
[35] *Ibid*, 645–7.
[36] *Ibid*, 637, 642.

and that of the state was thus not merely facilitated through law—it also pervaded its structure.

A second and more consistent thread running through descriptions of the property–sovereignty interface is how private rights structured what has come to be understood as the vocabulary of public law. In the early modern state, civil lawyers encountering a plurality of feudal relations 'offer[ed] an imperial view of kingship while simultaneously strengthening private property rights from below'.[37] The transmutation of landholdings based on political and social relations into alienable interests in a land economy was accompanied by ideals of kingly rule as fostering a specific form of propertied order through which subjects might live diligently and virtuously.[38] This identification of property with universalist ideas of virtue or 'rightfulness' was also central to the selective authorisation of violence that many lawyers now take to be a function of public law.[39] Routes for that authorisation included the extension of the conclusion that 'property that belonged to no-one came to the first good faith taker' to the non-European world, or the endorsement of war as 'sometimes necessary to protect trade routes or commercial practices' or to open ports to commercial exchange.[40] But property shaped the legal form of rule not only in terms of the authorisation of extra-European violence but in terms of the nature of royal power at home. It was from the terrain of property, and its binding up in the universal language of *ius gentium*, that nobles argued for a vision of royal power against propertied privileges as the power of judging rather than of plenary legislation.[41] It followed from the argument for property as a product of natural reason that the State was not to 'distribute property according to some moral principle … but to give effect to relations of *dominium*'.[42]

The theme of private law rights as imprinting on the nature of public law continues through the exploration of the French tradition. The legal formation of the French state proceeds from Richelieu's 'proprietary understanding of public power' that attempted to 'coordinate the private interests and privileges', financiers and tax administrators, into something resembling a form of statecraft.[43] Government was in essence the mutual accommodation of propertied right, to the detriment of those parts of society not represented within this fusion of interests.[44] Efforts to formalise aspects of this statehood through the Physiocratic idiom continued to

[37] *Ibid*, 67.
[38] *Ibid*, 61, 67, 70–1, 92.
[39] *Ibid*, 149, 158–63.
[40] *Ibid*, 145, 158–66, 222–3, 259–61.
[41] *Ibid*, 39, 52–8, 62–72, 107–14.
[42] *Ibid*, 309.
[43] *Ibid*, 356–7, 383.
[44] *Ibid*, 375–7, 383.

emphasise *le respect absolu de propriété*,[45] while advocates of a language of commercial statecraft and the harnessing of the merchant class emphasised the mutually reinforcing 'relations between property and power'.[46] While the shift from feudal authority to popular sovereignty appeared revolutionary as a matter of European public law, lawyers continued to claim that the 'first duty' of the state was the protection of property and to view citizenship within the nation as a privilege of proprietors.[47]

What had been more or less implicit in France became explicit in England, where the protection of property as the 'great and chief end' of those united in the commonwealth was front and centre in canonical articulations of English statehood.[48] If property and representation were essential rights that followed Englishmen over the sea, for Koskenniemi, they were rights that *began at home*.[49] Common lawyers understood the protection of the commonwealth, which was the basis of the prerogative, as extending to the right to conduct a business and the preservation of freedom of enterprise, with prerogative interventions in property limited to 'the necessary defence of the realm'.[50] The only revolution to be had here was that most British revolution of a 'final victory of property rights against the royal prerogative', where the 1689 Declaration foreclosed taxation of private wealth outside legislation.[51]

In general, the book avoids a firm theorisation of the relationship between property and sovereignty in favour of a focus on *bricolage*.[52] This is in line with the book's overarching commitment to historicist over pre-existing modes of theoreticist intervention.[53] The point, we are asked to think, is not that this interface *has been* configured in one or another way but that lawyers (or scholars working with law) have constructed it in particular ways according to a confluence of normative commitments and tactical needs—and that they have deployed concepts on both sides of the coin in order to do so. The relationship depicted thus perhaps comes closest to an essentially recursive or cyclical one, captured in Smith's argument that '[t]he preservation of property and the inequality of possession first formed [civil government], and the state of property must always vary'

