Toward a Concrete Temporality of Adjudication: Law’s Subject and Event

A thesis submitted to the University of Manchester for the Degree of Doctor of Philosophy in the Faculty of Humanities

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ABSTRACT

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Toward a Concrete Temporality of Adjudication: Law’s Subject and Event
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This thesis claims that temporality can provide a novel means through which to distinguish between different types of judgment. Specifically, it focusses upon how the adjudicative process determines factual construction and argues that the resultant construction is, at least in part, contingent upon temporality.

As the first of two starting points, the thesis begins by rejecting the subsumption thesis of judgment which states laws simply subsume facts that they ‘correspond to’. It attributes this rejection to the generality of laws and their flexibility as either rules or standards. Second of the two starting points, though related to the first, is what the thesis refers to as the ‘Kantian axiom’ which argues that time shapes consciousness. Extending this, the thesis posits that, filling in the lacuna created by the shortcomings of the subsumptive theory of judgment, adjudication’s temporality shapes its factual construction.

Having established these preliminary points, the thesis describes the different ends of a spectrum of judgment in which legal decisions can tend toward. Adjudication as Cognition (abstract judgment), predicated I argue on a spatial-temporality at one end, and Adjudication as Understanding (concrete judgment), grounded on a creative reading of Bergsonian and Gadamerian temporality at the other.

The main differences between these forms of judgment is the qualitatively different types of fact they produce, made possible through the temporalities upon which they are contingent. This results in different constructions of the subject and event (facts which law gives meaning to) which may impact upon ascriptions of responsibility. In addition, it is with adjudication as understanding that a potentially transformative form of judgment is possible and in which the radical difference of the subject and event of law emerges.

Temporality is thus capable of reframing old problems of jurisprudence as well as articulating new ones. It argues that factual construction, in particular subjectivity is, in part, predicated upon time, and that temporality, as unproblematised, may conceal an exercise of judicial power. It also highlights the general marginalisation of temporality in (legal) modernity and reveals the ‘temporal trap’ of legal subjectivity in which futures are bound and pasts are arbitrarily selected.
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ACKNOWLEDGEMENTS

Perhaps it is a coincidence (or may be it is fate…) that I chose time as a topic of discussion for my thesis, as my middle name, Zaman, is its rough translation (coupled with far more majestic meanings) in Urdu, Arabic and Hebrew.

My years researching as a doctoral student on the theme of time have been some of the toughest in my life, with much at stake. My ability to persevere was not possible without the help of the many who surrounded me. Thus the rules of brevity, when it comes to acknowledgements, must temporarily be put to one side.

Firstly, I would like to thank God.

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This is for my family.
INTRODUCTION

‘You would measure time the measureless and the immeasurable.

You would adjust your conduct and even direct the course of your spirit according to hours
and seasons.’

Kahlil Gibran, On Time

‘Time is a wealth of change,

but the clock in its parody makes it mere change and no wealth.’

Rabindranath Tagore, Stray Birds

The case of R v. Ahluwalia\(^1\) is familiar to many as presaging the reception of Battered Woman Syndrome as grounds for diminished responsibility in murder charges. One way that the case could have been abstractly described was of a woman who poured petrol onto her sleeping husband and set him alight. However, Lord Taylor CJ in the appeal opted for a more concrete account of what had happened. Indeed, it was important in this narrative to outline the history of being a victim of sustained domestic violence that had constituted the defendant, Kiranjit Ahluwalia, and her actions. The normative ascription of responsibility appeared to change upon the reception of a particular type of past which partially absolved her. A reading of the judgment could have concluded that the necessary inclusion of this particular past (rather than an exclusive focus on the incident) conditioned how the law understood both the defendant and its overall construction of ‘what happened’. To put it crudely, the clock started not when

\(^1\) [1993] 96 Cr. App. R. 31
she had poured petrol on her now deceased husband, but *earlier*. With this ‘temporal stretching of the legal subject’² came the emergence of difference, a concreteness which effected the attributions of responsibility. The appellate ceased to be ‘a woman’ and became ‘Kiranjit’, imbued with a particular history and located in a particular situation. The judge therefore appeared to have the option of seeing the history of violence as either naturally connected to and constitutive of her transgression, or as entirely separate and independent of it.³

This thesis claims that the inclusion (or exclusion) of that history of violence is attributable to temporality and that temporality is at least partially responsible for how adjudication constructs its reality, how it shapes its understanding of the legal event and natural person, and how it potentially effects responsibility attribution. To put it succinctly, with *Ahluwalia*, the ascription of responsibility was concomitant on the incorporation, not just of a particular fact, but more fundamentally, of a particular type of pastness (given that adjudication is *ex post facto*) which was necessarily connected to the murder, specifically the introduction of the ‘history of violence’ into adjudication’s determination of ‘what happened’. What does the invocation of this past, or ‘what happened’, have anything to do with temporality?

Essentially, ‘what happened’ is adjudication’s construction of reality. In terms of ‘time framing reality’ or ‘time framing consciousness’, this is not a revelatory claim, as will be apparent from a later development of Kant’s *Critique of Pure Reason*.⁴ Briefly put, Kant stated that time (along with space) was an *a priori* feature of the intellect that allows us to make sense of data to produce phenomena. In addition, a key figure on time and social theory, Barbara Adam said ‘any new perspective on the world entails a reconceptualization of the temporal relations involved’.⁵ The orientation of the thesis therefore creatively extrapolates Kant’s axiom⁶ that time frames consciousness,⁷ to posit that time similarly frames adjudication’s construction of ‘what happened’ (or its pastness). This connection between time (specifically time-framing) and reality construction in law has, as will be apparent, only scarcely been discussed⁸ (though a framing of the enquiry in Heidegger’s interpretation of Kant shows how time and Being are

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⁴ See Chapter 1, section 1.4 and Chapters 4 and 5
⁶ See Chapter 1, section 1.4
⁷ See Chapter 3, section 3.2
related. In particular, such discussions have not elucidated a detailed and sustained theoretical understanding of the temporality upon which its reality construction is contingent. In this regard, the thesis will pick up on both these points; that time conditions adjudication's construction of reality and unpack what the conceptualisation of that time is.

The very ability to either weave together or cleave apart different elements of 'what happened' as in the case of Ahluwalia (whether the history of violence ought to be considered as part of a unified account of what happened together with the killing of her husband, or as something separate), has invited little attention. Indeed where it has, it has notably been described as an arational choice, an exercise of unrestrained politico-judicial whim that allows judges to delineate and 'cut off' certain facts about the incident, natural persons, contexts or epochs. By contrast, this thesis argues that the ability to 'weave together or cleave apart' is contingent on whatever theory of temporality informs adjudication's construction of 'what happened.' To use a crude analogy once more, one particular theory of time could construct the types of 'pastness' that are included in adjudication's determination of what happened, as exclusively focussed upon the transgression (pouring petrol on a sleeping man) whereas another theory of time may construct a past that observes the necessary interconnectedness of reality (between the transgression and the 'histories of violence' or even societal pressures). Temporality, it will also be argued, is the difference between the production of both the paradigmatic abstract, deracinated and rational subject of law and a subject of law that, though it can exercise some agency, is necessarily situated and constituted by its past. In other words, the thesis will cautiously state that subjectivity is actually, in part, contingent upon temporality.

In claiming that adjudication's construction of 'what happened' is actually partially conditioned by time, the thesis will claim that the absence of the problematisation of temporality ignores how judges partially determine factual construction (or 'synoptic judgment') and indeed whether typologies of facts exist that are contingent upon different theories of time. In determining what these theories of time are upon which adjudication is contingent, it is hoped

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9 See Chapter 1, section 1.4
11 Alan Norrie, Crime, Reason and History: A Critical Introduction to Criminal Law (Cambridge University Press, 2011) 137-140
13 Emmet T. Flood, 'Fact Construction and Judgement in Constitutional Adjudication' (1991) 100, 6 The Yale Law Journal, 1795. Lord Bingham offers some comments on how judges ascertain facts from evidence though this is more to do with truth value rather than the temporal scope from which these facts are determined. See also The Business of Judging: Selected Essays and Speeches (OUP, 2011) 3-24
14 Despite the aporia surrounding conceptualisations of time, there seems to be some agreement of tensed-time (past, present, future) as the common referents of time. J M E McTaggart’s seminal essay, Time where he identifies the A-Series (past, present, future) and the B-Series (earlier/later) may dispute this but as useful signifiers, the project will understand time and temporalities in the A-Series at this point, though what is signified borrow from Gadamer, Bergson and Kant in the following chapters. See also JME McTaggart, ‘Time’ in Richard M Gale (eds), The Philosophy of Time: A Collection of Essays (Harvester Press, 1978) 86-97
that this will provide an unusual but illuminating account of the differences between contrasting types of judgment, and unlock the potentially transformative effects of legal decision making.

**The Temporality of Adjudication and its ‘Multiple Pasts’**

Let us return back to the peremptory claim so far. What, if anything, has fact construction in adjudication to do with temporality? If, albeit preliminarily, an attempt to link temporality and how adjudication constructs reality is trying to be established, this may *prima facie* seem like an irrelevant question for the following reason. After all, laws (not a theory of time) often state explicitly which facts they give meaning to, whether a law proscribes murder or prescribes the freedom of contract. It is, as Raz calls it, the classical image of the judge, ‘he identifies the law, determines the facts, and applies the law to facts’.

Of course, this account is a caricature of adjudication, what we may know as the subsumptive fallacy. Indeed, ‘rules are by definition general. They gather numerous known and unknown particulars under headings such as “vehicles,” “punishment,” “dogs”’. For example homicide can include different types of intent, different categories of victims, and very different factual situations, all of which are seen as particulars or instantiations of the general rule. This thesis argues that it is, in part, different theories of temporality that allow for these different instantiations of the same rule. To demonstrate this, the old provocation defence in the case of *R v. Ahluwalia* can be compared to *R v. Baillie (John Dickie).* In determining the first limb of the defence ‘sudden and temporary loss of self-control’ the courts constructed ‘what happened’ using contrastingly narrow and broad time frames respectively. In the case of *Ahluwalia*, recalling that she had suffered horrendous domestic violence over several years, the courts were unwilling to entertain a lapse of time between the most recent bout of violence (‘the provocation’) and the killing of her husband. The appellant unsuccessfully tried to convince the courts of the ‘the slow burn’ approach as a justification for the lapse of time, which would have necessarily required a broad time frame of the legal event (‘what happened’). Lord Taylor CJ stated that ‘the defence is concerned with the actions of an individual who is not, at the moment when he or she acts violently, master of his or her own mind’. Yet contrastingly in the *Baillie* case, which involved a man who upon hearing that his son had been threatened by a drug dealer and then set off for the drug dealer’s house, the courts here adopted a broader time frame

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15 See Chapter 5, section 5.3
18 Frederick Schauer, ‘Formalism’ (1988) 97, 4 The Yale Law Journal, 534
19 *Ahluwalia* (n 1)
21 *R v Duffy* [1949] 1 AER 932
22 *Ahluwalia* (n 1) [138] emphasis added
such that the lapse of time did amount to a sudden and temporary loss of self-control. To quote Lord Henry J, ‘the judge clearly expressed the view that in her judgment this was not a case of provocation because any sudden or temporary loss of self-control must have ceased by the time of the fatal act...it seems to us that that approach is too austere an approach’. This was not a simple ‘law-fact’ subsumption. Rather, I claim that whatever theory of time lends to ‘framing’, and thus the separability of pastness in ‘what happened’, conditioned how that very past in the case was constructed. Thus to presume that legal norms mirror the complexity of life verbatim is to entertain the caricature of subsumption. Adjudication’s constructions of these realities are not simply law-fact subsumptions, but far more flexible than that; and it is time that can, in part, explain these ‘indeterminacies’.

Related to this, rules can operate as standards that provide much more scope as to what is included in the determination of ‘what happened’. This is examined shortly when looking at the treatment of rules by different forms of judgment (abstract or concrete). Further to this, Lord Bingham said that the process of fact construction is generally unregulated. In attempting to connect temporality and fact construction, the indeterminacy of the latter has been described as the rational choice of ‘time-frames’ in legal decision-making. Thus the generality of legal rules, their nature as either rules or standards and the sentiments averred by Lord Bingham, that the process of synoptic judgment is, at the very least, unregulated (not to suggest at this point that it is radically indeterminate), prompts investigation into alternative explorations of how adjudication constructs its reality. This thesis attempts to fill that lacuna with recourse to different theories of temporality.

The terms ‘what happened’, ‘reality’, ‘factual determination’, ‘legal event’ and ‘pastness’ have all been used interchangeably and colloquially to describe the process of fact-construction in adjudication. Pastness is a particularly useful synonym for fact construction as it resonates with the idea that time and adjudication may be connected. Indeed, adjudication is operative as a historical inquiry that is generally ex post. It may be likened to an epistemological (or constructivist or hermeneutical) endeavour where the judge’s role is in ‘determining what

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23 Referring to the trial judge
24 Baillie (n 20) [37]
27 Kelman (n 10) 594
28 The claim that adjudication generally takes place ex post can be summarised in the following reasons. Some forms of adjudication have an anticipatory orientation that appears to settle matters prior to the purported illegality takes place, such as administrative detention, inchoate crimes and global counter-terror law. Further to this, injunctions, whether statute, equity or common law based, which include freezing of assets to stop the commission of a crime or non-molestation orders to prevent domestic violence, can all occur in anticipation of an alleged illegality.
happened at some time in the past’. Adjudication is also interesting for the fact that it is the process in which laws encounter the life-world and thus they take on a retrospective narrative of their own through their relation to facts (what often may be termed a chronology). Though one may intuitively think, like Lon Fuller does, that laws proper movement is forward in time as they guide our future conduct, in adjudication, laws become part of its ‘backward reasoning’. Therefore, adjudication introduces ‘timeless laws’ into the time-bounded world. So though in principle laws are normative ex ante, no written legal order can do without ex post adjustments.

If adjudication is reasoning invested in the construction of pasts (and not merely ‘law-fact’ subsumptions), why does it consider certain types of pastness immaterial? Clearly there is discrimination of pastness, justified or not; a defendant summoned before a judge for killing his wife would hardly bring up his late father’s alcoholism. What about, however, a young black teenager from Tottenham who assaults a police officer; is it only the pastness of the transgression which is relevant in our determination of the legal event – or ought one to consider the pastness of discrimination that has characterised the relations between the police and the group of people to whom that individual belongs; can one ‘frame in’ a defence of social duress that is manifested through a particular type of pastness to mitigate responsibility? Or imagine a frustrated and disenfranchised young Muslim man that commits heinous acts abroad- would adjudication ignore the systemic harassment of him by the intelligence services? Or if we look at the rules governing war, do the Laws of Force and humanitarian law accommodate the social reality of state and non-state actors’ unequal abilities in combat (what is popularly known in the literature as asymmetric warfare)? What pastness do the laws’ presumed liberal idea of sameness consider immaterial when adjudicating potential war crimes pertaining to Columbian Marxists or Palestinian guerrillas? Does this pastness provide any exculatory claims for their (in)ability to fight conventional wars or can adjudication simply ‘frame this out’? Can it capture everything in its determination of ‘what happened’? If it doesn’t, why doesn’t it and what enables it to discriminate between these multiple pasts? The

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29 Bingham (n 26) 3. See also Rosemary Coombe ‘Same As It Ever Was: Rethinking the Politics of Legal Interpretation’ (1989) 34 McGill Law Journal, 615
31 Lon Fuller, The Morality of Law (Yale University Press, 1969) 53
32 See also Christopher Hutton, ‘Meaning, Time and the Law: Ex Post and Ex Ante Perspectives’ (2009) 22 International Journal of the Semiotics in Law, 279
33 Anecdotally, a friend of mine recalled a story where Amicus (a renowned charity that works with inmates on death row in the US and elsewhere) would piece together detailed historical biographies of their client, even sourcing records prior to when the client was born, such as whether their father had worked with hazardous materials or a documented history of alcoholism. The operation of these incredibly remote events was to mitigate sentences from death to life imprisonment in appeals. See also Mark George, ‘An Introduction to US Death Penalty Law & Procedure and Internships’ (Amicus University Lecture, Manchester, October 2014)
35 David Rodin and Richard Sorabji, (eds.) The Ethics of War: Shared Problems in Different Traditions (Ashgate, 2006)
discrimination of pasts (‘what happened’) can be explained, as the thesis will develop, by reference to temporality and different theories of time.

**Temporality as the difference between Abstract and Concrete Judgment**

So far the focus has been that adjudication’s construction of facts, or ‘what happened’\(^3^6\) and its construction of subjectivity is predicated on temporality; or to put it another way, that theories of time and the features of those conceptualisations of temporality can provide a novel account of how adjudication constructs its past (whether separable or whether interconnected). Once a convincing account of temporality and adjudication has been developed, it will attempt to explain why the particular theory of time that conditions the conventional form of judgment (shortly described as *abstract judgment* and later detailed as *adjudication as cognition*), produces problematic constructions of subjectivity (an abstract, deracinated, ‘rational’ subject) and ‘what happened’ (‘pastness’). Thus, an alternative theory of time and the features of that conceptualisation of temporality may produce, it will be argued, an alternative form of adjudication with different configurations of subjectivity.