[45] *Ibid*, 448.
[46] *Ibid*, 446.
[47] *Ibid*, 464–70, 482–4.
[48] *Ibid*, 634, citing Locke's *Two Treatises*. British lawyers would 'weave the utility of the commonwealth tightly with the rights of property of Englishmen': 562–3.
[49] *Ibid*, 749. Property law, as distinct from positivist international law, is understood as a structure that predated the colonial encounter rather than being born through it: cf Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, 2012).
[50] Koskenniemi (n 1) 582–3.
[51] *Ibid*, 632.
[52] This is defined as the use of 'familiar legal vocabularies lying around to construct responses to new problems in order to justify, stabilise, or critique the uses of power': *Ibid*, 2.
[53] See, eg, the characterisation of colonialism, capitalism, or liberalism as both shared shorthand and 'epistemological obstacles' to other ways of thinking: *Ibid*, 3.

with the form of that government.[54] One implication to be drawn from this is that a transformation seeking to transcend relations of *dominium* cannot focus on reimagining what many lawyers take to be 'economic' structures without also committing to a reshaping of the modern state.[55] To do otherwise is to risk falling into the patterns of argumentation that Koskenniemi depicts either as a political-economic managerialism or as an expansionist statecraft.

Another implication to be drawn is that taking 'public law' as an object of study divorced from the material interests and property structures underpinning it is itself a political decision.[56] This is especially visible in the book's treatment of the extension of European theories to the settler colonial societies formed through European expansion.[57] On this front Koskenniemi joins legal scholars from the settler colonial world who since at least the early twentieth century have traced the connections between an ostensibly public state and the private interests that it helped to sustain. One version of this critique has sought to reclaim the state from private rights, as in the work of legal realist Morris Cohen. Cohen depicted the large privileges granted by the US state to companies during the North Atlantic's Gilded Age as rights that provided for social relations of domination as well as, through directing the distribution of the future surplus of a society, narrowing the world that could be made through the state.[58] Another version shows that the legal forms in which our discipline locates the possibility of public representation have already been structured by private interests. International legal scholar Cait Storr has traced how imperial arrangements made with German companies concerned with rights in minerals on the island of Naoerō (now the state of Nauru) were not only relations of domination, but formed part of a process of 'accretion' that shaped the form of governmental administration and eventually, of Nauruan sovereignty and constitutional order.[59]

It is no surprise that some version of this historiographical move has been made most sharply by Indigenous scholars and scholars in settler colonial

[54] *Ibid*, 669.

[55] See also Anne Orford, 'Food Security, Free Trade and the Battle for the State' (2015) 11 *Journal of International Law and International Relations* 1.

[56] I have elsewhere argued that the development of a scholarly vocabulary of constitution-making as international practice, in the mid-twentieth century, depended on the rejection of materialist accounts of what that might mean: Anna Saunders, *Constitutionalism as Postwar International Law* (MPhil Thesis, University of Melbourne, 2020).

[57] Koskenniemi (n 1) describes the Lockean theory of how property called political order into being as a 'virtual constitution for the Atlantic colonies' and argues for a conceptualisation of settler empire in which 'political sovereignty followed the rights of property': at 726.

[58] Morris Cohen, 'Property and Sovereignty' (1927) 13 *Cornell Law Review* 8, 13, 21–25. And see Julia Dehm, *Reconsidering REDD++: Authority, Power and Law in the Green Economy* (Cambridge University Press, 2021) ch 3.