Temporality, it will also be claimed, is the difference between *abstract* or *concrete* forms of judgment and subsequent normative ascriptions of responsibility. The title of the thesis, *toward a concrete* temporality of adjudication, establishes a tentative normative aim.\(^3^7\) To recall the case of Ahluwalia once again, the opening paragraph cited two ways in which the facts of the case could have been described; abstractly or concretely. Continuing this, William Lucy’s paper, *Abstraction and Equality*, outlines two approaches in which judgment may proceed—*abstract* and *concrete judgment*. The further aim of this thesis is to demonstrate that the fundamental differences between abstract and concrete judgment are the theories of temporality which underpin them. Concrete adjudication (later detailed as *adjudication as understanding*) is sympathetic and ‘tempered not just with mercy but also by knowledge: not only of the conduct in question and its context, but knowledge of our character…in all our particularity…we are not strangers but intimates, with a history’.\(^3^8\) Contrastingly, abstract judgment (later referred to as *adjudication as cognition*) being formalistic, ‘judges us (i) not in all our particularity but as identical abstract beings; (ii) by reference to general and objective standards equally applicable to all such beings; (iii) the application of these standards being

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\(^3^6\) Bingham (n 23) 3. See also Rosemary Coombe ‘Same As It Ever Was: Rethinking the Politics of Legal Interpretation’ (1989) 34 McGill Law Journal, 615

\(^3^7\) See below ‘Thesis Questions and Contributions’

mitigated only by a limited range of exculpatory claims’. 39 Lucy identifies abstract judgment as morally problematic for the reason that all natural persons are reduced to formally equal legal subjects exercising reason that is ‘the principal means by which the law treats those before it as abstract beings rather than as the beings they actually are’. 40 Abstract judgment is thus characterised by *presumptive identity*, that treats the legal subject in a reductive manner, not detailing them in their specificity (social, cultural or economic milieus). It is also characterised by the *uniformity component*, in which legal rules are disinterested in the natural person’s specificity, and applies all rules indiscriminately. 41 Alan Norrie’s discussion of the etymology of criminal law doctrine supplements the understanding of presumptive identity in abstract judgment:

‘In place of real individuals belonging to particular social classes, possessing the infinite differences that constitute individuality, the reformers proposed an ideal individual living in an ideal world. ‘Economic man’ or ‘juridical man’ were abstractions from real people emphasising one side of human life- the ability to reason and calculate- at the expense of every social circumstance that actually brings individuals to reason and calculate in particular ways’. 42

Abstract judgment, unlike concrete judgment, is invested in analytical convenience with little interest as to ‘reflect the real world outside it in any direct or obvious manner’. 43 Indeed, as the conventional form of judgment, 44 it could be said to be locked in a crisis of representation. In asking the question ‘Who is law for?’ Ngaire Naffine speculates as to what a strict legalist answer may be and, in doing so, she conveniently sums up the limits or crisis of representation well:

‘It is wrong to think of law as trying to divine and reflect the true nature of humanity or, in the alternative, as orientated, in any simple fashion, to a particular constituency. Law’s purposes are too varied and complex to be characterised in this way. The question ‘Who is law for?’ may well be regarded by such lawyers as a political, sociological or even philosophical question which the members of these other

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39 ibid 23
40 ibid 25
41 ibid 26
42 Norrie (n 11) 21
44 The author claims its pervasiveness by saying that this is found in most current legal systems- common law, civil or ‘mixed’- and functions in both private and criminal law. See also Lucy (n 38) 24
disciplinary groupings are entitled to pursue; but it is not a specifically legal question which lawyers need to ask’.45

Indeed, it is worth repeating in the case of Ahluwalia that abstraction would have produced ‘a woman’, but concreteness produces ‘Kiranjit’, imbued with a particular history and, to quote Alan Norrie once again, ‘infinite differences that constitute individuality’.

Moving from the limitations of abstract judgment, concrete judgment, it is reckoned, may provide a catalyst for adjudication’s transformative potential. The aim of the thesis is to articulate a concrete form of judgment (later described as adjudication as understanding)46 and the theory of time that makes this possible. Lord Devlin once described the role of judges as the gatekeepers of the status quo47 concerned primarily with personal justice, rather than social justice.48 Thus a form of adjudication with transformative potential could be understood as committed to social justice, either breaking open the status quo or anticipating a shift in the Zeitgeist.49 A temporality that is concrete aims to overcome the limitations (if one would consider them as such) of why certain pasts are considered immaterial (which appears to be a problem in abstract judgment). Concrete judgment reveals situatedness and thus difference (countering the presumed identity or uniformity component of abstract judgment). It embraces the constituting experiences of the legal subject50 and thus ought to be characterised by a theory of time that is experience.51 As such, it ought to construct its reality in all the complexity of that experience, (not just in isolated causal chronologies for analytical convenience) and construct its natural persons in their radical difference and singularity, not just as abstract legal subjects.52

Continuing from the section on ‘the Temporality of Adjudication and its Multiple Pasts’, a point was made about the nature of legal rules and why ‘law-fact’ subsumptive theories of adjudication are inadequate accounts of judgment. Concreteness, unlike the uniformity component of abstract judgment, does not look at the nature of rules in the same way.53 In abstract judgment, legal rules and concepts are not only alienated from the life-world but are

45 Naffine (n 43) 3
46 See Chapter 4
48 ibid 7
50 To quote Oliver Wendell Holmes, ‘the life of the law has not been logic; it has been experience.’ See also The Common Law (The Lawbook Exchange, 1881) 1
51 This is what is later understood by Bergson’s theory of time, Durée. See Chapter 3, section 3.1
52 Costas Douzinas & Adam Gearey, Critical Jurisprudence: A Political Philosophy of Justice (Hart, 2005) 1-77
53 For a good introduction to how laws can operate as either rules or standards, see also Mark Kelman, A Guide to Critical Legal Studies (Harvard University Press, 1987) 15-63
rigid and *sensed*. This means that the way they are applied in ‘real-life situations’ is to subsume the situation into pre-ordained categories as if the legal rule or concept had already anticipated it - this in effect is the uniformity component of abstract judgment.\(^{54}\) Concrete judgment however would demand rules that are *senseless*, or malleable, and can be tailored to a case that it sees as unique, rather than as a particularisation of a general rule:

'It is not the case that the judge disregards a past rule or overturns reason as previously given…the rule arrives without reason or explanation and is without sense until furnished by the adjudicative process. What judges do, therefore, is provide a sense for the rule, which is to say that a judgment creates a rule insofar as it connects together the old form (tradition, the rule) and a new content (the reasons provided for the rule)'.\(^{55}\)

Concrete judgment therefore is committed to the singularity of the case, the uniqueness of the natural persons, ‘their character, their particularity, and their history’ and refutes the subsumption thesis. A *concrete temporality* therefore is one that aims to introduce difference and singularity into adjudication’s determination of ‘what happened’. Indeed, a concrete form of judgment, which tries to embrace context as far as is possible, is naturally a contender for adjudication with transformative potential. Karin Van Marle’s insightful article, *Law’s Time, Particularity and Slowness*, probes into whether certain forms of time can capture the particular\(^{56}\) (or the concrete uniqueness of a case) and disrupt the universalising tendencies of law ‘by lingering, or showing greater attentiveness’.\(^{57}\) Her notion of *delay* as a temporal strategy provides a limited solution to the problem of law’s general inability to accept multiple truths and meanings. Here, the same claim is made such that time can capture the singularity of the case and resist the presumptive identities and uniformity components of which Lucy derides in abstract judgment. It also remedies the inadequacies of a subsumptive account of adjudication.

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\(^{54}\) Parliament and the Law Commission, when drafting laws, will often do so with certain situations in mind, which the law is intended to cover. Lord Bingham also demonstrates this in his judgement in *R v. Jones (Margaret)* [2006] UKHL 16; [2007] 1 A.C. 136 [161]. Thus it considers what situations may fall under prevention of crime-criminal damage defence for the purposes of s.3 of the Criminal Law Act 1967. This maintains the idea of laws as ‘sensed’ such that they have pre-ordained categories which anticipate and therefore subsume new factual situations as if they were already inhered in the legal rule/concept. This will later be explained in the discussion on the ‘philosophy of recognition’ in Alexandre Lefebvre, *The Image of Law: Deleuze, Bergson, Spinoza* (Stanford University Press, 2008)

\(^{55}\) Lefebvre (n 17) 102

\(^{56}\) The sense, I think, in which Van Marle uses ‘the particular’ is not as an instantiation of a general rule (which is what I understand its common usage as) but as a singularity which is external to the legal rule. To avoid confusion therefore, I will refer it to as a singularity to illustrate the case’s uniqueness

How adjudication constructs the event and the natural person (later, collectively termed as the ‘retrospective narrative’) as variations of pastness (contingent upon a theory of time) establishes the difference between abstract and concrete judgment (later detailed as adjudication as cognition and adjudication as understanding respectively). A theory of time that necessarily sees these multiple pasts as interconnected, rather than amenable to ‘time framing,’ will produce different legal subjects (either the presumed identity of abstract judgment or the unique, singularly different subjects of concrete adjudication) and constructions of ‘what happened’. The claim here is that a particular theory of temporality constructs legal subjectivity in adjudication by re-introducing or eliding different types of pastness and overall, potentially altering the attributions of responsibility.

The Temporality of Adjudication and the Exercise of Power

Adjudication, as the process in which abstract rules encounter the world, is invested in representing reality and the natural persons who inhabit that reality. It moves beyond mere interpretation of rules but also focuses upon adjudication’s fact construction or ‘world-making features’.

This thesis is claiming that temporality is a facet of those world-making features and such that the conceptualisation of time requires exploring. However, it is important for more than mere responsibility ascription; especially if one can argue that this is an indeterminate (as in Baillie), arbitrary or unproblematised process; an unchecked exercise of power. Indeed, it is worth repeating that for Ahluwalia, time was, if reading the judgment adventurously, the difference between her very freedom or incarceration. When a criminal legal rule, for example, delineates commencement of what is legally meaningful as the intentional element, the very framing of event presupposes a certain conception of time that observes the agent’s complicity in the ensuing events as having started from when s/he formulated the intention. This is what has been elsewhere referred to as ‘temporal triggers’ and provides the apparatus for how (in)adequately reality is represented. Would an alternate theory of time have shifted these temporal triggers to either more remote or proximate pasts, or perhaps introduced other ‘types of pastness,’ such as societal conditions or historical episodes, as ‘enduring pasts’ (in that

58 Emily Grabham, ‘The Strange Temporalities of Work-Life Balance Law’ (2014) 4, 1Feminists @ Law 1
59 See Chapter 1, section 1.4
60 Temporal triggers refer to positions in time which initiate or terminate legal events. See also Ali Khan, ‘Temporality of Law’ (2009) 40,1 McGeorge Law Review, 87
Rosalyn Higgins observed how time and certain legal concepts responded ‘to the resolution of important matters of policy’.\textsuperscript{61} Time, she advanced, was not passive but actively involved in the delineation of rights. One of the examples she drew from, in international intertemporal law, established the principle of the ‘critical date’, described as ‘the point of time falling at the end of a period within which the material facts of a dispute are said to have occurred’.\textsuperscript{62} For \textit{Ahluwalia}, a theory of time that lent itself toward interconnecting a ‘history of violence’ to her transgression diminished her responsibility. Developing \textit{Ahluwalia}, Higgins applies this to the milieu of rights\textsuperscript{63} rather than just responsibility. Identifying the boundaries of ‘what happened’ provides clarity as to which principles and rules are engaged. Indeed, ‘right regimes are therefore often conceived and implemented through temporal mechanisms that rely, at least, on a ‘before’ and an ‘after’’.\textsuperscript{64} Looking at this within the context of equalities law and policy, Emily Grabham makes the case that time functions as a mechanism to establish certain legal identities, and can even limit those outside its boundaries, access to certain types of legal rights.\textsuperscript{65} Indeed, as part of the interpretive process to impose authoritative understandings of laws, adjudication exercises institutional violence:

‘Legal interpretation takes place in a field of pain and death. This is true in several senses. Legal interpretive acts signal and occasion the imposition of violence on others: A judge articulates her understanding of a text, and as a result, somebody loses his freedom, his property, his children, even his life. Interpretations in law constitute justifications for violence which has already occurred or which is about to occur. When interpreters have finished their work, they frequently leave behind victims whose lives have been torn apart by these organized, social practices of violence. Neither legal interpretation nor the violence it occasions may be properly understood apart from one another’.\textsuperscript{66}

\begin{footnotesize}
\footnotesize\textsuperscript{62} L F E Goldie, ‘The Critical Date’ (1963) 12, 4 International and Comparative Law Quarterly, 1251
\footnotesize\textsuperscript{63} Keebet von Benda-Beckmann specifically refers to this as ‘temporalities within the law’ [emphasis added] as they ‘affect the specific ways in which rights, obligations, and prohibitions entailed in legal relationships, institutions, and procedures are positioned in time.’ Keebet von Benda-Beckmann, ‘Trust and the Temporalities of Law’ (2014) 46, 1 The Journal of Legal Pluralism and Unofficial Law, 4
\footnotesize\textsuperscript{64} Emily Grabham, ‘Governing Permanence: Trans Subjects, Time, and The Gender Recognition Act’ (2010) 19, 1 Social and Legal Studies, 108
\footnotesize\textsuperscript{65} Grabham (n 58) 1
\footnotesize\textsuperscript{66} Robert Cover, ‘Violence and the Word’ (1986) 95, 8 Yale Law Journal, 1601
\end{footnotesize}
This violence will be re-interpreted in the context of temporality, Lady Hale, commenting on the difference between socio-legal scholars and judges, similarly stated that ‘the activity of judging is indeed very different from the activity of authorship…authors do not need to decide real cases, with real people in front of them, who stand to lose their lives, their liberty, their health, their livelihood or a great deal of money if the judge gets the answer wrong’. For Ahluwalia, had Battered Woman Syndrome not been considered as a medical condition for the purposes of diminished responsibility, it would have meant life imprisonment for a victim of domestic violence.

So are these delineations or ‘temporal triggers’ arbitrary? This thesis claims that certain theories of temporality potentially allow adjudication to ‘delineate’ reality in such a way. Indeed, ‘many legally significant situations can be defined either within a narrow or a broad time frame. This includes the question of whether different incidents are to be considered separately or as a unified whole’. In addition, where there is talk of arbitrariness, the debate of legal indeterminacy cannot be too far. Whether indeterminacy can be reframed along the lines of temporality is picked up later in the thesis. However, making the claims of (in)determinacy using the vocabulary of time could conceive temporality (whatever that is) as an expression of power. This is not indeterminacy for example, and the natural indeterminacy of language. Rather it is an indeterminacy derived from the unrestrained use of time frames (Ahluwalia contra. Bailie).

**Thesis Questions and Contributions**

So far the argument has proceeded through a kind of syllogistic reasoning predicated on the Kantian axiom that time shapes consciousness. If reality construction and subjectivity are contingent upon temporality, and adjudication is invested in reality construction (‘what happened’) and subjectivity, then it follows that adjudication itself is underpinned by a temporality. The preceding outline has also attempted to present temporality in law (specifically adjudication) as that which has too readily been presumed or ignored and that, if one accepts that the nexus between it and adjudication’s construction of reality, notions of

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69 See Chapter 4, section 4.21
70 Indeed, some further argue that it is precisely as a consequence of modernity that time and space are seen as objective and thus external to human experience, and as such, have come to be taken for granted. See also Barbara Adam, *Time and Social Theory* (Polity Press, 1990) 104-126.
subjectivity and overall responsibility ascription, it is of paramount importance that this be problematised. Indeed, ‘time is not often conceived as a force that bites into law. Law is thought to exist in time (history) and time (as historicity) is believed to affect law; however, time is rarely conceptualized as an ontological, requisite, or constitutive feature of law’.  

In that vein, the thesis attempts to make the following original contributions to knowledge through the following four research questions. Firstly, it will seek to develop the claim that time is connected to adjudication’s reality construction (extending the Kantian axiom and framing this within Heidegger’s *Kant and the Problem of Metaphysics*, in which Heidegger emphasis time as the root of Being). Secondly, it will try to articulate that temporality is prior to constructions of subjectivity; or that how the paradigmatic abstract, deracinated and ‘rational’ subject of law is constructed in adjudication’s pastness, is actually contingent on time. Thirdly, it will make a few brief points about how time, as that which is unproblematised, is an otherwise ignored exercise of power that is able to include or exclude, frame in or out, factors which may be constitutive of transgressions. Fourthly, the thesis will try to articulate how an alternative theory of time may produce a concrete and thus transformative form of judgment.

**Claim one: Temporality and Reality Construction**

Time attempts to fill in the gap that subsumptive theories of judgment create. As a result of the generality of legal rules and their fluid nature as either rules or standards, this creates inadequacies in these accounts of adjudication that I claim temporality can address, in part, through its relation to how adjudication determines *points of fact*. Extending the Kantian axiom that time shapes the intellect (and framing this within Heidegger’s interpretation of Kant’s *Critique of Pure Reason*), which has been woefully under theorised in relation to how adjudication’s temporality shapes its reality, the arguments in this thesis will provide a detailed exposition of *what* theory of temporality it is that reality construction in adjudication is *conventionally* conditioned upon (preliminarily introduced as abstract judgment but later described in detail as *adjudication as cognition*). This will hopefully provide a novel explanation of how adjudication is able to elide or include certain types of pastness in its construction of ‘what happened’. In other words, as adjudication is primarily a determination of pastness, it will attempt to explain the different types of pastness (and thus different types of facts) in relation to theories of time.

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Claim two: Temporality as prior to Subjectivity

Perhaps intrepidly, the thesis will try to demonstrate that particular theories of time, and thus their resultant construction of pastness, produces the paradigmatic abstract, deracinated and rational subject of law that Lucy derides. It takes abstract judgment (later adjudication as cognition) as the conventional form of adjudication and states that, though laws may presume implicitly or state expressly a reasonable person standard, it is more fundamentally a particular theory of time, which I claim is symptomatic of the modern legal systems that produces this particular type of legal subjectivity that constructs them in a reductive manner. This tries to reframe the construction of subjectivity through different types of pastness which are contingent on particular theories of time.

Claim three: Temporality as an Expression of Power

Accepting that temporality conditions adjudication’s construction of ‘what happened’ and that temporality has rarely been problematised, the thesis takes a sceptical approach to that very absence. It tries to determine whether temporality is a site of concealed and therefore unrestrained political power and tries to reframe the indeterminacy thesis along temporal lines. Some questions I may ask include what theory of time allows for the delineation of the ‘start and finish’ of legal events that are intimately linked to the establishment of rights and responsibilities. If a particular theory of time is responsible for how adjudication determines ‘what happened,’ what are the limitations of that theory of time and of its ability to represent reality and the natural persons? What types of pastness are included (duty of care, breach, mens rea, actus reus), and what are excluded (materialism, racism, social deprivation) in adjudication’s determination of ‘what happened’? To put it loosely, what is missed out and why? What is the nature of the pastness (facts) that adjudication considers as material and that it considers immaterial? Indeed, is law even interested in ‘mirroring reality’? If these limitations are significant, can a ‘concrete temporality’ address the problems of abstract judgment (abstract subjectivity/ ‘presumed identity’ and the uniformity component)? Does time operate as a smoke screen for naked judicial power, discriminating between the causally proximate and the causally remote? Does adjudication’s time purport to expound virtues of certainty and consistency at the expense of acknowledging difference and concreteness? If temporality re-articulates the debates of indeterminacy, can it reveal, if any, the limits of law? Ultimately, if ‘multiple temporalities’ exist and temporality is responsible for how natural

Naffine (n 43) 2-3
persons frame perception, is there something absent in the way adjudication constructs reality from how it is experienced by the natural person?

**Claim four: Temporality as unlocking Adjudication's Transformative Potential**

Having described what the temporality underpinning the conventional form of judgment is and its limitations, I will attempt to articulate how concrete judgment, conditioned upon an alternative theory of time developed from creative applications of Henri Bergson and Hans-Georg Gadamer, may produce different constructions of pastness and subjectivity (later described as *adjudication as understanding*).

A few salient points ought to be made as to the nature of the contribution the thesis attempts to produce which will be revisited in the concluding remarks. Firstly, the title of thesis is deliberately named *toward*. Whilst the following chapters try to offer a novel account of adjudication through a problematizing of time, there is also a tentative normative element attached to the work that may be described as *opening without closure*. What is meant by *opening* is that if a convincing account can be offered which positions the construction of the natural persons and the event in adjudication as contingent upon time, it provides the possibilities for alternative conceptions of temporality to infuse our understanding of adjudication as a type of epistemological or hermeneutical endeavour. What is intended by *closure* is a hesitancy as to whether the particular temporal approach offered in this thesis as an alternative (Bergson and Gadamer), will be useful though later, I briefly explain my use of Bergson and Gadamer.74 Secondly, taking from the idea that philosophy is as useful in its enterprise of demystification as it is in reconstruction, as well as attempting to articulate a theory of adjudication which is more concrete, the thesis will also seek to problematise time and observe what emerges from such a move. The examination of time in adjudication may confront limits as to its role that teeter on the edges of nihilism or a cul-de-sac in which adjudication is necessarily limited in the ability to be concrete (and thus restrict its transformative potential). In effect, the thesis is primarily about problematizing and secondarily (though no less importantly) about postulating. It attempts to raise the ascendancy of time in discussions of law and adjudication.

Though it is important to state what this thesis is about, it is equally as important to make a brief point about what the thesis does not attempt to say. As the project tries to cautiously articulate a particular theory of adjudication, it will inevitably make certain presumptions. For

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74 See Chapter 1, section 1.33
example, the focus of the case law analysis will be targeted primarily at criminal law judgments (though some civil law cases are mentioned throughout). This is for the simple reason that criminal law usually involves only one party (upon which the thesis will specifically focus upon as the natural persons). Following conversations with colleagues regarding developing theories, often what one finds is that certain ‘moves’ are required for the theory to be applied to particular areas of law. For example, one way civil law would differ from criminal law would be to require considering two parties as natural persons which may involve a theoretical wriggling that is not the case with criminal law. Though not within the scope of this thesis, future development of the work could focus on understanding what these moves would entail. Also, though it attempts to link temporality in adjudication with fact construction, it is not concerned with rules of evidence and the various judicial processes for determining the truth-value of statements. It is concerned with what types of facts are included in the determination of ‘points of fact’ and tries to argue that such a process is, in part, are contingent upon different theories of time.

Following this, the thesis will not make direct and specific references to regulation, orders-in-council, secondary legislation, equity, discretionary powers of the executive, or the Royal Prerogative, the operation of Tribunals, and trials based on intelligence (or inchoate and associational laws). In relation to time, most of the theories are advanced from philosophy, specifically Henri Bergson and Hans-Georg Gadamer, so the rich literature on other philosophical, sociological, psychological understandings of time or the ‘geography of time’ will not be relevant here. The thesis takes as its focal point the archetypal form of adjudication that settles disputes ex post with references to statutory and common law. Many of these exclusions simply stem from practical limitations of what can and cannot be included.

**Thesis Outline**

Earlier it was mentioned how William Lucy identified two forms of judgment- abstract and concrete. This thesis claims that these forms of judgment, which are later given the titles of adjudication as cognition and adjudication as understanding respectively, are underpinned by different theories of temporality. One form of temporality produces the problematic abstract judgment that Lucy describes and the other, a more ‘sympathetic and contextualist approach’.

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75 The natural person is of course just one type of legal personality. For further discussion, see Chapter 4, section 4.31
77 They attempt to explain the process of interpretation and fact construction and not just the types of judgment
Therefore, rather than thinking of adjudication being either-or, the project encourages one to think of variations of adjudication as a spectrum in which decisions can tend toward either end.

The thesis begins with an exegesis of the general literature on time and law and also introduces the two key theorists who provide the theoretical basis for the work, Bergson and Gadamer. This will be preceded by framing the enquiry, which seeks to creatively develop the ‘Kantian axiom’, within Heidegger’s interpretation of Kant’s *Critique of Pure Reason*. Heidegger places immense importance on time so a brief elucidation of his work helps to situate the claims within a wider literature. While the singular focus on adjudication is important, the literature of law and time that extends beyond this will be necessary to familiarise the reader with a generally exotic lexicon of this recent ‘turn toward time’. This is handled in the opening sections of the literature review. In particular, the thesis outlines Alexander Lefebvre’s creative application of Bergson in his theory of adjudication as a significant reference point for the thesis. From this, emerging themes are developed that can be provisionally consolidated into a common vocabulary within the law-time scholarship, as well as beginning to acquaint one with the specific Bergsonian and Gadamerian vernacular.

The second chapter provides a segue from the critical review and begins to layout the theoretical work. It starts by displacing the litigant or natural persons in litigation as the epistemic centre, instead arguing that the law is typically responsible for the determination of ‘what happened’. The chapter also introduces the ‘retrospective narrative’ as an all-encompassing term to describe fact (past) construction of the subject and event of law. The chapter concludes by identifying two key ways in which temporality and law are discussed and how they are interrelated. These are known as the ‘Temporality of the Legal Rule’ (‘TOLR’) and the ‘Temporality of Adjudication’ (‘TOA’). The section will also explain how major debates in jurisprudence may be framed within the context of time (‘TOLR’) but will set the focus of the thesis upon ‘TOA’.

Chapter three develops creative applications of the theories of time that will inform the spectrum of adjudication towards which legal decisions tend, with *adjudication as cognition* at one end and *adjudication as understanding* at the other. I will use Bergson’s reading of Kantian temporality but frame it as ‘dominant-spatial’, the features of which will be outlined and thus form the basis of the types of pasts which are emergent in a decision that tends toward adjudication as cognition. The chapter will then go on to introduce Bergson’s theory of time, *Durée*, before making some brief descriptive comments of the temporal resonances of Gadamer’s *Effective History*. These will both inform adjudication as understanding.
Chapters four and five are related in that they will detail the antipodal ends of this abovementioned spectrum of adjudication (with its focus on fact construction). Chapter four explains *Adjudication as Cognition* as the archetypal form of legal decision-making which is likened to Lucy’s abstract judgment. Adjudication as Cognition is characterised by Dominant-Spatial Temporality, which is responsible for the way it constructs its reality and its production of the abstract, deracinated and ‘rational’ legal subject. The qualities of space that are inhered in the factual construction of adjudication as cognition (as a result of its time) present the natural persons and the legal event in ways which the chapter considers as analytically useful but also severely problematic. It produces what will be later described as a *spatial past* which is said to ‘contain the natural persons’.

Chapter five outlines the normative orientations of the project and explains the antonymous form of judgment, *Adjudication as Understanding* that develops Bergson’s durée and Gadamer’s effective history. This builds upon Lefebvre’s account of adjudication, as inherently creative, by shifting the focus of Gadamer and Bergson’s contribution to law from legal interpretation (and the situatedness of the judge) to the situatedness of the natural persons. Distinct from adjudication as cognition, adjudication as understanding may simply be referred to as a ‘radically contextualist’ (and thus concrete) form of judgment, which forces open the boundaries of ‘what happened’ that are often punctuated by adjudication as cognition, and understands the natural person, not as an abstracted rational legal subject, but in their difference as a subject that is both constituting and constituted. Adjudication as Understanding produces a *variegated past* in which the ‘infinite differences that constitute individuality’ emerge and may consequently effect responsibility ascription. I’ll end this chapter by making a few points about some of the potential problems with adjudication as understanding.

The final chapter attempts to demonstrate the tendencies toward the different ends of this spectrum with reference to a few key criminal law cases. It tries to highlight the problems with decisions that tend toward adjudication as cognition, for the reason that important information is omitted from its factual investigations, made possible through its theory of time, that may ultimately affect ascriptions of responsibility. *R v. Ahluwalia* demonstrates the tendencies toward both adjudication as cognition in the failed provocation defence and the tendency toward adjudication as understanding in the creation of the successful Battered Woman Syndrome defence. *R v. Hill*, *R v. Hall* and *R v. Saibene and others*, which are both civil

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78 Norrie (n 11) 21
79 Ahluwalia (n 1)
80 [1988] 89 Cr.App.R. 74
81 (Crown Court, 2011)
disobedience cases that invoked lawful excuse in criminal damage suits, attribute their respective failure and success, it is claimed, by their respective tendencies toward alternative ends of the adjudicative spectrum (and thus fundamentally, different temporalities). In each of the cases, the chapter will seek to understand what adjudication (whether of the cognitive or understanding variant) ‘cuts out’ and how this changes normative ascriptions of responsibility. Finally, to bring the thesis to its conclusion, it will touch upon the comments made at the beginning of this section, consolidating key themes, identifying the nature of the contribution, the workability of adjudication as understanding, and potential avenues for future work.
CHAPTER ONE

Literature Review

Historically, time has rarely been thought about in law, let alone adjudication; ‘as in science and philosophy, questions of time have not been the subject of sustained inquiry in legal scholarship. In comparison to space, interest in time has been marginal, has been sporadic, and is just beginning to gain momentum’.82 Mariana Valverde chronicles the turn from the spatial to the temporal in her book Chronotopes of Law: Jurisdiction, Scale and Governance.83 In it, she outlines how spatiality is privileged in socio-legal studies, and how legal historians have failed to challenge this asymmetry. Additionally, prior to the ‘turn’, temporality was only theorised as history. Space’s hegemony in legal analysis is in part also to do with what Valverde observes as Kant’s artificial separation of space and time. More specifically for law, David Delaney’s The Spatial, the Legal, and the Pragmatics of World-Making: Nomospheric Investigations was a catalyst for the field of legal geography, though Valverde identifies enclaves within this literature that did tend toward a time-space analysis; a key text being Jenny Shaw’s “Winning Territory”: Changing place to Change Pace,85 which contrasts the time-space of the family unit against the frenetic pace of work life or network time.86

The most emphatic elevation of time to the heart of legal analysis was Carol Greenhouse’s A Moment’s Notice: Time Politics Across Cultures. Greenhouse explores the etymology of intuitive linear representations of time, situating it within European Christian narratives of genesis, original sin and redemption. This was subsequently given scientific rigour through western legal and political apparatus, and has such been normalised to the extent that:

82 Mawani (n 71) 256
83 Mariana Valverde, Chronotopes of Law: Jurisdiction, Scale and Governance (Routledge, 2015) 37-43
84 For an exegesis of the literature on Law and Space, see also Andreas Philippopoulos-Mihalopoulos, ‘Law’s Spatial Turn: Geography, Justice and a Certain Fear of Space’ (2010) Law, Culture and the Humanities, 1
85 Jenny Shaw, ‘Winning Territory’: Changing place to Change Pace in Jon May and Nigel Thrift (eds) Timespace: Geographies of Temporality (Routledge, 2001)
86 See also Brian M Stewart, ‘Chronolawgy: A Study of Law and Temporal Perception’ (2012) 67, 1 University of Miami Law Review 303
Since the Middle Ages, linear time has been the time of the nation-state, although its modes of rationalization (as technology and social control) vary with time and space... time arises not from the ethnographic ground on which it is played out as a relative question but from the temporal assumptions embedded in specific state practices – bureaucratic administration, taxation and the regulation of economic life, and through a variety of executive, legislative and judicial powers.\(^\text{87}\)

The drive behind the temporal turn therefore, came not just from the absence of its focus, its premature equivocation with history, but extended to identifying time as an expression of power and dominance. Testament to the ‘temporal turn in law’, a series of published papers from a symposium on \textit{Time, Law and Society} in 1994, a 2012 conference hosted by the Max-Planck Institute for Social Anthropology called \textit{The Temporalities of Law} and finally, a newly formed research network\(^\text{89}\) that co-ordinated a 3-day workshop entitled \textit{Diagnosing Legal Temporalities}\(^\text{90}\) have cemented this critical juncture.

\subsection*{1.1 Literature Outline}

The structure of the literature review will try to do two things. Firstly, it will provide a general background of as many things ‘law and time’. The operations of time in law, as will become apparent, are in fact incredibly varied, though \textit{some} of the functions of temporality will not be directly relevant to the thesis. However, as law and time lack a coherent and common vocabulary, it is useful to look at those different operations and borrow some of the ideas and lexicon that may be useful for familiarising ourselves with the literature. Secondly, the literature review will introduce specific ideas that will relate directly to the research questions and how the theoretical practitioners that the work is premised upon, have been used in adjudicative theories and law (Bergson and Gadamer).

The review will therefore be divided into the following sections. First, it will begin by briefly explaining some concrete though unrelated examples of law and time under the heading of ‘Some Examples of Legal Temporalities’. Through these seemingly disparate manifestations of time in law, it emerges that temporality operates as an umbrella term for some of the

\begin{itemize}
  \item \textit{Some Examples of Legal Temporalities} \cite{Greenhouse:1996}; \cite{ibid:73}; \cite{See also:<http://www.kent.ac.uk/law/time/>}; \cite{Grabham:2016}\textit{(Forthcoming)}
\end{itemize}
different features of the law and legal system that may provide interesting scope for future work (think about the notion of a ‘speedy trial’ for example). However, this is primarily useful for both reversing the ‘silence of time in law’ and accelerating the temporal turn in legal scholarship. The brief discussion in this section on legal theory and time however, will bear some relevance for later.

The following section, which will be considerably more detailed, looks at more sustained attempts to marry law and time and attempt to pre-empt some common themes taken up in the later chapters. This section will end by introducing a key contribution to the literature by Mark Kelman entitled ‘Interpretive Construction in the Substantive Criminal Law’ 91 which importantly outlines both the relation between time and reality construction and some of its problems.

The next sections of the review introduce two main theoreticians of time whose work form a central part of the thesis. The content here will be less evaluative and more descriptive.92 The fourth section of this chapter therefore seeks to frame the enquiry of the thesis, developing what I have earlier called the ‘Kantian axiom’ which claims temporality shapes consciousness. This framing is done with a very brief reference to the work of Martin Heidegger and his Kant and the Problem of Metaphysics which develops this Kantian axiom and from whom a lineage to Gadamer and Bergson can be drawn. The fifth section will provide a short discussion on the applications of Gadamerian hermeneutics in law and very briefly, what temporal themes can be extrapolated from his post-Romantic ‘conditions of understanding’. The sixth section will familiarise one with the work of Henri Bergson, in particular his durée (though a more thorough undergoing of his work is reserved for later).93 As well as explaining his ideas, the review will also critically look at the application of Bergson in adjudication, focussing in particular on the work of Alexandre Lefebvre (a common reference of work which the thesis builds upon) and the exciting reinterpretation of American Common Law by Renisa Mawani. Bergson and Gadamer will inform the temporality that characterises concrete judgment’s determination of ‘what happened’ (later adjudication as understanding) as part of the thesis’ normative aims. The final section will end by briefly deducing some common themes and relate these back to the research questions.

To recall the four research questions; the original contributions of the thesis are set around the following; (i) to develop the claim that adjudication’s factual construction is contingent upon

91 Kelman (n 10) 594
92 The creative readings and applications of these theories are saved for later in the thesis see Chapter 3
93 See Chapter 3, section 3.1
temporality and to ascertain what theory of temporality is present in the conventional forms of judgment, (ii) to argue that constructions of legal subjectivity in adjudication can be reframed as contingent on temporality and that the abstract, deracinated and rational subject of law is created through time, (iii) that once time has been argued as connected to reality construction, time conceals an expression of power and (iv) alternative temporalities may produce a form of judgment (earlier described as concrete judgment, later *adjudication as understanding*) with transformative potential.

1.2 Some Examples of Legal Temporalities

First, I will offer an admittedly brusque overview of some concrete examples of ‘legal temporality,’ to shine a light on particular features of laws and legal systems that could collectively fall under, or relate in some way to, time and to observe the different operations of time in law. So what are some of the examples of ‘legal temporality’? Perhaps most intuitively, laws can be understood as providing reasons for the practical actions of self-directing, intelligent agents, and can be said therefore to guide our future conduct. Indeed, it is worth repeating once more that Lon Fuller stated that the proper movement of law is forward in time.

If one continues to probe a little further to explicit prescriptions of time in statutes; Hayley Rogers of the *Good Law Project*, in a presentation entitled *Time in Drafting Legislation* identified the different uses for time in statutes. These included drafting guidelines on expressions of time commencement of legislation, Statutes of Limitations, and how references to time are to be interpreted as well as formal legal requirements with time bars. It may also extend to Sunset Provisions and, though more popular in civil law jurisdictions, the *doctrine of desuetude*.

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94 Farmer (n 73) 342
95 Bar of course retroactive legislation which is prohibited by Article 7 (1) of the European Convention on Human Rights, clause 3 of Article I, Section 9 of the United States Constitution and is a staple of Rule of Law theories. For exceptions to this, see also Viscount Simmonds in *DPP V. Shaw* [1962] AC 220, the War Damage Act 1965 and *Burmah Oil Company Ltd v Lord Advocate* [1965] AC 75
96 Fuller (n 31) 53
97 Hayley Rogers, ‘Time in Drafting Legislation’ (Diagnosing Legal Temporalities Workshop, Kent, April 2015)
99 Interpretation Act 1978, s.9
100 See also s.20 (2) Constitutional Reform and Governance Act 2010 which demands all treaties are to be laid before Parliament for 21 days before being ratified
101 This is a custom whereby laws become unenforceable due to a prolonged period of non-use
Pushing a little further; the doctrine of precedent, as that which venerates the past, and statutory law making, as that which guides future conduct (and of course laws can be retroactive in effect and adjudication generally takes place ex post) are all related to issues of time. The case of Pepper v. Hart, seen as a landmark decision, established an exception to the rule of Parliamentary Privilege by allowing courts to consult legislative history in Parliamentary discussions in courts to determine the meaning of ambiguous statutes.