[59] Cait Storr, *International Status in the Shadow of Empire: Nauru and the Histories of International Law* (Cambridge University Press, 2020) 24–26, 89–98, 245–7.

states.[60] The judicial articulation of European doctrines of tenure as the 'skeleton of principle' that sustains sovereignty is there no abstract concern, but an elementary aspect of the law in which our students are currently trained.[61] In the words of Kahnawà:ke Mohawk scholar Audra Simpson, that colonisation was a 'structure of dispossession' characterised by the twin legal moves of the propertisation of land and political incorporation of peoples into the newly constituted sovereign, both of which many Indigenous peoples continue to refuse.[62] Koskenniemi's suggestion to reimagine empire as jurisdictional rather than territorial therefore seems directed toward a European audience rather than a settler colonial one in which this is arguably already a dominant historiography.[63] The book's further contribution in this respect is to place squarely on the table, as a contemporary political concern, both the legal traditions of the European states that facilitated property's colonial export, as well as the ongoing responsibility of the inheritors of those traditions for the world that they have created.[64]

Lastly, in placing the history of the state at the heart of its analysis, the book opens up productive avenues for conversation between international lawyers and scholars of law and capitalism. But the periodisation of the work from 1300 to 1870, and the concomitant focus on a period of capitalism centred around land, agricultural production, and trade in commodities, means that questions of the legal characterisation of our own time remain urgent ones. If certain forms of property rights and constellations of material interests have been so significant for the constitution of the public state, then what are the implications of shifts to a technological and deeply financialised capitalism: one more concerned with the preservation of monopolies, the policing of trade secrets, and the availability of speculative markets?[65] How does the mode of capitalism in which we live change the nature of

[60] See also Patrick Wolfe, 'Settler Colonialism and the Elimination of the Native' (2006) 8 *Journal of Genocide Research* 387; Aileen Moreton-Robinson, *The White Possessive: Property, Power and Indigenous Sovereignty* (University of Minnesota Press, 2015); Shaun McVeigh and Shaunnagh Dorsett, *Jurisdiction* (Routledge, 2012). The 'parcel by parcel' dispossession of Indigenous peoples, rather than the wholesale assertion of territorial sovereignty, is also recognised by Australian law: see *Love v Commonwealth of Australia* (2020) 270 CLR 152, 207 [121] (Gordon J) citing *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 69 (Brennan J).

[61] *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 29 (Brennan J).

[62] Audra Simpson, *Mohawk Interruptus: Political Life Across the Borders of Settler States* (Duke University Press, 2014) 11, 74.

[63] Koskenniemi (n 1) 712–14, 726.

[64] On thinking about law as inheritance, see Anne Orford, 'The Past as Law or History? The Relevance of Imperialism for Modern International Law' in Emmanuelle Jouannet and Hélène Ruiz-Fabri (eds), *Tiers Monde: Bilan et Perspectives* (Société de legislation compare, 2013).

[65] See Oren Bracha, 'The History of Intellectual Property as the History of Capitalism' (2020) 71 *Case Western Reserve Law Review* 547; Amy Kapcynski, 'The Public History of Trade Secrets' (2022) 55 *UC Davis Law Review* 1367; Fleur Johns, 'On Dead Circuits and Non-Events' in Ingo Venzke and Kevin Jon Heller (eds), *Contingency in International Law: On the Possibility of Different Histories* (Oxford University Press, 2021).

the public authority (judicial, administrative, military) that it demands?[66] In other words, if we have learned that property needs a state, much still remains to be said about the ways it needs it at present.[67]

Property, aesthetics and legal transformation: beyond Hohfeldian reason

Alongside an argument for property and sovereignty as an analytic totality, the book also offers us a new way of thinking about property and its relationship to legal transformation. It does so through situating legal imagination in the context of particular social transformations, the rise and fall of the professions, and the images and practices that attended European empire. In particular, we are asked to think across a series of moments that situate property in relation to aspects of the legal imagination that might broadly be described as aesthetic. Here I am referring not so much to questions of legal style or genre, but more to the visual practices, forms of imagery and objects of desire that connect law to aspects of social life. In medieval Europe, Christian aesthetics and rituals of sacrament and confession are depicted as critical to the consolidation of royal power and its relationship to noble right at a time of social transformation and 'spiritual anxiety'.[68] Physiocratic ideas of economic management and the idea of the French colonial sovereign as 'co-proprietor' with colonist farmers were deeply influenced by agricultural aesthetics of production and abundance.[69] British proponents of the *lex mercatoria* embraced mercantile aesthetics and techniques, and through building a 'new genre of writing that moved freely between expositions of new commercial practices [and] discussion of the legal regulation of those practices' depicted a limited role for public interference in the accumulation of private wealth.[70] The sense that emerges is of property–sovereignty less as binary frame and more as scaffolding through which other pictures of law have been thickly woven—the warp and weft for larger visions of transformation.