Another relationship between law and time may also include the question of whether the law ought to punish the unpunished for crimes committed many years ago. A recent example of this involved a decision by the Independent Police Complaints Commission, an investigatory body with certain adjudicatory powers, not to conduct a further investigation into the events of the Orgreave Coking Plant. The report submitted that ‘given the passage of time, some material is apparently no longer available, having been lost or destroyed’ and that ‘the significant passage of time may limit others’ ability to recall exactly what happened with accuracy’. A similar problem emerged in another recent case, Keyu and others v Secretary of State for Foreign and Commonwealth Affairs where the courts refused to allow an appeal to order a public inquiry of the Batang Kali massacre which occurred in 1948 when the area was under British Colonial administration, because ‘it had been brought too late’. Connected to this, ought such distantly past acts be adjudicated on by the rules of the present legal system or laws contemporaneous with it? This of course is a question for intertemporal law.

Pushing further still; in providing proscriptions and prescriptions for future acts, laws and the future are particularly relevant in theories of the ‘risk society’ and the raging debates surrounding The Politics of Possibility. Unlike laws guiding future conduct (if guiding is what they do), here they pre-empt illegality and then adjudicate upon them. In addition to the complexity of future crimes, Global Counter-Terrorism and Security law is seeing a growing

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102 [1992] UKHL 3
103 Tom Douglas, ‘Should we punish crimes from the distant past?’ (Practical Ethics Blog, 8 May 2015) <http://blog.practicalethics.ox.ac.uk/2015/05/should-we-punish-crimes-from-the-distant-past/>
105 ibid 17
106 [2015] UKSC 69
107 ibid [28]
109 Benda-Beckmann (n 63) 11-14
literature on the iniquities of terrorism trials and their ‘temporal hybridity’. The idea of laws anticipating future conduct are of course well established in inchoate and associational crimes, administrative detention and variations of self-defence in war from its anticipatory bent to the more controversial Bush Doctrine of pre-emption. Staying with defences, some appear to relate to time by necessarily preceding the mens rea in Criminal law; and from domestic criminal law to its international equivalent, articles 11 (1) and (2) of the Rome Statute state the ICC’s temporal jurisdiction or ratione temporis which deals with the date from which crimes are actionable by the court.

Certain accounts of adjudication suggest that legal rules have an anticipatory logic embedded within them, in that in their generality, they foresee situations that may happen. This is most commonly expressed in the general-particular adage. Cases exist as mere instantiations of rules and in effect the former is said to have always been in the latter. One could also think of the law-time nexus as the length it takes for the legal process to unravel itself, or notions of a ‘speedy trial or administrative process’. A recent example in the High Court was a decision regarding ‘Fast Track Rules’ for asylum seekers which the court said incorporated structural unfairness due to the short amount of time for the appeals process. Law and time can also relate to the sequence of events which determine the establishment and hierarchy of proprietary rights; or legal history’s diachronic analysis that examines the development of law over time; or System Theory’s account of the normative closure-cognitive openness of law including the phenomenon of law’s ‘temporal porosity’.

Finally, what do other contemporary legal theorists say about time? This is a particularly important discussion which bears significant relevance to the research questions and will be

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111 See also Gavin Sullivan, ‘Transnational Legal Assemblages and Global Security Law: Topologies and Temporalities of the List’ (2014) 5, 1 Transnational Legal Theory 81
112 Farmer (n 73) 334
113 Michael Walzer, Just and Unjust Wars: A Moral Argument with Historical Illustrations (Basic Books, 2006)
114 The Rome Statute of the International Criminal Court 1998, s.11(1)(2)
118 Jarko Tontti made a salient point about the general absence of time related to legal theory scholarship:

‘The mainstream legal theory concentrates on the world of the present; that is, to the world of norms, rules and principles. The prevailing opinion of the so-called analytical school, for example, sees the function of legal doctrine as the systematisation and interpretation of valid law. From a practical point of view, this systematisation and interpretation takes very little interest in what has happened (legal history) and is also rather cautious in making proposals (de lege ferenda) or prognoses concerning the future. Ahistoricity and atemporality has characterised and still continues to characterise most currents of thought in legal theory. Also many critical approaches towards legal positivism, the forefather of analytical legal theory, share its limitations in this respect and concentrate on the present’.

developed throughout the thesis. As time and change are sometimes seen as analogous, could Hart’s Rules of Change and Recognition, which acknowledged both stability and intrasystemic change in his soft-positivism, be an expression of temporality? Hans Kelsen’s hard positivism argued that the ‘temporal sphere of validity of a positive norm’ may also refer to past acts. Dworkin’s chain novel analogy was perhaps the most unequivocal in his mutual respect for past, present and future in his interpretive theory of fit and appeal. These particular types of discussion embrace the perennial debate of a legal systems’ propensity toward stability or change (which shall later be referred to as the Temporality of the Legal Rule or ‘TOLR’) and entertain wider debates about variations of the declaratory theory, rule scepticism and indeterminacy. In its purist conception, adherents of a declaratory theory of the common law assign it a past-orientated disposition whereas generally, statutory laws are deemed to be future-orientated. Legal philosophers, it appears therefore, have implicitly been talking about legal temporality all this time.

A thorough glance presents us with an ineffable variety of situations in which time and law appear as bedfellows and in a sense, these very different examples all have claims to being ‘law’s time’. The inconspicuousness however, is probably attributable to both a lack of a common vocabulary and that time operates in different ways. Indeed, it cannot help that philosophical and social conceptions of time are still plagued by intellectual chaos and discord. However, the purpose of this short section is to begin to explain how time in law has, in effect, always been there.

1.3 Law and Time: General literature

The review can now begin in earnest with a more detailed and focussed exegesis of the literature. One preliminary point to make however is the problem with the scholarship and its lack of ‘codification’. There is no ‘field’ or ‘body’ of literature to speak of (though that may soon change) and coupled with the absence of a common vocabulary, aporias in the philosophy of time, this makes a coherent exegesis tough, though certainly not impossible.

119 See Chapter 2
121 Hans Kelsen, Pure Theory of Law (Max Knight tr, Lawbook Exchange Ltd 2008) 12-14
A good start however is Liaquat Ali Khan’s paper entitled, *Temporality of Law*. Khan shares the view that the importance of exploring these themes stem from its absence in the literature, referring to the earlier work of Rebecca French (later discussed) as ‘stop[ing] short of constructing any analytical framework for understanding the connections between law and temporality’.

The author defines time as either a point (t) or as duration (Δt) of reality, and uses these as analytical tools to ‘define, construct and manage legal relations’. He relies on the classic Aristotelian conception of time as measuring motion between the ‘before and after’ (the precursor to ‘clock time’), distinguishing between macro- and microunits in adjudication’s determination of ‘what happened’. Khan’s four theses are as follows; the principle of temporal correlation, the principle of temporal inertia, the principle of temporal triggers, and finally, the principle of temporal co-operation. Of interest to the research questions are the first three.

The principle of temporal correlation suggests that proximity between different events and the duration (Δt) between them, can strike up legally significant inferences about which events can be said to be causally related. Whilst he hastens to add that time does not cause physical change, it provides normative clarity and canvases a frame of reference. He demonstrates this point with reference to an American labour law case of *Canavan v. Rita Ann Distributers* wherein an inference was drawn from the date at which an employer sacked a woman a week after having found out she was pregnant. In addition, he clarifies the temporal proximity position with reference to murder, highlighting the different points in time of certain defences such as provocation, and self-defence in the use of force and how inferences can similarly be made in these respects.

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126 Khan (n 60) 63
127 ibid 56
128 ibid 59
129 ibid 71
130 ibid 80
131 ibid 87
132 ibid 100
133 Lindsay Farmer quotes Scott Veitch saying that ‘legal conceptions of responsibility are organized according to conceptions of proximity and foresight, which refer to particular roles and duties, and according to a narrow conception of foreseeable consequences.’ See also Farmer (n 73) 343
The principle of temporal inertia states that ‘law is both the instrument of change and the anchor of stability’.\(^{135}\) He discusses systemic stability or ‘precedential inertias’ to describe the dominance of past rules on outcomes of new cases. Both allude to the manner in which general resistance to change over time maintains consistency within a legal system. For example, a particular judicial approach, such as formalism, claims to ensure a certain level of stability. However, Khan also highlights the potential iniquities of absolutist legal inertia in its inability to respond to avulsive political, social or economic changes. This is a common and indeed important discussion in which law and time are manifest; the proclivity or otherwise of a legal system toward change (whether statutorily or through judicial approaches\(^ {136}\) and how this effects how temporality conditions adjudication’s construction of ‘what happened’\(^ {137}\). Additionally, in his final paragraph he cites that ‘an intelligent understanding of temporality may alleviate the time famine that bedevils a fast-paced world. The study invites lawyers, scholars, and judges to explore just and sustainable connections between law and temporality’\(^ {138}\).

The principle of temporal triggers\(^ {139}\) introduces the notion of points in time (t) that initiate or terminate a legal event (‘what happened’) or the commencement of statutes. Simply put, trigger times are the point at which the facts which are relevant to the law in question are said to have commenced and ceased in adjudication. Thus trigger times can activate or terminate laws, powers, rights and obligations and thus corresponds to time being jurisgenerative. As for statutes, ‘allocative triggers’ refer to the promulgation of a statute or treaty, while what he calls ‘arbitrary triggers’, which are more indeterminate, refer to the time triggers of fundamental human rights, such as the right to life. Finally, ‘terminative triggers’ operate in antithesis to allocative triggers, ending rights, obligations and powers, exemplified by limitations, laches and sunset provisions.

How can Khan’s theses begin to help answer the research questions? The first principle of correlation refers specifically to ‘event construction’ (what has interchangeably been termed ‘what happened’, ‘pastness’, ‘reality construction’, ‘factual construction’) and how time is linked to it. He discusses duration (though not in the sense that Bergson does as will later be explained) as the difference between the beginning and end of a ‘legal event’. What is interesting about Khan’s duration is its causal underpinnings, specifically with an emphasis on proximity, with time as the referent. It is not entirely clear how the author makes the distinction between temporality and causality (though one would assume that it is on the basis that the

\(^{135}\) Khan (n 60) 80
\(^{136}\) This is later described as the Temporality of the Legal Rule(s). See Chapter 2
\(^{137}\) This is later described as the Temporality of Adjudication. See Chapter 2
\(^{138}\) Khan (n 60) 106
\(^{139}\) Khan (n 60) 87
cause is temporally prior to the effect). The general antipathy toward remoteness which Khan defends (and is generally apparent in, say, Tort), seems to corroborate the proximity element of causal-temporal relations. Khan’s discussion of laws’ tendency toward causal proximity would prosper from a normative analysis which explains why there is a tendency toward proximate causal relations and how this may be linked with power. In spite of this however, it is important that the conflation between temporality and causality has been established early on as a way to acknowledge how time is generally understood in law— is such equivocation of temporality with causality at adjudication’s peril? 140

The second principle is very interesting, for it situates a perennial jurisprudential debate within the vocabulary of temporality (much like in the section ‘Some Examples of Legal Temporality’). 141 What the legal philosophy literature, particularly theories of adjudication, discuss about the legal systems’ appetite for either perpetual change (as the radical pragmatist may claim) or formalist obedience to precedent (as the adherent of the declaratory theory would assert) is framed under the terms of temporality. As has been said, this will later be referred to as the ‘Temporality of the Legal Rule’ (‘TOLR’) and is a common approach in discussions about time and law.

Interestingly, Khan also describes the ‘scalenic consciousness’ 142 as the agglutination of past memories, current experiences and future projections. His most definitive statement on the impact of this consciousness states that:

‘An efficient scalenic consciousness harnesses interior knowledge along with exterior research while uniting the past, present, and future awareness. Numerous legal activities, including teaching law classes or presenting oral arguments in courts of law, require a fully functional scalenic consciousness. Lawyers lose efficacy as advocates and as transactional functionaries when they do not focus on the present moment or are unable to tap efficiently into past memories or cannot successfully wonder about the future’. 143

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140 See Chapter 4, sections 4.1 and 4.2
141 See Chapter 1, section 1.2
142 Khan (n 60) 78
143 Ibid 79
Khan acknowledges what may be described as the phenomenon of multiple temporalities in
the social world\textsuperscript{144} and also what may provisionally be called a ‘temporality of the being’\textsuperscript{145};
he sees the self, not drawn by either past, present or future but by past, present, and future. Temporality is read as phenomenological (and later as ontological).\textsuperscript{146}

The title of his piece and his introduction seem to suggest that there is a temporality inhered
in law but his discussion suggests otherwise. His first and third theses of correlation and trigger
times observe how law can make certain inferences with points of demarcation in time. This
\textit{appears} to suggest an approach of how law understands time ‘out there’ rather than a theory
of time inhered in law. Indeed, he is even clearer in his leaning toward ‘substantivalist time’\textsuperscript{147}
by saying that time is not the reason for change. This thesis would argue that it is only because
of a particular theory of time inhered in law that it is possible to have the demarcation and the
ability to make such legal inferences that Khan identifies. However, Khan does not examine
the effects and potential problems of ‘temporal disparity’ between law and the self’s ‘scalenic
consciousness’.

Using Khan’s temporal inertia principle as a launch pad, a brief comparison can be made with
Brian Stewart’s paper, \textit{Chronolawgy: A Study of Law and Temporal Perception}, which starts
by saying that ‘the evolution of law does not occur at the same pace as the evolution of man’.\textsuperscript{148}
Indeed, he labels the asymmetries between ‘a society accustomed to instant gratification and
constant flux…confronted with a legal system that must operate deliberately and change
infrequently by design’\textsuperscript{149} as a temporal one.\textsuperscript{150} In his paper, Stewart discusses not only the
existence of multiple social temporalities but dedicates a specific focus on judicial temporality.
This, according to Stewart, can be categorised as both ‘fixed or relational’; fixed, refers to time
frames that are static and predetermined\textsuperscript{151} such as the time limits for filing appeals or statute
of limitations; and relational time\textsuperscript{152} refer to how judicial temporality is invested in

\begin{itemize}
\item \textsuperscript{144} See also Georges Gurvitch, \textit{The Spectrum of Social Time} (D. Reidel Publishing Company, 1964)
\item \textsuperscript{145} See Chapter 1, Section 1.4
\item \textsuperscript{146} See Chapter 5, section 5.2 and Chapter 1, section 1.4
\item \textsuperscript{147} This is the idea that time is a universal invariant, an \textit{empty container} which exists independently of things that
inhabit it. Plato’s Forms and Newtonian physics are perhaps most famous for articulating this theory. See also Ned
accessed 25 July 2014
\item \textsuperscript{148} Stewart (n 86) 304
\item \textsuperscript{149} ibid 304
\item \textsuperscript{150} The law’s ability to synchronise with other temporalities are explored by John Harrington when discussing ‘temporal
porosity’ as exemplified in laws relating to the termination of artificial nutrition and hydration (ANH) of patients in a
permanent vegetative state (PVS). Here, the temporality of a legal norm and its epistemic construction of when life
ceases is subsumed to medical expertise based on its determination of life and death. Thus the crucial points of time
are not defined legally but rather extra-legally. See also Harrington (n 117) 14
\item \textsuperscript{151} Stewart (n 86) 318
\item \textsuperscript{152} ibid 319
\end{itemize}
accommodating the temporal considerations illustrated of other spheres (elsewhere described as temporal porosity). 153

Stewart concludes his argument saying:

‘As mankind transitions away from temporal experiences guided by the minute hand of the clock to experiences guided by the interminable network, it is unclear precisely what effects lay in store for traditional legal institutions. A good deal of this uncertainty stems from the rate of change inherent in modern society; it is exceptionally difficult to determine future events in times of continuous transformation. It is clear that technological change will continue to accelerate and this change will continue to alter man’s relationship with time. In order to avoid the pervasive effects of the need for speed, legal actors must become aware of the detrimental nature of temporal compression as it relates to the goals of the legal process. It may be necessary for individuals who feel the continuous pressure of time-based stress to seek balance by occasionally unplugging from the network and turning off those electronic devices that permit non-linear representations of time. Once disconnected, it may be possible to think more clearly about the best way to maintain institutions and ideals left to us by previous generations whose relationships with time were significantly distant from our own’. 154

Stewart’s contribution develops the difficulties inhered in a legal system that is perpetually inert inhabiting a society which is technologically advanced, globalised and thus in constant flux (how would the current jus in bello regulate fully-autonomous robots in warfare?) Importantly for the thesis, it intimates toward a larger debate around the push and pull of progress and tradition in law and the ability of the Rule of Law to respond to societal changes using the vocabulary of time. Again, this refers to what will later be understood as the ‘Temporality of the Legal Rule’ (‘TOLR’). However, Stewart lacks any theoretical depth into how legal reasoning may respond to a ‘society in flux’, merely suggesting that a return to an ‘old time’ may allow us to think more clearly.

Carol Greenhouse’s paper is one of the most significant and enduring contributions to what may one day be considered a distinct literature on law and time. Just in Time: Temporality and

153 Harrington (n 117) 14
154 Stewart (n 86) 327
the Cultural Legitimation of law offers a comparative anthropological study of law, with a particular focus upon competing temporalities not just as different theories of time but different understandings of time. Her main argument explores the hegemony of linear time which 'intrinsically demands a single principle of selection but [that] real life is not so neatly arranged' and that:

'Institutions that regulate social change must also, therefore, regulate the play and contestation of the multiple temporal logics that inhere in situations, and make temporal commitments themselves. Thus, the 'shapes' of time are not inscribed as fixed geometric blueprints in a culture's mentality, but are contested, negotiated, defended and transformed in the juxtaposition of persona and institutional forms that comprise social life anywhere'.

Linear time owes its success in its ability not to ‘displace indigenous time concepts in Europe so much as it added itself to them in the life of the new institutions which made linear time socially relevant’. It is not because it is the only ‘type of time’ available, but rather that linear time has had the ability to construct and manage institutions which she relates to ‘the church’s idiom that situated time in relation to eternity [in which] secular temporal discourse achieved a reification of society by locating the end of time outside of any individual or collective social experience’. The common law, Greenhouse suggests, adopts this linear temporal logic.

She says that law’s linear temporal hegemony not only placates competing conceptions of temporality that are perpetually being negotiated and re-negotiated, but they paradoxically create indeterminacies, which are resolved by the legal. To use the phrase in the article ‘the law represents itself in ways that situate it at precisely these indeterminate points, resolving conflicts one at a time while gesturing toward the totality of all resolutions of all hypothetically possible conflicts’.