This reminder that legal transformation can be seen equally as an aesthetic practice as a technical task is especially salient in respect of property. Despite the pioneering work of sociolegal, historical, decolonial and feminist scholars, self-consciously technical approaches to property remain a significant

[66] See Susan Sell, 'Twenty-First Century Capitalism: A Research Agenda' (2022) 3 *Global Perspectives* 1; Ilias Alami and Adam Dixon, 'Uneven and Combined State Capitalism' (2021) *Environment and Planning A: Economy and Space*.
[67] My own work traces this relationship between the internationalisation of patent rights and the transformation of legal thought over the long twentieth century.
[68] Koskenniemi (n 1) 35*ff*, 117–8, 130–7.
[69] *Ibid*, 453–4, 527.
[70] *Ibid*, 592, 592–6.

presence within the academy.[71] This persistence can in many respects be traced to Hohfeld and the legal realist tradition.[72] At the opening of the twentieth century, that tradition responded to 'abstract and analytically expansive' notions of property that had accompanied the growing power and wealth of US companies in the Gilded Age.[73] In response to this problem, Hohfeld offered an analytic method, in the form of his taxonomic hierarchy of legal relations. He presented what Schlag has termed a 'structuralist world of jural form' in which property could be understood not as a law immanent to physical things but through the particular set of relations, entitlements and correlative disablements that it entailed.[74] Departures from that taxonomy once set down should, he thought, be understood not as interpretive disagreements among jurists, or any purposefully chameleonic conception of property, but as 'errors of transposition' through which 'the logic of things becomes the things of legal logic'.[75] This kind of analytical thought has influenced the work of legal scholars and critical theorists, including those working in the emergent school of law and political economy. Those scholars have pointed either to its importance in attending to precisely what is being brought in through these types of borrowings, or to the political utility of emphasising that property rights are above all social relations between persons with respect to things.[76] Thinking about property as a 'structuralist world of jural form' may also offer a set of tools to scholars thinking about law as a system of transactional practices or a means of engineering economies, including in areas that are only infrequently the subject of litigation.[77]

The Hohfeldian analytic, and the description of property as a 'bundle of rights', has continued to be significant to common law legal education and to legal thought. Yet despite this embrace of taxonomic method, property as it exists in the world of legal decisions and precedents (rather than in the classroom) remains deeply fluid and malleable, difficult to place boundaries on either as a concept or as a categorisation or field. This is especially

[71] On the former, see the work of, *inter alia*, Brenna Bhandar, Cheryl Harris, Annelise Riles, Ambreena Manji, K-Sue Park, Frederic Maitland, William Cornish, Brian Simpson.

[72] On the ongoing relevance of Hohfeld to legal thought and education, see the essays collected in Shyamkrishna Balganesh, Ted M Sichelman and Henry E Smith (eds), *Wesley Hohfeld: A Century Later* (Cambridge University Press, 2022).

[73] Annelise Riles, 'Property as Legal Knowledge: Means and Ends' (2004) 10 *Journal of Royal Anthropological Institute* 775, 784.

[74] Pierre Schlag, 'How to Do Things with Hohfeld' (2015) 78 *Law and Contemporary Problems* 185, 203, discussing Hohfeld's famous *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning* (1913) 23 *Yale Law Journal* 16.

[75] The term 'errors of transposition' is Schlag's: (n 74) 193–4.

[76] For the former, see Schlag (n 74) 199; for the latter, see Anna di Robilant and Talha Syed, 'Property's Building Blocks' in Shyamkrishna Balganesh, Ted M Sichelman and Henry E Smith (eds), *Wesley Hohfeld: A Century Later* (Cambridge University Press, 2022). See also Keith Aoki, '(Intellectual) Property and Sovereignty: Notes toward a Cultural Geography of Authorship' (1966) 48 *Stanford Law Review* 1293, 1333, calling for a 'radically deromanticized functionalist approach to intellectual property'.