Though this is an ethnological study it is considerably useful for the purposes of the research questions. It explains the recurring theme of a society with concurrent multiple

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156 ibid 1633
157 ibid 1636
158 ibid 1638
159 ibid 1640-1641
160 ibid 1641; Again, this is the anticipatory logic of legal rules and concepts mentioned earlier, at work, in the introduction.
161 To quote Greenhouse:
temporalities, but its most important contribution is in explaining the perhaps intuitive idea of time being linear (or at least its representation of it) as a useful symbolic myth. Despite its basis in anthropology, Greenhouse’s pioneering allocation of Western law’s time as one of linearity can also be said to have a direct relation to adjudication. The almost instinctive idea that time proceeds in a linear fashion (and echoed later by Rebecca French in her treatment of law and time) is arguably responsible for the ‘chronological’ construction of ‘what happened’ in adjudication, the linear development of legal orders, or even the ‘timelines’ that are used to represent litigants’ histories. Greenhouse explains how the state apparatus within ‘the West’ was able to normalise this social construct of time, perhaps to the point of ‘a priori-tising’ such a formulation.

A legal system also invests in the idea that it is complete yet subject to change, ‘ephemeral yet enduring’. For it to expound the virtues of legal certainty, it professes completeness, but for it to be responsive and particular, it must be fluid and changeable. Greenhouse also explains how law is able to absorb competing temporalities within the fabric of this linear temporal myth. What is particularly interesting, in trying to understand whether there is something missing in how adjudication constructs reality from the way it is experienced by the natural person, Greenhouse’s discussion that law’s time is potentially dominant may have something interesting to say.

Rebecca French offers one of the most meticulous discussions of time in law, stating that ‘time is always necessary in law, yet it is rarely examined’. Against the ethnological analysis of Greenhouse, French states that ‘law is deeply embedded with ideas about time that deserve our attention- our legal notions of time are more complex and varied than simple linear clock time’. Her analysis distinguishes between ‘attributes’ that are used to describe qualities of the nature of time, ‘models’ which refer to the differing temporal structures and finally, ‘forms’ as particular categories of time in law.

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162 See Chapter 4
163 Greenhouse (n 87) 179
164 This is the anticipatory logic of legal rules and concepts at play once again
165 See also Mawani (n 71) 253
166 In Chapter 4, I will explain how conventional adjudication (adjudication as cognition) reproduces chronologies which are analogous to Greenhouse’s hegemony of linear legal time and that a feature of its temporality is dominance. See Chapter 3, section 3.22
167 French (n 125) 663
168 ibid 671
169 ibid 672
Models of time operate as useful metaphors. ‘Linear’\textsuperscript{170} time for example, may be used to describe the powerful forward charge of the Enlightenment which is infused with an aspirational yearning for progression,\textsuperscript{171} all the while disposing of traditions which it sees as inhibiting the onward march of Modernity. Linear time therefore may be synonymous with improvement. ‘Bipolar’\textsuperscript{172} models, with their origins in Durkheim and Giddens’ risk society, describes adjacent but juxtaposing social patterns; one which is ‘primitive, face-to-face, less complex and the other, modern, more complex society with a division of labour’. This could be used to describe the (largely discredited)\textsuperscript{173} formulation of Samuel Huntington’s ‘Clash of Civilisations’ and the opposing push and pull of (antiquated Islamic) tradition and (western scientific) progress; or French uses the example of Originalism in US Constitutional law attributable to Justice Antonin Scalia.\textsuperscript{174} Indeed, this push and pull has been most recently demonstrated in the recent landmark US decision of Obergefell v. Hodges with justices Kennedy and Scalia demonstrating these different polar ends.\textsuperscript{175} Finally, French also describes other models of time such as the ‘Event/Rupture model’\textsuperscript{176} which refers to an abrupt change in the chronology of time,\textsuperscript{177} one which is vital to understanding the deep changes in which the grundnorm of a society alters\textsuperscript{178} and ‘Cyclical’\textsuperscript{179} configurations which unlike linearity, are inherently sequential and are used to describe life cycle patterns, spiritual notions of reincarnation as well as describing the rise and fall of empires.

Attributes of time mainly explain how ‘law has the power to create, alter, distort, or even destroy time itself, not simply our experience of it.’\textsuperscript{180} ‘Social Construction of time’\textsuperscript{181} asserts that law, as a social concept, is a product of social formation.\textsuperscript{182} This is considered in light of the mailbox rule in contract law that acknowledges events can be changed:

\begin{itemize}
\item\textsuperscript{170}ibid 689
\item\textsuperscript{171}Renisa Mawani states that ‘the imperial idea of linear time...the authority of a universal, secular, and singular Western time...has underwritten global histories of capitalism, what counts as politics, as well as prevailing conceptions of the modern political subject. See also Renisa Mawani, ‘Law as Temporality: Colonial Politics and Indian Settlers’ (2014) 4 UC Irvine Law Review, 74
\item\textsuperscript{172}French (n 125) 691
\item\textsuperscript{175}576 U.S. ___ (2015)
\item\textsuperscript{176}French (n 125) 692
\item\textsuperscript{177}French refers to the landmark case \textit{Brown v. Board of Education}, 347 U.S.483 (1954). See also Jiri Praban, ‘The Time of Constitution-Making: On differentiation of the Legal, Political and Moral systems and Temporality of Constitutional Symbolism’ (2006) 19, 4 Ratio Juris 456; in this article, Praban comments, in his opening remarks, about how Plato considered constitution-making as a ‘new beginning’ and to an extent this is also followed by Kelsen. See note below
\item\textsuperscript{178}No jurist would maintain that even after a successful revolution the old constitution and the laws based thereupon remain in force, on the ground that they have not been nullified in a manner anticipated by the old order itself.” See also Hans Kelsen, \textit{General Theory of Law and State} (Harvard University Press, 1945) 118
\item\textsuperscript{177}French (n 125) 690
\item\textsuperscript{180}ibid 693
\item\textsuperscript{181}ibid 695
\item\textsuperscript{182}Andrew Wistrich also talks about the temporality of law in relation to its purpose. See also Wistrich (n 123) 750
\end{itemize}
‘Time, therefore, is both a relationship between people and a mechanism for ordering experience. While we tend to take the concept of time for granted in the law and presume that it is simply the equivalent to the chronological passage of time, this image robs us of seeing that we socially structure and construct the way we see time’.183

Forms of time are demonstrated in legal cases, theory, practice and literature which purport to codify the appropriate kinds of time to analyse and formulate laws. ‘Industrial time’,184 she denotes as being the recurrent category in law which relates to the standardisation of time into even, quantifiable units or as a particularisation of clock time; the convenience of standardization can relate to monetary value and the general commodification of time that has been intrinsic to a capitalist mode of production. It identifies an important point whereby the law can ‘erase, create, contract, expand, or even eliminate time’.185 The example she uses illustrates the rescission of a contract of sale following a latent defect in which the court deems the contract never to have happened.186 The law has effectively erased an event (or part of) which the parties deemed to have been valid,187 also possessing the ability to either compress time188 or to even change the order in which events occurred.

French’s taxonomic system of law and the variations of times are useful. For the purposes of the research questions, one of which argues that adjudication’s factual construction is contingent on time, French provides a basis for further development in this regard. In particular, the discussion of industrial time in which the system of law is able to re-order, chop and change at its will, suggests a qualitative attribute of legal temporality that relates to its ability to dictate the construction of ‘what happened’ beyond the subsumptive thesis. ‘Industrial time’ however, doesn’t provide a detailed theoretical underpinning of time and how that constructs reality.

French also demonstrates her pragmatist credentials by suggesting that these competing forms of time compete with one another to determine which one temporality might best represent a situation; ‘it is imperative that we, as academics and practitioners, critically reflect on our approach to legal time. This might involve consciously promoting new ideas over traditional ones and moving away from dualistic reasoning patterns, particularly the bipolar

183 French (n 125) 695
184 ibid 705
185 ibid 707
186 ie the Doctrine of Frustration
187 Contrastingly, contract law may be observed as creating an event ex nihilo as in the case of implied contracts
188 French (n 125) 707
model currently employed by social and legal theorists'.\textsuperscript{189} Legal outcomes are contingent on time because it is a particular model of time that law adopts which best understands the situation. If the normative aim of this project is to articulate a transformative jurisprudence, one criticism could be that French's contribution, that adjudication is contingent on time, lacks necessary grounding that limits its potential for a radical and creative adjudication.\textsuperscript{190} However, French ought still to be considered as one of the more significant contributors to the time-law literature.

Some of the recurrent themes so far have included the ‘multiplicity of temporalities’ as a source of conflict, the potential power dynamics behind event construction or ‘world-making’ as an expression of temporality in adjudication (creating and destroying parts of events) and varying attempts to describe legal temporality. References, though succinct, have also been made to the idea of the temporality of the natural persons. What is also worth reiterating is the difference between ‘how adjudication (law) understands time’ and ‘how time frames adjudication’s construction of what happened’, of interest being the latter.

Andrew Wistrich’s, \textit{The Evolving Temporality of Law Making} is particularly useful, providing some important nomenclature for describing time in relation to legal theory and law making.\textsuperscript{191} It begins with a modest refutation of the presumption of law being \textit{past-oriented}. Drawing influences from Bentham who supported consolidating and codifying the common law into statutes, Wistrich suggests that such moves would shift the temporal direction of law from one that looks backwards toward one that is prospective.

Wistrich starts by looking at the normative grounds for ‘pastness’ in law (though understood in the wider sense of precedent \textit{not} factual determinations) as a ‘respect for tradition, status quo biases, path-dependence, escalation of commitment, a desire to avoid making tough decisions, a reluctance to invest in improving upon past solutions to similar problems, a preference for intertemporal consistency, an inclination to follow the example of others and a penchant for pre-commitment’.\textsuperscript{192} Indeed, he identifies the traditions of law making that apparently weigh the past more than the future:

\textsuperscript{189} ibid 747
\textsuperscript{190} Lefebvre (n 17) 139-140
\textsuperscript{191} This will feature in the later discussion on the Temporality of the Legal Rule(s). See Chapter 2
\textsuperscript{192} Wistrich (n 123) 740-741
'A grounding in ancient and moral philosophy, a written constitution that is difficult to amend, entrenched statutes that outlive their transitory purposes, the doctrine of stare decisis, the ex post facto clause, the presumption against statutory retroactivity, statute of limitations, originalist and textualist approaches to constitutional interpretation and the finality of court judgments'.

The effect of these restraints is one which reduces the adaptability of a legal system, resulting in the Rule of Law's 'lag' behind a society in flux. To that effect, an importance is stressed on the 'future life in law' which the author bases upon Kant's notion of foresight as a condition of practical activity (an ability however, which is informed by the past). Human beings are inherently future-oriented and perpetually aspirational; indeed 'however much we respect and are influenced by the past, we understand that focusing our attention on it would be futile. The past has happened and cannot be changed. We can only affect the future'. He refers to Oliver Wendell Holmes' 'bad man theory' which approximates the law as being that which only cares for the material consequences of things rather than formalist concerns of adherence to the past. When lawyers advise their clients, it often relates to forecasts and predictions on what they think will happen, not on 'what has happened' (again, this is used not in the context of factual determination but on precedents). Therefore, if law desires synchronicity, which is understood as keeping up with a society in flux and facilitates the aspirational temporalities of legal subjects, one must encourage, according to the author, the shift toward statutorising law.

Wistrich identifies five attributes of time; 'direction' which assigns prospectivity and retrospectivity to statute and common laws respectively, 'duration' determines whether a law is enduring or transient, 'speed' refers to the pace at which a law changes, 'basis' clarifies whether the information upon which this is predicated is taken from the past or are calculated predictions of the future and 'purpose' looks to whether the change is to maintain the existing rules or to remedy them.
Wistrich levels novel\textsuperscript{198} criticism at Originalist strands of constitutional interpretation, \textit{stare decisis}, the declaratory theory of law\textsuperscript{199} and instead makes an argument for more pragmatic, goal-oriented forms of adjudication. He re-iterates his central argument, the 'Multiplication of Statutes',\textsuperscript{200} outlining that while statutory legislation is supplemented by past considerations (what issue needs reforming), it is generally projected toward co-ordinating future conduct. Similarly, the expansion of administrative regulation,\textsuperscript{201} which accentuates a 'conscious policy intervention approach’ shows that the sands of time are shifting toward a future-oriented approach of law making.

Wistrich explains the normative value of this temporal shift with a defence premised on the chimeric nature of the past. Whilst he concedes that one knows more about the past than the future, determining a natural, value-free past is magnificently treacherous.\textsuperscript{202} Hindsight can revise certain elements, different people may assign varying levels of significance to different facts and as such, the enterprise becomes manifestly aimless. Indeed, the further an event descends into the past, the more difficult it becomes to recollect these incidents. The predicament of ‘temporal-centrism’\textsuperscript{203} also rears its head which describes the penchant for comparing what was done to the standards of present conduct. Basing laws in the future circumvents this problem of what Wistrich attributes as unavoidable relativism and invigorates the law with a dynamism that would not be possible were it based on an ambiguous past. However, remembering of course that the future is unknown and can only be predicted with varying levels of calculation, an obsession with the future may also mean ‘we cannot dwell comfortably in the present’,\textsuperscript{204} allocating disproportionate amounts of power to particular generations, and evaporating the possibility of binding contractual promises (through pre-commitment) that facilitate optimality and value-maximising.\textsuperscript{205} In order to deal with the inherent differentiation of life, according to Wistrich, requires more statutorising.

An agonistic reading and disagreement with Wistrich, specifically his enmity toward ‘past-oriented law’ and predisposition toward ‘future-oriented law’, helps to focus some of the later discussion and provides the basis for the wider theorisation on the Temporality of Legal Rules

\textsuperscript{198} It is novel in the sense that he doesn’t reject constitutionalism for it being exclusively past-oriented, because constitutional documents are often seen as breaks from the past. This is evidenced with pragmatic interpretations of the US constitution.

\textsuperscript{199} Arthur Hogue puts it rather cynically stating that ‘courts resort to a legal fiction or grasp at a mere hint of an analogy—anything to avoid open confession that they are pouring new wine into old bottles.’ See also Arthur R Hogue, \textit{Origins of the Common Law} (Indiana, University Press, 1966) 11

\textsuperscript{200} Wistrich (n 123) 777

\textsuperscript{201} ibid 786


\textsuperscript{203} Wistrich (n 123) 799

\textsuperscript{204} ibid 804

\textsuperscript{205} ibid 804
('TOLR'). He thus describes adjudicative theory in the context of time (though the important distinction to be made is that he is not talking about the relation between time and factual construction in adjudication-'TOA'). Also, disagreement with Wistrich’s ascription as to the natural persons relates to the second of the research questions discussing temporality and subjectivity. In contrast with Bergson and Gadamer who assign the past as necessarily constitutive of the self, Wistrich extinguishes these possibilities in his uncompromising commitment to futurity, a legal subject that can transcend its past. The criticism is levelled therefore more at ignoring a legal subject’s past as constitutive. Another important point worth mentioning is whether a distinction ought to be made between the temporality of the natural persons, and the temporality of the natural persons qua subject of law.

Wistrich’s five attributes of time, speed, direction, basis, purpose and duration demonstrate an important point that time is contemporaneously quantitative and qualitative (certainly a point which, as will later be shown, resonates with Bergson). One source of confusion however, is how the author understands future- and past-orientedness. When Wistrich derides the pastness of the common law, he is saying that it derives its legitimacy from past rules (not factual determination), or the doctrine of precedent. However, it couldn’t be equally said that statutes, in being future-oriented, derive their legitimacy from future rules. So why are they, according to Wistrich, future oriented? What he actually means is that it aims to bind the future; in exactly the same way that common law rules do. Statutes are no more future oriented than common laws, the only difference is that the statutes seemingly imbue a disconnect from the past, which common laws are obedient to. Perhaps what Wistrich more accurately means is that formalist adjudication (as opposed to the pragmatist adjudication he supports) is problematic for these reasons. This perhaps makes another misguided presumption that the common law is not conducive to pragmatist future-oriented adjudication which someone like Patrick Atiyah would appear to disagree with. The common law, in private law areas for example, tend to operate and satisfy utilitarian demands with flexible and responsive ‘past-oriented common law’ rather than supposedly ‘future-oriented statutes’. Also, when Wistrich says that a natural person is future oriented and as such, adjudication should facilitate the foresightedness of its subjects of law, it is not clear why ‘the pastness of the common law’ he derides is analogous to the futurity of persons which he thinks laws ought to embrace.

As part of his larger legal pluralist project, Emmanuel Melissaris’ The Chronology of the Legal, is a fascinating attempt to examine whether and how time is built into the concept of

206 See Chapter 2, section 2.21
207 See Chapters 3 and 5
208 Patrick Atiyah, Pragmatism and Theory in English Law (London Stevens & Sons, 1987) 1-42
209 For an introduction into Temporalities of Law which form part of a larger legal pluralist project, see also Benda-Beckmann (n 63) 1
His ‘Chronos’ is the ability of participants to grasp and control time and constitutes part of their shared experience of the legal. A normative understanding of time is imperative to a normative discernment of law. Melisarris begins by dealing with how legal theory, if at all, treats the issue of temporality:

“They understand it as an entity observable in an objective way, as an object the ontology of which can be grasped definitively. As far as the form and structure of time are concerned, time seems to be understood in terms of the distinction between past, present, and future. History is the flow of events and facts through these three points in time. This flow is linear and forward-facing. The movement is from past to future in the way of the movement of an arrow…it is against this background that the law develops as an historical event”.

This sets up the presumption of linear and ‘objective’ time in law as a top-down normative order that regulates the objective world, but a presumption that is fraught with limitations that is unable to account for explicit expressions of time in legal language:

“There seems to be a coherent and consistent mode of making sense of time normatively or, seen from a different perspective, a way in which a commonly accepted perception of time determines the content of the law in a necessary manner. If that were not the case, why and how the law is connected to conceptions of time would remain unexplained and wholly contingent. So, a suspicion persists that there is a special connection between legal normativity and time, not simply the boundaries of existence of legal norms or the time interval that the pool of reasons admissible in legal reasoning occupies”.

Melissaris explores the systems theory approach of François Ost’s *Le temps du droit*. In it, Ost describes temperance as the rhythm of legal action that enables the harmony of diverse temporalities and the pace at which we organize the governance of our social actions, and

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210 Melissaris (n 124) 841
211 ibid 839
212 ibid 843-844
213 ibid 844
214 See also Nobles (n 116)
this rhythm is set by the four temporalities of the law in their amalgamation: memory, pardon, promise and revision or reproblematization, collectively *mélangées*.216

‘Memory and pardon complement each other- the latter being the possibility of undoing the past (delier le passé), thus being released from its burden, and the former being what facilitates pardon in the first place: a sense of origin and institution that gives rise to a sense of the continuity. Reproblematization expresses radical critique, which puts the act of promising- that is, the act of normatively anticipating the future in the right perspective by releasing it from the asphyxiating embrace of tradition’.217

What the author sees as Ost’s limitations provide the springboard for his Chronos. Whilst he agrees with the merging of the four temporalities, Melissaris says that Ost fails to develop his own *contrat temporal* which the author creatively takes up. For the author, the notion of a temporal contract captures key conditions of the legal community’s epistemological and experiential information which distinguishes law from other normative orders.218

To mature Ost’s *temporal contrat* therefore, Melissaris develops the notion of a ‘shared normative experience as constitutive of the legal’.219 Using Hart’s internal point of view, Melissaris asks what it is that participants actually commit to and how that shared commitment manifests. He refers to Robert Cover’s *Nomos and Narrative* and how narratives encapsulate the *conditions of life* and thus create normative commitments. In this sense, it is not authority, but rather these bonds which bind a community together that compose the legal. Melissaris however, adds that.

‘In order for narratives and symbols of the commitment of participants to their shared experiences to emerge, there must be something else underpinning them and lending them coherence. Narratives that constitute, according to Cover, or reveal, according to my reading, the legality of the normative commitment of participants, must be joined together by something immanent in the way the participants in a legal discourse experience their place in the world and not merely in the contingent manifestations of their place. If we are to uphold the idea that the concept of law enjoys some ontological autonomy and does not collapse into other normative categories and, at the same time, we wish to decentralize that concept of law and disassociate it from the state,
then we are in need of an understanding of the legal that is abstract and will, therefore, enable us to locate and explain legal phenomena so as to map and make sense of the legal territory’.\textsuperscript{220}

Normativity, as actions that ought to be pursued, require an understanding of the actions and their context. The context is composed of structures (law being one of course) and one must both understand them and understand how we can change them. The law as a structure makes two claims which include the ability to evaluate on past actions and to mediate between \textit{phenomenon} (facts) and \textit{noumenon} (norms).\textsuperscript{221}

The shared experience which participants commit to is explained as follows:

‘It is connected to the way the participants relate to the world, the way they understand themselves in their environment and how they interact with others. It is normative not in the sense that it has action-guiding force, but rather to the extent that it concerns the idea of justice and the possibility of transforming the world with reference to that transcendental and acontextual idea by imposing constraints on freedom of action. At the same time, it is shared; that is, it is necessarily social. This differentiates it from the way an individual rational agent understands and applies the moral law by exercising his or her autonomy. Finally, and more importantly, it is experiential: it is part of the form of life of a specific host of people who share an epistemological understanding of the world’.\textsuperscript{222}

Thus, legal orders are identified by the outer limits of the commitment of participants to their shared normative experience, ‘that is, the combination of their experiences of the world and their ability to prescribe ways of transforming the world collectively’.\textsuperscript{223} To restate his position, Melissaris reformulates the legal form as the participants’ idea of justice and a collective legal common sense which is a way of understanding the world and how to change it.

\textit{Chronos} therefore is the ability of the legal community to synchronise the time of their real world with the imaginary temporality of the normative world.\textsuperscript{224} This not only indicates the

\textsuperscript{220} ibid 850
\textsuperscript{221} ibid 851
\textsuperscript{222} ibid 852
\textsuperscript{223} ibid 853
\textsuperscript{224} ibid 855
nature, form and structure of time of the community but explains how normativity is placed in
time. Chronos delineates the temporal boundaries of the legal order, in two senses. In one
sense, it refers to the participants’ understanding of the ‘normative maintenance of the
historicity of their links, and the merging of that with the teleology of their existence in common,
their shared aspirations, and their aims’.225 The other sense, Melissaris illustrates with
reference to the case of McLoughlin v. O’Brian,226 in which a woman was permitted to claim
for third-party psychiatric harm after her family were killed in a traffic accident. In determining
how we isolate the relevant event (referred to as ‘event individuation’), as well as which norms
and principles will apply to it, one must locate this against the shared normative experience.
In the case of McLoughlin, Chronos is able to explain why the delay between the accident and
the mother’s knowledge of the fatalities warranted compensation:

‘Translatability of time intervals into normative language. It is only because of that pre-
existing commitment to the possibility of normatively grasping, controlling, and
transforming time, and therefore finding a normative meaning to the time difference
between the two central events in McLoughlin, that it is possible to reconcile with the
crippling contingency of the decision, to attach some normative importance to it, and
to instantiate the relevant rule’.227

Melissaris’ ‘temporal contract’ provides original insights as well as translating and
consolidating important continental literature on law and time,228 Perhaps because the
orientation of the thesis works toward what may be called the ‘first principles of law’229 (i.e.
facticity) one initially struggles with Melissaris’ abstraction of legal time in the Chronos. The
collective time of the participants allows it to develop the law and the world they inhabit and
draws in their normative commitment because of law’s ability to capture the conditions of life.
However, the author’s claim that laws that capture the conditions of life will foster normative
commitments is paramount. Conditions (rather than causes) appear to be given a temporality
that upholds how time-bound narrative understandings are essential to legal commitment. It
could be said that a theory of time in adjudication that fails to do so, inhibits its transformative
potential. This goes to illustrate the radical underpinnings of Melisarris’ Chronos, in which time
is effectively given primacy.

225 ibid 855
226 [1983] 1 A.C. 410
227 Melissaris (n 124) 858
228 Gerhart Husserl, Recht und Zeit: Fünf rechtsphilosophische Essays (Vittorio Klostermann, 1955)
229 Lefebvre (n 17) 56
Interestingly, he says that perceptions of time, history and historical information which legislators and judges incorporate into law are important but reveal nothing about how law is connected to time. The primary intellectual disagreement would be levelled at how the author dismisses this ‘historical information’ that the judge takes into account as not indicative of legal temporality (though this criticism may be misfired, as Melissaris is concerned with legal systems and legal theory rather than adjudication and its construction of facts/pasts). What the author dismisses as empirical reductionism this project takes up as the first principles of law. Certain *types of facts*, it will be argued, can be distinguished by the temporalities upon which they are contingent. To quote Keebet von Benda-Beckmann, ‘temporalities of law become perceptible only in concrete places’. 230

Developing the idea that ‘multiple temporalities’ exist within the social world and that they may be a source of conflict is dealt with in David Engel’s *Law, Time and Community*. He uses the example of Sander, a rural county in Illinois and tries to capture to what extent the laws were able to accommodate the antagonistic ‘temporal commitments’ of its citizenry.

Engel looks at time as a cultural construct, drawing inspiration from Henri Bergson’s experiential account of time and Durkheim’s bipolar model of temporality as a framework which is collectively constructed. 231 In effect, the ‘model’ of time (akin to French earlier), juxtaposes modernity and traditionalism and Engel also distinguishes between two aspects of the human experience of time; non repetition and repetition. 232 The author then embarks on a case study which looks at the interrelation of experiences of time and social change. Engel posits that the antinomy within the community and their response to these changes, were pinned on contrasting images of time. 233

Repetition or *iterative* models of temporality are often connected with agricultural societies. Augmenting ideas with the past legitimates the present with ‘recurring images of sameness, which reaffirm and reinforce essential enduring qualities of a culture’. 234 This is contrasted with the non-iterative or linear model that is perpetually engaged in the pursuit of progress (often related to capitalist modes of production). For the former, progression may be perceived as

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230 Benda Beckmann (n 63) 1-2
232 ibid 609
233 ibid 610
234 ibid 610
Cultural disintegration\textsuperscript{235} and for the latter, sameness is cultural stagnation.\textsuperscript{236} Ultimately, these are seemingly irreconcilable and are used to illustrate the nature of social conflicts.\textsuperscript{237}

The study hinges on the opening of a new Cosmo plant and though not the first time a big business had tried to establish itself in the area, some residents saw this gentrification as undermining their iterative temporal commitments. The opening had come after a fierce debate about the community's changing tides, its connection to its past and its wandering into the future. The traditionalist saw this as a threat to their 'iterative lifestyles', the liberals and business oriented welcomed it with open arms. The latter's views prevailed and the establishment of a Cosmo plant signalled a symbol of change in Sander County. What the author refers to as an 'event of articulation',\textsuperscript{238} (the factory opening) symbolised the respective pull towards either the past or future and, crucially, 'provided a temporal framework for other forms of comparison and differentiation'.\textsuperscript{239} The same event was perceived in two different ways by virtue of the competing temporalities of the rural folk.

Engel tries to understand the role law has in settling or indeed creating these conflicts. He begins by stating that legal norms have no predisposition to either the iterative or linear models and in fact characterise both the stability-change paradigm.\textsuperscript{240} Contractual disputes, based on old customs of promise and exchange warranted intervention by the courts as a welcome mechanism 'to force the repetition of values that the culture could no longer maintain'.\textsuperscript{241} Engel makes it clear however that this is the means by which 'iterative expectations could seek fulfilment' rather than continuity with tradition \textit{per se}.\textsuperscript{242}

Engel's strongest claim, when he hints toward a synthesis of this dialectical relation between iterative and linear models of experiential time, is the tendency to dismiss time as mere epiphenomenon:

'By emphasising the differences between past and present- the irreversible or linear aspect of time contrasted with iterative expectations- they could, for example, underscore the importance of certain traditional but embattled values, shore up

\textsuperscript{235} ibid 611
\textsuperscript{236} ibid 611
\textsuperscript{237} ibid 612
\textsuperscript{238} ibid 615
\textsuperscript{239} ibid 615
\textsuperscript{240} ibid 626
\textsuperscript{241} ibid 626
\textsuperscript{242} ibid 627

59
particular authority figures, or stigmatize elements of the local society as ‘outsiders’. Used in this way, recollections of the irretrievable past were more than nostalgia: They were efforts to shape opinion and assert control. By contrast, those who criticized the grip of ‘old-fashioned’ attitudes in the community were engaged in their own effort to use the imagery of time- in this case, iterative time portrayed in negative terms- to push the community in new directions and to reinforce new centres of power and influence.'

Time helps to organise and systematise events. The stakes are therefore very high and Engel provides a convincing case for how competing temporalities can help us to re-understand certain hostilities. The main strength of the contribution however, lies in elevating the significance of temporality as a source of antimony. It dismisses the idea of time as a mere by-product of the social world and instead places it as part of the cognitive apparatus that allows us to make sense of the world (in a way, extending the Kantian axiom from phenomenology to anthropology). To reiterate once again, it is not about the construction of time but how construction is contingent on time. Engel in effect pushes forward the initiative for a turn in understanding social relations through the lens of time.

Before moving onto the seminal article by Mark Kelman, the final parts of this section deal with a few conference and workshop papers exploring the themes of law and time. To recall, these include a collection of papers from a symposium on Time, Law and Society published in 1994 and a The Temporalities of Law conference hosted by the Max-Planck Institute for Social Anthropology.

1.31 “Time, Law and Society”

Though Carol Greenhouse had written several important pieces on law and time from an anthropological perspective, the 1994 Nordic Symposium on Time, Law and Society appeared to be the first concerted attempt to synthesise a collective literature from a legal theory and practice perspective, on time and law. Mogens Blegvad’s opening remarks begin by explaining how views of human society and sociability are necessary for understanding law. Blegvad is sceptical of ‘future-oriented theories’ in the social sciences, deliberating over Bentham’s
hedonic calculus, Hume’s moral theory and the general inadequacy of futurity in neo-classical economics, in which he quotes Gordon C Winston:

‘Time orders events. A fundamental complication in social analysis is that the same events must always be ordered under two different, though compatible, schemes. Under one ordering, any event can be described with respect to another event as taking place before, after, or simultaneously. Under the other ordering, a person or society is introduced, whereupon the same events can also be ordered as future, now, or past...it is useful to make this difference stark by describing these alternative orderings of events as two different kinds of time. An analytical time involves only the before-simultaneously-after ordering. A perspective time shows events the way people experience them in future-present-past ordering...Analytical time…permits analytical mind games, thinking about events that take place in time, while ignoring the constraints placed on an actual participant in those events. Analytical time lets us wander over the time freely...But if we think in analytical time, we can live, act, and decide only in perspectival time’.244

Perspectival time is inherently experiential and purports to capture the reality of participants and their surroundings. Analytical time, Blegvad says, is an uneasy fit that presumes absolute knowledge of a future the actors cannot have.245 Economists are generally able to retrospectively theorise about an actor’s expectations on the basis of past experience. Indeed ‘experience, expectation, and strategy belong to the subjective sphere, but the outcomes of following a strategy are determined by the objective structure of the world’.246

Blegvad also explains how Winston describes institutional pressures on human action and interaction that considers the constraints on agency247 though he rejects radical subjectivists that render economics as nothing but pure conjecture.248 Institutions, he cites, have a regulatory effect on temporality, reducing Hume’s infirmity of the uncertain future to fomenting our predilection toward short termism. Blegvad also hesitates toward excessively ‘binding the future’249 as that which stifles necessary change. Interestingly, he then goes on to say that ‘law as an institution involves an attempt to bind the future, but this can be turned around.

246 ibid 16
247 ibid 17
248 ibid 16
249 Much like Wistrich, Stewart and Khan
Since the future becomes the present and the present the past, it means also that past events are meant to determine the present'.

Kevät Nousiainen’s paper, *Time of Law- Time of Experience*, is an immensely important contribution, placing itself as one of the few which looks at the link between temporality and reality construction. Time is ontologically and epistemologically involved in the most basic questions of law, with a particular emphasis placed on laws which include an intent element. She attempts to reconstruct temporality from the view of the action subject and suggests that adjudication involves an interesting temporal challenge of being *ex post* though attempting to reconstruct the view of the action subject *ex ante*. Thus subjective time, Nousiainen cites, is operative alongside a universally accepted conception of time, and *both* inform the law. She thus establishes the triad of ‘reality construction, text, time’.

The triad offers the clearest description of how temporality conditions adjudication’s factual construction. Adjudication will utilise broad or narrow time frames for determining ‘what happened’, wherein the broad time-frame considers incidents as constitutive of a unified whole, and the narrow as singular and disconnected. Crucially law, according to Nousiainen, naturally produces a ‘subject structure that keeps apart the subject in its active and passive formulations. This seems to implicate two time structures- a subjective, active and ex-ante time, as well as an objective, passive and ex-post time’. Proceeding to develop a phenomenological conception of time of the action subject, Nousiainen then starts to briefly outline Bergson’s theory of time, *durée*, as experiential time, and his critique of Kant’s concept of time, accusing him of ‘spatialising temporality’. Bergson conceptualises time as qualitative, connected together in a unified, mobile whole, rather than a homogenous continuum that can be divided into parts which is characteristic, from the view of Bergson, of Kantian time. She uses Bergsonian time to suggest that changes and subsequent measurement (narrow or broad time frames) are impossible as one cannot ‘measure differences in experience’. In other words, to delineate experience (or to create what Khan has called temporal triggers) is inimical to lived experience (or time). Interestingly, one example she uses is Battered Woman Syndrome and the choice of time frames adjudication uses in determining culpability.

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250 Blegvad (n 245) 21
251 See Chapter 1, section 1.4
252 Nousiainen (n 68) 23
253 See also Hutton (n 32) 279
254 Nousiainen (n 68) 29
255 Nousiainen (n 68) 31
256 This will be explored in Chapter 6
These two articles are intensely relevant to the research questions. Mogens Blegvad makes explicit the association between temporality and reality construction in adjudication and the bifurcation of time he borrows from Gordon Winston helps to explain how events are ordered in both the analytical and perspectival guises, the difference being that the latter involves the content of these experiences (he uses the word constraints), rather than just their ordering. Analytical time is a theoretical construct but perspectival refers to the 'subject in their active and passive formulations'. Thus, something may be missing from how analytical time constructs reality from how it is experienced in perspectival time. The differences between these categorisations of time seem to be absorbed by Nousiainen's explanation of Bergson and 'spatial time'. It asks some interesting questions as to what constraints pertain upon actors that are absent in the privileged analytical sense which presume temporality and causality as being natural associates. Instead, a creative reading of perspectival time reveals not exclusively causal relations but aims to reveal conditions (or constraints on the natural persons) as an aid to enriching understanding of action. As Blegvad further accentuates, actors that are represented in perspectival time do not have the dispensation of knowing the future that analytical time presumes ex post. Analytical time therefore constructs events in a manner that obscures and obfuscates, replacing concreteness with investigative convenience.

Theories of economics and moral theory in terms of temporality which is similarly used by Wistrich and is applied to the later discussion on legal theory ('TOLR').

Importantly however, Nousiainen effectively pre-figures what will become the theoretical bases of the different forms of adjudication, predicated on the temporalities of Bergson and Gadamer, and the interplay between text, time and reality construction. Although she does not delve into the problem of the competing conceptions of temporality, or the theoretical scrutiny of these temporalities, she does clearly set out that adjudication's construction of reality is contingent upon time.

1.32 “The Temporalities of Law”

Keebet Von Benda-Beckmann accentuates the centrality of time in social stratification and practice and importantly, stipulates how the time of law only becomes perceptible in 'concrete places'. This pre-figures the later discussion that typologies of facts exist, distinguished by the temporalities upon which they are contingent.

257 See Chapter 3, section 3.2
258 Myrtle Korenbaum, in the preface to Gurvitch (n144) xxii
259 See Chapter 2, section 2.21
260 Benda-Beckmann (n 63) 1
Khan, French and Wistrich’s contributions are all applauded and she meticulously goes through different instances which demonstrate the linking of time, most lucidly in evidence.  

Interestingly, the author makes a very important point aimed at pastness; ‘in the process of constructing and shaping collective memory, specific points of time in history tend to be highlighted while other periods of history are edited out in order to legitimize governance regimes, racial categories, or to assert claims to political positions under local law’.  

This appears to touch upon the scenarios mentioned in the introduction of the multiple pasts, some of which are considered immaterial (what will later be described as the variegated past in adjudication as understanding).  

Additionally, as well as discussing the complex temporalities present in ‘risk societies’, Von-Benda Beckmann also acknowledges the ‘lag’, between society and the rule of law (effectively reinforcing Khan’s thesis of temporal inertias). Though intended as a prologue to the volume, it deduces key themes which highlight the significance of the larger discussion. This includes her mention of times manifestation in ‘concrete places’, how law sews the past, present and future and the calculated construction of pastness.