[77] On this kind of work see Johns (n 65) (though Johns does not there draw on Hohfeld).

true in international law as a fragmented discipline operating across different fora and through arbitral institutions, where the question of what property means, in terms of the jurisdiction to hear, quantum of and scope of exceptions to claims has been progressively interpreted in favour of investors since the end of the Cold War.[78] Anne Orford has described the way that lawyers might approach questions of the relationship of property to systemic change as one that examines the move between technique and ideology: between the technical incidents of property and their larger justifications.[79] In focusing on legal imagination, the book shows how we might take the anti-Hohfeldian implications of that argument a step further. This is because the book is less concerned with grasping the political implications of contestation through different legal regimes—whether patents, investment, debt, rights, or war—and more concerned with the processes and ways of thinking that have accompanied the inception of new frames and their thick relationship to social power. For law in this inceptional or transformative mode, analytical thought seems to offer even less purchase.

The implications of this insight for contemporary scholarship on property are twofold. The first is not only that what counts as property is a question of interpretation rather than fact, but also that this interpretation depends on law's imbrication with a range of aesthetic and social practices. The tendency of lawyers to draw from languages 'lying around' means that for Koskenniemi, legal imagination is at least in some times and places dependent on other disciplines and aesthetic forms and their epistemic weight.[80] In this sense, the work echoes Schlag's critique of Hohfeld in that there is no such thing as an empty legal concept, a pure form that is not already 'infused with content' of a political or social or aesthetic nature.[81] This offers a concomitant way of thinking about how lawyers might go about taking responsibility for our discipline: if there is no such thing as law as a bounded world or law *before* the outside-of-law, then the problem is not only international law's craving for external disciplines that fill some perceived lack.[82] Instead, we might also be interested in how lawyers decide which disciplines to turn to, or which alliances to make, as well as the ways that the consequences of those collaborations are able to be registered. This work is particularly urgent in our own time and as the analytical approach has, in some jurisdictions, failed to provide traction on a return to absolutist notions of property and the dismantling of the environmental and social state.[83]

[78] Anne Orford, International Law and the Social Question (Asser Press, 2020) 41*ff*.
[79] *Ibid*, 21.
[80] See, eg, Koskenniemi (n 1) 242–3.
[81] Schlag (n 74) 232.
[82] See Maria Aristodemou, 'A Constant Craving for Fresh Brains and a Taste for Decaffeinated Neighbours' 25 *European Journal of International Law* 35.
[83] See *Cedar Point Nursery v Hassid*, 594 US ___ (2021); *Eco Oro Minerals Corp v Republic of Colombia*, ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability, and Quantum (9 September 2021).

The second implication is that we might think about the task of *transformation*—of the inception of new regimes rather than the working out of old ones—as one where the joining of the legal imagination to social practices, movements and aesthetics warrants heightened attention. Put differently, we might reconsider the potential of technical approaches to property as an avenue for legal transformation. Much of international legal critique in the past decade has focused on how law, and the political commitments of different forms of law, has been routinised or rationalised within a particular field or institution.[84] Descriptions of law as more or less patterned by the oscillation between territorial control and international jurisdiction, or between a biological idiom of immaturity and a political-economic idiom of improvement, also have salience in an institutional or scholarly forum, where it is often international lawyers rather than anyone else that determine what kinds of arguments hold sway.[85] The degradation of the natural world and the onset of the climate crisis has seen this critique of existing fields and grammars joined by a more explicit concern with building a critically-oriented programme of legal transformation. This scholarship raises questions that reorient our concerns with the boundaries of adjudication or law as argumentative practice or with the existing commitments of particular interpretive communities. It foregrounds how we might think about these concerns as part of a broader and more existential question of law's capacity to reflect aspects of the world and other traditions of living within it: of Indigenous laws, more-than-human life, or queer dissensus.[86] In taking legal imagination as its object the book, therefore, assists us in the task not only of thinking about the aesthetics with which law has been allied, but also of asking how we can transform law into a discipline capable of registering, without consuming, these ways of relating to the world.

Law, climate and the future of profession

The conclusions that can be drawn from the book on the subject of law as profession are marked by an irresolvable tension. On the one hand, the idea that

[84] See, eg, Kate Miles, *The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital* (Cambridge University Press, 2013); Andrea Leiter, *Making the World Safe for Investment: the Protection of Foreign Property 1922–1959* (PhD Thesis, Melbourne Law School and Vienna Law School, 2019); Orford, 'Food Security' (n 55); Kathryn Greenman, *State Responsibility and Rebels: The History and Legacy of Protecting Investment against Revolution* (Cambridge University Press, 2021).

[85] Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press, 1989); Ntina Tzouvala, *Capitalism as Civilisation: A History of International Law* (Cambridge University Press, 2020).

[86] See Emily Jones, *Posthuman Feminism and International Law* (forthcoming 2022); Cait Storr, 'From Sacred Trust to Common Heritage: An Uncommons History of the Common Heritage of Mankind' (lecture delivered at the University of Essex, 2021); Claerwen O'Hara, 'Consensus in International Law: Authority, Democracy, Difference' (PhD Thesis, University of Melbourne, 2022); Usha Natarajan and Julia Dehm (eds), *Locating Nature in International Law* (Cambridge University Press, 2022).

neither the configuration of property and sovereignty nor the stability of that configuration in any particular setting can be taken for granted leads us to conclude that the role of lawyers and of the legal profession should be central to scholarly inquiry. Although not all of our protagonists are lawyers, the lawyer is a key motor of the legal imagination: whether the function of that imagination is seen as one that works primarily through institutions; that lays foundations with a select audience of professionals or elites or foreign powers; or that engages in a larger form of persuasion with a public audience.[87] From the outset of the book, we are asked to understand the shift to thinking about authority 'as a function and an office' as tied up with the consolidation of the role and power of counsel.[88] On the other hand, the suggestion that the work of lawyers depends as much on aesthetics as on technical aspects for its power and ideational coherence—at least at the moment of transformation, if not at the moment of routinisation—leads to the conclusion that this sense of lawyers as masters of their craft is a misplaced one. As with aesthetics, so also with material interests: much of what we learn about how lawyers created a larger frame within which the world proceeded to be organised shows that they have often done so in the service of one or another powerful actor.

This uncertainty regarding our own mastery is pervasive of the book. The story of legal imagination is therefore also the story of how the vocabularies created through these alliances became generalised and thereby difficult to escape. As Koskenniemi remarks, 'it is not easy to shed the suspicion' that, in the words of Horkheimer, 'the proposition that tools are prolongations of human organs can be inverted to state that the organs are also prolongations of the tools'.[89] No sooner has the lawyer as *bricoleur* been placed at the centre of the frame, in other words, than her work is revealed to be constrained by all sorts of other things. In these paragraphs I want to suggest that not only is this underlying contradiction central to the way that Koskenniemi asks us to think about the legal profession, it is also central to the experience of what it has meant to be a member of that profession. Legal professionalism as it exists in many places is caught between the experience of technical mastery and the structure of representation. If legal practice is, to use a colloquial phrase, about being 'on the tools', it is usually also about being on them *for* somebody else—whether that someone be a person, a corporation, an Indigenous nation, or some vehicle for representing 'the public' as a whole. Many modern lawyers take oaths to institutions and are bound by a set of ethical obligations not only in their representation of their clients but in their conduct before those institutions.

[87] Koskenniemi (n 1) 4–6.
[88] *Ibid*, 24. In some cases, as with Coke's faith in artificial reason, the professionals are not even in the background at all: the more-or-less determinate 'professional consensus of the legal community' is the very thing that allows the edifice of the common law to function: at 582.
[89] *Ibid*, 951.