The other important article from this volume is Armin Höland’s *Calibration and Synchronisation of Law by Zeitgeist*. The author describes the ability for a legal order to either change or stabilize with reference to paradigm shifts, or the *Zeitgeist*, defined as the ‘real or hypostasised societal consensus on values, moral judgments, the need for changes and innovation as well as the justification for preserving the past and the status quo’. The nature of a legal order’s response to this meta-legal reference realises a temporality; either *calibration* which is ‘the point of departure for interpreting or deliberating on a given norm or legal concept in order to maintain logical consistency and to ascertain if the intention and purpose of the law had been appropriately defined at the outset’, or *synchronisation* which ‘ensures that a society’s legal framework comprising rules, regulations and reasoning is in tune with the developments in the social, economic and cultural environment of its application’. Indeed, the judges are the gatekeepers of the status quo. One may liken these to ‘stability and change’ of a legal order respectively and how this is able to demonstrate the system of laws’ ability to keep apace of society. The notion of the Zeitgeist is developed as having temporal resonances (it may be worth considering the case

\[261\text{ ibid 6} \]
\[262\text{ ibid 7} \]
\[263\text{ See Chapter 5} \]
\[264\text{ Benda-Beckmann (n 63) 12} \]
\[265\text{ Höland (n 49) 100} \]
\[266\text{ ibid 106} \]
\[267\text{ ibid 105} \]
\[268\text{ ibid 100} \]
\[269\text{ Devlin (n 47) 1} \]
\[270\text{ Höland (n 49) 100} \]
\[271\text{ ibid 101} \]
of *R v. R* as responding to the Zeitgeist or the recent US Supreme Court decision of *Obergefell v. Hodges*.273

Höland’s discussion of a legal system’s propensity toward stability and change once again refers to the Temporality of the Legal Rule (‘TOLR’), providing a synonymous exposition of Khan’s temporal inertia thesis and is another useful prelude to a point which will be made later as to how legal and adjudicative theories can be distinguished based upon their propensity toward the past or future (and thus temporality as per Wistrich and others). As a precursor to that discussion, a case can be made that the author’s description of calibration is a synonym for pragmatic adjudication whilst synchronisation may be akin to formalist theories of law.

1.33 Kelman & the ‘Time Frames’

This section will now finish with Mark Kelman’s 1981 paper entitled *Interpretive Construction in the Substantive Criminal Law*,274 which earns its separation due to its direct importance to the research questions and the questions it produces through a critical engagement with it. Along with Nousiainen, Kelman is one of the few scholars of law that have specifically linked temporality to reality construction. He begins with the claim that legal argument proceeds in two stages. Of interest is the first stage which is composed of four unconscious interpretive constructs275 that refer to how adjudication constructs these assemblages of what happened and how it frames possible rules to handle them. The first of these interpretive constructs include the use of narrow or broad time frames (much like Nousiainen) where adjudication may ‘incorporate facts about the defendant’s personal history. Other times, we incorporate facts about events preceding or post-dating the criminal incident. An interpreter however, can readily focus solely on the isolated criminal incident, as if all we can learn of value in assessing culpability that can be seen with that narrower time focus’.276 A simple example demonstrated by Alan Norrie,277 is an old American case of *State v Preslar*278 where a woman, after having been beaten by her husband, left the family home for her father’s with her child. Some distance from her house, she rested and decided to continue the following morning but died of exposure. The court argued that she had exposed herself without necessity and was ‘fully

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272 [1991] 3 WLR 767
274 See also Kelman (n 10) 591
275 Benjamin Cardozo also accounts for the ‘subconscious element in the Judicial Process’ as the forces of ‘likes and dislikes, the predilections and the prejudices, the complex of instincts and emotions and habit and convictions, which make man, whether he be litigant or judge.’ See also Benjamin Cardozo, *The Nature of the Judicial Process* (Yale University Press, 1921) 167-190
276 Kelman (n 10) 594
277 Norrie (n 11) 141
278 (1885) 48 NC 417 18
voluntary’. Had the courts applied a broader time frame perhaps they would have connected the woman’s act to the ill-treatment from her husband and perceived it as a constituted act of necessary self-preservation.

Second of the constructs, related to the first, is the apportioning of *disjoined or unified accounts* which may force us to look beyond an isolated incident say if a defendant made a decision at an earlier moment to act criminally; ‘is a negligent decision to kill followed by an intentional killing a negligent or intentional act? Is the person who misses X and shoots Y someone who commits two crimes- attempted murder of X plus, say, reckless homicide of Y- or one crime- an intentional murder of the person?’ 279 Thirdly, *broad or narrow views of intent* which reflect upon whether, in the commission of a crime, a person thinks singularly about each and every aspect in the execution of the criminal act. Finally, *broad or narrow views of the defendant* which seeks to ascertain whether the person is a constituting or constituted subject of law, either ‘rational and so the legally competent...classic contractor’ 280 or situated. 281 Alan Norrie says that the paradigmatic rational legal subject 282 loses its special character when a broader time-frame is adopted. 283 Recalling the ‘multiple pasts’ (and indeed Ahluwalia) that were discussed in the introduction, why does the law see it pertinent to include some things such as provocation as a defence in its establishment of ‘what happened’, but exclude for example, social circumstances and pressures as exculpatory? ‘Time frames’ therefore focus the difference between the ‘free-will paradigm’ and the ‘spectre of determinism’ in law. 284

The conclusion that Kelman makes is that criminal law tends to adopt narrow time frames and, to quote Lindsay Farmer’s reading of Kelman; ‘has particular political implications, buttressing a particular view of free will, since it leads us to ignore earlier decisions or actions that could have an impact on our understanding of how free or determined a particular act actually was...shaped by political considerations and served certain social and class interests’. 285 In effect, broader time frames incorporate facts that may destabilize the legal subject as one that is free willed and autonomous, whereas narrower time frames reinforce the willed actor (hence engaging the second of the research questions that time and subjectivity are connected).

279 Kelman (n 10) 595
282 Naffine (n 43) 64-65
283 Norrie (n 11) 137-141
285 Farmer (n 73) 340
What Kelman is indirectly hinting at is that time or temporality is inextricably linked to how judges construct both the legal event, subjectivity,\(^{286}\) and how this is ‘law as politics’ by another means. Thus it can literally be said that time frames adjudication’s construction (as per the extrapolation of the Kantian axiom). Kelman clearly outlines a relationship exists between temporality, subjectivity, reality and criminal responsibility. A ‘narrow time frame’, to use Kelman’s nomenclature, may see that a defendant is charged and convicted with murder. However, a time frame that moves beyond the \textit{mens rea}, to include a qualifying trigger in the loss of self-control, or a condition that pre-exists the narrow time frame, such as insanity, mitigates responsibility-\textit{but why ought adjudication stop there?} For these reasons, subjectivity, the construction of legal reality, and the apportioning of responsibility appear to be contingent on temporality (specifically the phenomenon of \textit{time frames}) and, overall, how time constructs ‘what happened’ in adjudication. ‘Time-frames’ therefore are both jurisgenerative and political.

There are some early criticisms that can be levelled at Kelman which make his thesis even more compelling and in the process, engages the second of the research questions that temporality is prior to subjectivity- or that constructions of subjectivity can be reframed through the lens of time. Is Kelman being too hasty here, re-dressing an old debate in different attire? In other words, is the compartmentalisation of subjectivity that he describes, which actualises the difference between a constituted legal subject and a rational legal subject (broad-narrow time frames respectively), just another discussion about subjectivity? In other words, is it \textit{notions of subjectivity (not time) that determine how adjudication constructs its past} or is it in fact \textit{time that determines how adjudication constructs subjectivity (and the resultant legal event)}? Can we think of legal subjectivity in terms of temporality?

A creative reading of Kelman could argue that he thinks it is the latter, though one can understand that there are good arguments for both arrangements. It’s equally as convincing to suggest that temporality and subjectivity are actually the same thing. Indeed, ‘there is a close relationship between subjectivity and temporality- that in some way one can envisage subjectivity itself as temporality’\(^{287}\) In many laws, subjectivity is defined, or implied generally as the standard of reasonableness \(^{288}\) and concomitant to this standard is responsibility attribution. However, what Kelman appears to be suggesting is that the normative assessment of relative responsibility is contingent on the time-frames adopted. For example, a narrow time frame may apportion blame to the defendant in a negligence case. A broader time-frame however, may apportion partial responsibility to the claimant also. Would a ‘broader framing’ of the legal event and legal subject change a judge’s and jury’s normative assessment of

\(^{286}\) Grabham (n 64) 107

\(^{287}\) Achille Mbembe, \textit{On the Postcolony} (University California Press, 2001) 15

\(^{288}\) The thesis also claims that the reasonable man can be situated. See Chapter 6, section 6.1
responsibility? The question then becomes, if one can broaden ‘what happened’, why stop there? Indeed, what lends to the process of time-framing and thus determining whether certain facts are relevant or not? What constraints exist on the very phenomenon of time-framing in adjudication? To repeat Lord Bingham who stated that ‘in deciding facts, the judge knows no authority, no historical enquiry and (save on expert issues) no process of ratiocination will help him. He is dependant, for better or worse, on his own judgment’. Time, subjectivity and responsibility are intertwined but it is perhaps the first of this triad which has rarely been problematised.

Another defence of Kelman’s proposition that subjectivity can be reconfigured through a discussion of time, is that he refers to these as unconscious interpretive constructs, so rarely, if at all, will judges unequivocally or explicitly refer to ‘time frames’. This thesis therefore, sticks with Kelman’s claim (whether he intended it or not) that temporality is, in part, responsible for subjectivity and adjudication’s construction of social reality. It grounds this on the idea that the legal event, as those facts which laws give meaning to, are contingent upon particular understandings of temporality (which will become clear as the thesis progresses) and that adherence to a particular theory of time means adjudication produces a particular legal event and particular type of subject in its determination of what happened (thus the difference between abstract and concrete judgment).

Summarising the themes from this key contribution, if one accepts that temporality has something to do with how adjudication constructs ‘what happened’, the question then becomes ‘what theory of temporality lends toward this process of framing reality’ or ‘compartmentalisation’ of subjectivity. ‘Time frames’ seem to suggest a theory of time that is divisible rather than connected, which allows one to ‘carve up’ experiences of reality into distinct parts (recall the examples given pertaining to the discrimination of pastness). What enables these pasts to be constructed in either narrow or broad, unified or disjointed ways? How are different forms of subjectivity represented in factual construction? If indeed this is ‘law as politics’ as Kelman asserts, does time conceal an axis of power through adjudication? If another theory of time posited that experience is time, in which the past and present are interconnected and thus resistant to ‘carving up’ or ‘framing’ (as Ahluwalia seemed to suggest), what effect may this have upon adjudication’s construction of subjectivity, the resultant legal event and normative ascriptions of responsibility? In other words, a theory of time which ‘frames’ is more likely to produce a retrospective narrative that is different from a theory of time which is hostile to such framing.

289 Bingham (n 26) 3
290 Or ‘spatial time’. See Chapter 3, section 3.21
291 As is Bergson’s theory of time as durée. See Chapter 3, section 3.1
The following sections introduce the theoretical foundations of the thesis in Bergson and Gadamer, specifically focussing on the uses of these theoretical frameworks in legal scholarship, framing them and the enquiry in Heidegger’s work on temporality. Bergson and Gadamer, as will later become clear, offer theories of temporality which emphasis the attachment of the present with the past, and which are both resistant to division. In Bergson, his theory of temporality presupposes the entirety of the past (‘the Pure Past’) with an ephemeral present that is in a constant state of becoming. Similarly, Gadamer offers a theory of time that is ‘contextual’ in which an ‘effective history’ necessarily situates and shapes our present.

At the most abstract level, Bergson and Gadamer allow the thesis to articulate a theory of becoming which conceptualises reality as constantly in a state of flux (what Deleuze says, reading Bergsonian time, is ‘internal difference’) and being as mere appearance. More concretely and building on the ‘Kantian axiom’ in which temporality is the \textit{a priori} condition for shaping phenomena, Bergson and Gadamer will later explain the particular and favourable productions of the legal subject (as ‘situated’) and event that emerge in cases such as \textit{Ahluwalia}. Not surprisingly, Nousiainen uses Bergson’s theory of temporality in explaining reality construction in the use of Battered Women Syndrome defence.\footnote{Nousiainen (n 68) 36} Indeed, both Bergson and Gadamer importantly, can be read as linking temporality with consciousness, and thus, creatively extrapolating this, temporality with fact construction in adjudication. However, recalling that this thesis is one of \textit{opening without closure}, the primary direction of the work is to problematize temporality in adjudication’s factual construction (‘opening’) while secondarily trying to articulate alternative theories of time that may produce alternative constructions of fact in adjudication (‘without closure’)- therefore though commitments are made here to Bergson and Gadamer, future development of the work may seek exploration in other theories of time.

\footnote{The creative extrapolations of these theories and the temporal resonances of their work will be saved for the later discussions in chapters 3 and 5. However, it is claimed that the temporalities extracted from these theories produce the basis which informs Lucy’s description of concrete judgment (later \textit{adjudication as understanding}) that harnesses the transformative potential of adjudication.}

\footnote{Gilles Deleuze, \textit{Bergsonism}, (Hugh Tomlinson and Barbara Habberjam trs, Zone Books, 1991) 99}
1.4 The Kantian Axiom and Heidegger

This section focusses upon situating the ‘Kantian axiom’ which underlies the project (and the first of the research questions; that factual construction in adjudication is, in part, contingent upon temporality), as well trying to reframe the construction of legal subjectivity in terms of temporality (the second of the thesis questions that will try to articulate that temporality is prior to subjectivity; or that how the paradigmatic abstract, deracinated and ‘rational’ subject of law is actually contingent upon time). The axiom is developed from Kant’s *Critique of Pure Reason* where he discusses his 5 theses of time, the final one positing that temporality ‘determines the relation of representations in our inner state... [is] the a priori formal condition of all appearances in general’. This axiom is creatively extrapolated in rendering the thesis’s novel understanding of factual construction in adjudication through temporality. The emphasis and enthusiasm on temporality (though the thesis merely claims that temporality is, in part, responsible for fact construction) is similarly postulated by Martin Heidegger. One of Heidegger’s key contributions to European philosophy had been the study of *Being* rather than beings. The latter refers to entities and the features, substances or essences of those beings- what he refers to as *ontic knowledge*. The former however was the proper focus of ontological enquiry, *Being as such-* what did it mean to be? Heidegger therefore attempted to upend millennia old traditions of Western philosophy focussing in particular on Aristotle and Kant. The discussion of his work here however, is far narrower and focussed, helping to frame the enquiry which entails a creative use of the ‘Kantian axiom’ and in which Bergson and Gadamer can be seen as Heidegger’s intellectual progeny.

Martin Heidegger’s *Kant and the Problem of Metaphysics* is a thoroughly forensic interpretation of Kant’s 1st edition296 of *Critique of Pure Reason* and is often considered the sequel to Heidegger’s *magnum opus, Being and Time*. The *Kantbuch*, as it is colloquially named, has frequently been attacked as violent in its rendering of Kant’s transcendental philosophy in which ‘his so-called thoughtful dialogues often seem more like rapacious monologues’. Nonetheless, some have defended Heidegger’s interpretation whilst levelling this charge of violence against neo-Kantians.298

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296 Heidegger says that in the 2nd edition, timeless concepts of Kant’s transcendentalism prevail over time and hence Kant moves away from the question of time and Being. Heidegger also thinks that Kant, in the second edition, retreats from affording the prominent role of the Imagination in his threefold synthesis- hence why Heidegger prefers the 1st edition.
297 Daniel Dahlstrom, ‘Heidegger’s Kantian Turn: Notes to His Commentary on the “Kritik Der Reinen Vernunft”’ 45, 2 The Review of Metaphysics (1991) 331
In *Critique*, Heidegger finds a work of literature that is finally immersed in the real question of Being; a question that presupposes what he had otherwise seen in the great canons of philosophy as ontic endeavours. Whereas for Kant, the *Critique* is an exposition of the threefold synthesis of apprehension, recognition and reproduction, the *Kantbuch* is ‘devoted to the task of interpreting Kant’s *Critique of Pure Reason* as a laying of the ground for metaphysics and thus of placing the problem of metaphysics before us as a fundamental ontology’. So while neo-Kantians argue that *Critique* is an epistemology that aims to ground the natural science, Heidegger believes that Kant begins to provide an ontology of nature, not limited to the natural sciences. In the end, though Kant begins to tread the path toward real ontological inquiry, Heidegger says he ‘shrinks back’ from the possibility of explaining the temporality underlying his transcendental philosophy.

Heidegger locates the question of Being in temporality. Temporality was the concealed or neglected source of traditional ontological horizons and conceptions. His notion of ‘Originary Temporality’ operates in Kant’s threefold synthesis of the transcendental deduction and schematism; Synthesis of Apprehension concerns the reception of sense data, Synthesis of Recognition aligns this with concepts, and Synthesis of Reproduction in Imagination allows the mind to oscillate between the two. This triumvirate relates to Sensibility, Understanding, and Imagination of the cognitive apparatus respectively, together to produce the transcendental unity of apperception which leads to objective experience.

The Imagination is what ensures the continuity of sensations whilst the mind runs through new sensations. If it were to lose previous sensations, it would be stuck with instantaneous and isolated sensations and thus ‘the action of reproducing previous elements of the manifold is the synthesis of reproduction’. Apprehension and Reproduction therefore are inseparable. However, the mind can only reproduce a sensation in the Imagination if the new sensation can be identified with a previous one. This identification occurs in the synthesis of recognition in the concept which unites the sensations into a single representation. In short:

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299 Martin Heidegger, *Kant and the Problem of Metaphysics* (Richard Taft trs, 5th edn, Indiana University Press 1997) 1
300 Kaüfer (n 298) 184-185
301 Heidegger (n 299) 112
302 Dahlstrom (n 297) 336
303 Kaüfer (n 298) 189
304 ibid 190
‘The mind can only apprehend the elements of a manifold if it also reproduces them. And it can only do this if it recognizes each element as the same again by organizing the apprehension and reproduction according to a rule. This is not merely a connection between the three distinct actions that mutually presuppose one another, but an explication or analysis of three aspects of a single, unified cognitive capacity.’