Legal scholarship itself is caught somewhere between these worlds of intellectual inquiry and professional obligation. Although they exist within the university, law faculties are also shaped by their self-understanding of being adjacent to, and training students for, practice.[90] The question of legal professionalism has also been pivotal to efforts from scholars and practitioners to think through what a massively changed and changing climate means for the practice of law.[91] Jorge Viñuales has called for the profession to think of law as 'as one of the major technologies accounting for the Anthropocene' and to reconfigure the ways that law has facilitated the transactions that made up industrial life.[92] The catastrophic failure of the legal profession to respond adequately to the climate crisis, however, suggests that existing concepts of legal professionalism in this context have had at least partly conservative effects. The function of lawyering as representation means that responsibility can always be deferred—there is always something out there that is understood as driving the work and to which, finally, the lawyer is only responding. Lawyers' obligations to legal institutions embedded in existing political forms also help to orient the profession, legally and sensibly, to a fundamental concern with ensuring stability, continuity and the preservation of existing orders. These things can, and perhaps should, no longer be taken for granted.

In returning to the rise of that professionalism, and its relationship to the birth of the modern state, Koskenniemi offers us a way of relating it to a particular theory of history. In the use of the *ius gentium* to secure the independence of kingdoms from the empire, he argues that the French legists not only secured their own role as counsels but offered a new vision for the world, one in which:

> [i]nstead of ending violently with the last days and the second coming, history now became a field in which nature would take its course by its elements striving to their natural end, with the assistance of human beings as secondary causes, possessors of *dominium*.[93]

In this way he numbers law alongside history as among the professions that are responsible for constructing a vision of human agency and its

[90] Orford, *Politics of History* (n 6) 180. It is partly because of the legal academy's proximity to practice and the function of scholarship as participating in the making of international law that Orford has argued that it is not possible to write about that law without making an intervention in its present operation: at 185–94, 221–52.

[91] See Isabel Feichtner, 'Critical Scholarship and Responsible Practice of International Law. How Can the Two be Reconciled?' (2016) 29 *Leiden Journal of International Law* 979; Law Society of England and Wales, Climate Change Resolution <https://www.lawsociety.org.uk/topics/climate-change/creating-a-climate-conscious-approach-to-legal-practice#download-the-resolution>; Law Students for Climate Accountability, 2022 Law Firm Climate Change Scorecard, <https://www.ls4ca.org/climate-scorecard>.

[92] Jorge Viñuales, 'The Organisation of the Anthropocene: In Our Hands?' (Brill Research Perspectives, 2018).

[93] 'Against the view of time as a circular wheel of fortune or as decay from a Golden Age, ius gentium expressed a Roman vision of an active institutional life that offered the prospect of a gradually improving modernitas': Koskenniemi (n 1) 84–5.

relationship to the natural world.[94] This is the vision that has, in differing forms, been central to the division of the world into property and sovereignty. The legal professional ideals of representation and obligation have acquired their meaning within a world where the trajectory of human society includes the acquisition of property and where that acquisition is conducted within an assortment of modern sovereigns.

This theory of history, and the future that it purported to offer, has been fundamentally disrupted by the progressively escalating consequences of the arrival of humans as a 'geophysical force on a planetary scale'.[95] Across law, philosophy, and history, scholars are reckoning with the changing climate not only as a political and moral challenge but as an ontological one: with the return of the natural world as world-historical event.[96] Philosophers have argued that climatic change is a 'hyper-object' that in being 'massively distributed' defies the possibility of being fully captured by human thought while at the same time fundamentally structuring our reality: it inverts what many of us have come to think of as the 'normal' relationship where humans act on our environment and it does not act on us.[97] The science of 'tipping points' after which human action will no longer be able to restore the 'normal' climate fundamentally undoes the agentic assumptions on which our law has been founded. It does so not only in terms of visibly undoing human capacity to direct (after a certain point) the ends of our activity, but in terms of disrupting the temporal structure on which we have based our existence.[98] We are unable to discern whether we are in 'the present', or whether in a partial way we have already passed into a climatic past: in the words of Morton, 'whether the end of the world is already happening, or whether perhaps *it might already have taken place*'.[99]

Framing the *ius gentium* and its inheritances as a question not only of law but of history offers us a way to reckon with what the disruption of that history means for the legal profession.[100] In doing so, we might understand

[94] For the argument that the practice of history has influenced thinking about humans as 'free and independent agents that can shape their fate', see Constantin Fasolt, *The Limits of History* (University of Chicago Press, 2004). And see Ileana Porras, 'Appropriating Nature: Commerce, Property, and the Commodification of Nature in the Law of Nations' (2014) 27 *Leiden Journal of International Law* 641.

[95] Timothy Morton, *Hyperobjects: Philosophy and Ecology after the End of the World* (University of Minnesota Press, 2013) 7.

[96] *Ibid*; Dipesh Chakrabarty, *The Climate of History in a Planetary Age* (University of Chicago Press, 2021); Deborah R Coen, *Climate in Motion: Science, Empire and the Problem of Scale* (University of Chicago Press, 2018); Viñuales (n 92); Kathleen Birrell and Daniel Matthews, 'Laws for the Anthropocene: Orientations, Encounters, Imaginaries' (2020) 31 *Law and Critique* 233 (and contributions to that special issue).

[97] Morton (n 95) 2–6.

[98] Chakrabarty (n 96) 7

[99] Morton (n 95) 16 (emphasis in original). I am grateful to Martti Koskenniemi for discussion on this point.

[100] This should not be taken as endorsing a view of the 'Anthropocene' as some indivisible and ethically flattening construct, rather than a reality that has been and remains driven by the wealthiest members of highly industrialised nations.

the task of legal scholars and practitioners not only as being to propose rights and obligations (or to abolish existing ones), to create crimes, or to draft new resolutions and frameworks. We might also understand our task as being to adjust the underlying orientation of our *profession* in response to these world-historical shifts: to create a new professional sensibility oriented toward a new set of possible futures, while acknowledging those futures that our profession has assisted in foreclosing. In doing so we might think at least as much about planetary integrity as we do about the integrity of legal principle or doctrine or existing notions of sovereignty. And we might ask, as Julia Dehm and Sarah Riley Case have done, how the responsibility of historical emitters and the imperatives of repair can give rise to new legal forms.[101] Legal scholars will also need to attend to questions not only of how we conduct our scholarship but how we might transform the way we teach, and the political and ethical implications of being unable to do so.[102] In the contemporary university, the legal curriculum, and with it existing legal taxonomies and the question of whose laws we recognise *as law*, may be embedded to some degree in a range of legislative and regulative measures, and require political will to change.[103]

In the end this is perhaps the greatest gift of Koskenniemi's work: that it enables scholars to see the most fundamental aspects of our own legal traditions as deeply contingent and transformable, at a time in which we need this most. But it is also concerned that with all our knowledge, scholarship, and the accumulated reasons of centuries of legal judgment, in the words of Gentili, 'we see everything dimly': the ways in which our profession and our world has been produced; the interconnections between thought and practice, law and history, philosophy, empirical science; and the partiality of national or regional views.[104] It is this generation of lawyers and legal scholars, more than any other, that must learn to reconcile this concern with the imperatives of acting in the world. In that task there can be no better place to begin.

Disclosure statement

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[101] Sarah Mason-Case and Julia Dehm, 'Redressing Historical Responsibility for the Unjust Precarities of Climate Change in the Present' in Benoit Mayer and Alexander Zahar (eds), *Debating Climate Law* (Cambridge University Press, 2021).

[102] For one vision of a transformed curriculum, see Nicole Graham, 'Teaching Private Law in a Climate Crisis' (2021) 40 *University of Queensland Law Journal* 403.

[103] On the politics of the 'core' legal curriculum see Duncan Kennedy, 'Legal Education and the Reproduction of Hierarchy' (1982) 32 *Journal of Legal Education* 591, 597. On teaching Indigenous law as law, see, among others, the work of John Borrows.

[104] Koskenniemi (n 1) 232.