Where do we situate what I have called the Kantian axiom into this triumvirate? Heidegger, like Kant, similarly afforded time as the condition for the possibility of experience, as mediating between sense and thought. He outlines the rightness of Kant in that Kant identifies temporality as a source of what it means to be, designating it as pure intuition not an empirical one. Indeed, in Kant’s account, then, Heidegger finds his own distinction between an “original”, “ecstatic” sense of time (“temporality”), providing the meaning of being, and various “derivative”, “vulgar conceptions” or an “endless time”. Indeed,

‘Heidegger employs the term “temporal” to characterize the fact that the way in which human existence or being-in-the-world is present- and that means equivalently its transcendence, that is to say, “the possibility of experience,” or the way in which things are able to be present to and known by it- is inseverable from the past into which that human being has “always already” been thrown and, he insists, more importantly, from the finite future it is constantly projecting. We exist as something that both “has been around” and “is making things present,” precisely by always being “ahead of ourselves” and never completely “within” past or present. Temporality, this thick, ecstatic sense of time, the inevitable interplay of presencing and absencing, is what, in the final analysis, in one way or another, determines what ‘to be’ means, whether in the case of human existence, a tool, or a formula.’

Returning back to the threefold synthesis, Heidegger then demonstrates the essentially temporal character of all three components. The synthesis of apprehension produces representations of the present instance whereas the synthesis of reproduction combines these present representations with previous, past ones. Recognition is the ability to identify an impression as the again by ordering it according to a rule supplied by the concept. Heidegger

305 Kaüfer (n 298) 190
306 Dahlstrom (n 297) 333
307 ibid 337
308 ibid 351-352
says the concept does this by supplying a rule that already prefigures the future re-
identification of the same impression again as this kind of thing.

‘Insofar as the three modes of synthesis are related to time, and these moments of
time make up the unity of time itself, the three syntheses themselves obtain their own
unified ground in the unity of time. The point is that apprehension is unified with
reproduction and pre-cognition just as the present, past, and future constitute a
unity’.310

There is, however, a deeper sense of time that Heidegger outlines by developing the
imperative role of the Imagination in the threefold synthesis and how it ‘constitute[s] the
ripening of time itself’.311

‘The synthesis of apprehension in intuition enables representations of present
impressions...Here, the present that is apprehended is not a present impression, but
the present moment, the “now” as such. Similarly, the synthesis of reproduction in the
imagination produces a representation of past “nows”, which the synthesis of pre-
cognition in the concept projects onto future “nows”. The intelligibility of the sequence
of moments itself is constituted for the finite intellect in the action of the pure threefold
synthesis. As Heidegger puts it, the syntheses produces time, or are “timeforming”’.312

The unity of both intuition and thinking, Heidegger explains, is the work of the Transcendental
imagination which is source of every synthesis, without which, neither pure intuition nor pure
understanding could function.313 Thus if intuition and thought are grounded, as Heidegger
claims, in the imagination, ‘the transcendental power of imagination, as the pure, forming
faculty, in itself forms time- i.e. allows time to spring forth- then we cannot avoid…the
transcendental power of imagination is original time’.314 Indeed:

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309 This is what Heidegger calls pre-cognition
310 Käuper (n 298) 191
311 Heidegger (n 299) 137
312 Käuper (n 298) 191
314 Heidegger (n 299) 131
‘For that reason, however, the original unifying which is apparently only the mediating, intermediate faculty of the transcendental power of imagination, is in fact none other than original time. This rootedness in time alone enables the transcendental power of imagination in general to be the root of transcendence’.  

The transcendental imagination is not just about experience but also provides the point of departure for Being and the unifying function of reason and in it an ‘originary temporality’. In short the schema in Kant is that which links the a priori concept of understanding with sense perception in apprehension- they share temporality as ‘a bridge’, so to speak. Time therefore becomes the condition of the possibility for experience and is that from which Being is experience. The transcendental knowledge that must be presupposed for there to be experience, all rests upon the primordial ‘ecstatic-horizontal’ time of the imagination. Only temporality projected by the imagination can constitute ontological objectivity and give access to factical reality. Though for Kant this was primarily an epistemological investigation, for Heidegger, ontology, and therefore Being, is understood in terms of temporality.

I shall not delve too much into elaborating upon the lineage between Gadamer, Bergson and Heidegger. Gadamer’s hermeneutics move in a way similar to that of Heidegger. Heidegger’s concept of *phronesis* as emphasising our practical being-in-the-world and which presupposed theoretical elucidation, identified our concrete situation as the mode of knowledge. Gadamer similarly employs this *thrownness* of being-in-the-world by refuting the possibility of an interpretive style that is able to transcend context. Additionally, his dialogic approach, explained later as the *Fusion of Horizons*, is eminently Heideggerean. Gadamer thus moved away from attempting to articulate a timeless method of hermeneutics and was more enticed by identifying the conditions of the interpretive style. Thus being-in-the-world, or the *effective history* as Gadamer has it, is prior to any understanding. Our contexts of involvement, our horizons shape our interpretive endeavours. Indeed:

‘Gadamer redeploy the notion of our prior hermeneutical situatedness as it is worked out in more particular fashion in Heidegger’s Being and Time (first published in 1927) in terms of the ‘fore-structures’ of understanding, that is, in terms of the anticipatory

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315 ibid 137
316 See Chapter 1, section 1.5
317 Gadamer worked for Heidegger as an unpaid assistant
structures that allow what is to be interpreted or understood to be grasped in a preliminary fashion'.

The link to Bergson with Heidegger creatively uses Gadamer as a conduit. Some points of convergence between Bergson and Gadamer were mentioned earlier though hopefully those commonalities become more apparent later in the thesis when a more detail restatement of their work is offered. To repeat however, Bergson and Gadamer offer theories of temporality which emphasis the attachment of the present with the past, and which are both resistant to division. In Bergson, his theory of temporality presupposes the entirety of the past (‘the Pure Past’) with an ephemeral present that is in a constant state of becoming. Similarly, Gadamer offers a theory of time that is ‘contextual’ in which an ‘effective history’ necessarily situates and shapes our present. Within the framework of Heidegger’s Kantbuch, Gadamer and Bergson are read as connecting temporality to consciousness (or hermeneutics). Indeed for Bergson, the two could be read as inseparable when he describes his theory of time as ‘the form which the succession of our conscious states assumes when our ego lets itself live’.

1.5 Gadamer and Law: Creative Applications

The use of Gadamerian hermeneutics in legal interpretation is well documented. Indeed, Gadamer regarded law as having ‘exemplary significance’ in developing his Post-Romantic interpretation. The conventional treatment of Gadamer has tended to apply his hermeneutics to statutory interpretation. Because the focus of the thesis is primarily on temporality and its relation to fact construction, the aim here will not be to scrutinise the theory of Gadamer and his use in legal interpretation but to provide a basic background of his work of hermeneutics, and lay some groundwork for how this will inform our understandings of adjudication’s temporality.

319 See Chapter 3
320 See Chapter 1, section 1.3
321 See Chapters 3 and 5
323 Later described as ‘TOA’. See Chapter 2, section 2.22
Gadamer rejects objective, neutral or value-free\textsuperscript{324} readings of legal texts, instead explaining what the ‘conditions’ are for intersubjective meaning or \emph{Verständigung}. These can be understood in three ways; that interpretation is ‘ontological, dialectical and critical’.\textsuperscript{325}

That interpretation is \emph{ontological} derives from Gadamer’s assertion that the truth is largely independent of any method and that we are in fact interpretive beings. He adopts Martin Heidegger’s historicity of our ‘being-in-the-world as the fore-structure of Dasein’:

‘We are thrown into a world whose contexts moulds us and limits our imagination and, hence, our options. Our very being is a process of interpreting our past, which is projected onto us and to which we respond…not in what way being can be understood but in what way understanding is being...interpretation is the common ground of interaction between text and interpreter, by which each establishes its being…interpreter and text are indissolubly linked as a matter of being.’\textsuperscript{326}

To put it crudely, interpretation is not something one ‘does’, but rather something one ‘is’; hence to think of variable methods of interpretation misses the point. Unlike the \emph{tabula rasa} of the Cartesian spectator, what shapes one’s understanding of a text is one’s \emph{horizon} which is ‘the range of vision that includes everything that can be seen from a particular vantage point’.\textsuperscript{327} This relates to what Gadamer calls the \emph{history of effect};\textsuperscript{328} as our existence is inherently contextual, we project onto meaning the traditions of the world in which we are ‘thrown into’. One possesses an ‘effective historical consciousness by stint of awareness of this ‘situatedness’. To do otherwise demonstrates what Gadamer refers to as Enlightenment thinking’s ‘prejudice toward prejudice’.

That interpretation is \emph{dialectical} (or dialogical)\textsuperscript{329} refers to the to-ing and fro-ing between the horizons of the interpreter and the text. Meaning does not protrude from the text automatically (like authorial intent) but requires participation.\textsuperscript{330} Probing and further penetration of the text challenges the interpreter’s horizon;\textsuperscript{331} ‘the confrontation with the text and openness is

\textsuperscript{324} Indeed, like Thomas Kuhn’s ‘consensus, crisis, paradigm shift,’ Gadamer similarly rejects the objectivity of the natural sciences. See also Georgia Warnke, \textit{Hermeneutics, Tradition and Reason} (Polity Press, 1987) 3

\textsuperscript{325} William N Eskridge Jr. ‘Gadamer/ Statutory Interpretation’ (1990) 3832 Yale Law School Faculty Scholarship Series, 614

\textsuperscript{326} ibid 617-618

\textsuperscript{327} Hans-Georg Gadamer, \textit{Truth and Method}, (Joel Weinheimer and Donald G Marshall trs, 2\textsuperscript{nd} edn, Continuum Publishing Group 2004) 301

\textsuperscript{328} ibid 299-300

\textsuperscript{329} And also re-enforcing Gadamer’s Heideggerean credentials.

\textsuperscript{330} Warnke (n 324) 65

\textsuperscript{331} Brad Sherman, ‘Hermeneutics in Law’ (1988) 51 Modern Law Review, 390
willingness to expose, challenge and criticise prejudices highlighted by the text, this openness is achieved dialectically with a willingness to listen and also to admit error’. Indeed, ‘an important part of this testing occurs in encountering the past and in understanding the tradition from which we come’. The dialectical process with the text will eventually result in a *Fusion of Horizons* in which the interpreters’ prejudgments, generated by their effective history, are exposed and challenged, as is the text. Both stimulate introspection into the effective history of the interpreter and the presumptions of the text. Through conversation, a synthesis of sorts is accomplished.

That interpretation is *critical*; ‘the interpreter questions the text, the presuppositions of which may be attenuated or undermined over time. In turn, the interpreter uses the experience to re-evaluate her own pre-understandings, to separate the enabling, truth-seeking ones from the disabling, false ones’. Romantic Hermeneutics was based on a misplaced claim of transcendental meaning which undermines the critical scope of hermeneutics; indeed, the author is only the first reader of the text. The main criticisms levelled at Gadamer therefore, emanated from its *apparent* conservatism (which was most vocal in his debate with Habermas), its *apparent* relativism and its lack of critical bite. Though important, these will not be developed at this point though some of the themes will be broached throughout.

It is now possible to set out some very basic developments for the later discussion by advancing the temporal resonances of Gadamer’s work. With the popularisation of the sentiment that adjudication is interpretive (rather than merely a declarative enterprise) Gadamer’s utility in statutory interpretation varies among scholars. Some say that it exemplifies hermeneutical understanding, some are more reticent, but others present it as an honest account of statutory interpretation that avoids the limitations of other theories; and some suggest proponents of the Gadamerian understanding have yet to unlock its potential. Chapters 3 and 5 will place Gadamer alongside Bergson and provide a novel re-reading of his hermeneutics and various ontological claims. Understanding is contingent on a temporality in which the present is constantly being renegotiated by an over-hanging horizon.

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332 ibid 393
333 Gadamer (n 327) 306
334 Eskridge (n 325) 614
335 For a summary of the debate, see also Eskridge (n 325) 630-632; Warnke (n 324) 92
336 Warnke (n 324) 91
337 See also Francis J Mootz ‘Gadamer’s Rhetorical Conception of Hermeneutics as the Key to Developing a Critical Hermeneutics (2008) SSRN Electronic Journal
338 Coombe (n 33) 603
340 Sherman (n 331) 395
341 See also Eskridge (n 325) 609-681; George Wright, ‘On a General Theory of Interpretation: The Betti-Gadamer Dispute in Legal Hermeneutics’ (1987) 32, 1 American Journal of Jurisprudence, 191
342 Mootz (n 337) 1
Indeed, ‘time is the productive possibility of custom and tradition aiding understanding by illuminating what presents itself’. An extrapolation of Gadamer therefore, will result in the following. Firstly, he describes his hermeneutics as observing the conditions for understanding. The importance of this will become clear in the later chapters, but as a cursory point, temporality has thus far been discussed within the context of causal relations. The temporality of Gadamer will therefore seek to understand conditions which temporality introduces into adjudication’s understanding of ‘what happened’ and will be useful for trying to discern the typologies of fact in adjudication (causes and conditions). Secondly, and related to the first point, Gadamer has typically been used to illustrate the situatedness of the judge as interpreter and thus as an approach to statutory interpretation. However, this thesis will re-read Gadamer’s effective history as the constitutive horizon of the natural persons in adjudication (this ought to follow as such descriptions of his interpretive theory are ontological). The implications of this transference will be elaborated on in the later chapters.

1.6 Bergson, Law and Adjudication

As with Gadamer, the discussion here of Bergson is limited to a primarily descriptive use of his work in law, with the more creative applications saved for later in the thesis.

Though there is a renewed interest in the French philosopher who, at one time could have been considered one of the most famous thinkers in the world, his work sat dormant in the annals of philosophical curiosity. Bergson’s epistemology uses words such as images rather than ‘things’ or ‘appearances’ to express his philosophy of motion or durée. Succinctly put, durée is a theory of time based on movement in which the past and the present are interconnected and the present is constantly changing. Thus reality is composed of images which are constituted by the past but in a constant mode of being created or becoming.

345 As an interesting side note, Bergson is mentioned in ‘Truth and Method’ where Gadamer describes Bergson’s concept of time as ‘streaming consciousness’ and reaffirms his anti-Cartesian basis. Perhaps more interesting however, Gadamer quotes Bergson’s few public remarks about law in which the French philosopher accuses it of the same abstraction found in the natural sciences, as well as emphasising how language is necessarily representative of concrete experience. Gadamer (n 227) 23
346 For a more detailed analysis, see Chapter 3, section 3.1
His ideas and their reception into legal theory however, have not always been natural allies. Alexandre Lefebvre, responsible for the most comprehensive piece of ‘Bergsonian-inspired jurisprudence’, repeated a critique of Bergson’s (by Gillian Rose) of his apparent attack on ‘law and juridicism’. The *prima facie* enmity between Bergson’s metaphysics and law also extends to the difference between his open-ended pragmatism and the determinism of American Legal Pragmatism (which will shortly become apparent). However, Lefebvre has put together a brilliantly sophisticated application of Bergsonian scholarship that provides an account of adjudication’s inherent creativity. In addition to this, Renisa Mawani offers a novel interpretation of Kunal Parker’s *Common Law, History, and Democracy in America, 1790-1900* as demonstrating ‘internal differentiation’ which can be illuminated with a reading of Bergson.

Starting with Mawani, she facilitates a comparative study between Kunal Parker’s work and the metaphysics of Henri Bergson in an effort to provide an account of the former’s work through the lens of the latter. Parker invites his readers to consider time as ontologically bound up in the common law with Mawani using a creative application of Bergson’s durée to understand the US common law’s multiple temporal aspects. Parker understands the common law as both a relic of British colonialism but embedded within the particular histories of the U.S. This results in a mutual and oscillatory relationship between the ‘time of the common law’ and the ‘time of history’, in which both inform one another. However, the demands of democracy, contrasted with the antiquated and anti-democratic ‘rule of the dead’ common law, meant that the common law not only responded to the moves and changes of history but to itself. This lends itself to Bergson’s durée as constituted by an accumulating past. Indeed, the author then states that because the common law is ‘oriented to the past while reaching to the unforeseeable future, the common law is always becoming’.

The common law’s ability therefore to be rooted to a mythological past of *time immemorial* but respond to societal change provides it with its adroitness. Bergson’s durational time as that which *folds onto itself* and as indivisible motion (an accumulatory and immanent past), along with his anti-teleological view of evolution that responds to problems, bears a striking resemblance to how Parker describes the common law’s evolution. A historicist reading of

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347 Lefebvre (n 17) 114  
348 ibid  
349 Mawani (n 71) 253  
351 Mawani (n 71) 254  
352 ibid 255  
353 ibid 257
the common law therefore misunderstands the nature of it. While the past is authoritative, it is reshaped in an ephemeral present and projected into an unknown future, similarly responding to the emergent problems of society. The same case never happens twice, just as is the case in the irreversibility of durée—no two ‘moments’ are the same.

Where Bergson is most explanatorily illuminating for Mawani is in the work and practice of Oliver Wendell Holmes’ Jr. in whom Parker finds considerable intrigue (and interestingly, who Lefebvre, discussed shortly, re-interprets in light of Deleuzian readings of Bergson). The American jurist’s anti-finalist, pragmatic judgment, responded to the changes of society whilst also acknowledging the lag of the rule of law that is ‘at war, temporally speaking, with itself’. The differentiation however is not exclusively in response to changes exterior to it but asserts a reinvention internally. Mawani reserves the most informative remark for the end:

‘Law organizes and imposes time. It instils work and uniformity, all under the guise of systematicity and efficiency. While the common law recognizes other non-legal temporalities, including lived time as duration, it is often in conflict with them. Moreover, law not only responds to external temporalities; it also absorbs and obscures them. It expands and compresses time by emphasizing, erasing, and recasting historical events. As law’s time is imposed retrospectively, it is insufficient in capturing the ceaseless change that is life…by focusing on the relations that law has with other nonlocal temporalities, discussions of law’s time may run the risk of obscuring and even homogenizing the dynamic times of law’.

Mawani makes several key points that bear relevance for the research questions. The first pertains to how Bergson can offer a more robust account of both the inherent inventiveness and attendant pastness of the common law. She also offers a powerful working through of how time operates as an exercise of power and how this is rendered by the inherent representationalism of legal decision making, due to its positioning ex post factum of lived experience. Though she focusses on the interpretation of rules (‘TOLR’) rather than facts (‘TOA’), there are applications to how the temporality of adjudication calculates its construction of the legal event and subjectivity. Indeed, in another of her writings, entitled Law As Temporality: Colonial Politics and Indian Settlers, she makes the point that ‘law continually seeks to fix subjects and events in time through judgments, definitions, and impositions that

354 In Bergson’s theory of time, to talk of ‘moments’ is technically incorrect and thus reduces durée, which is an interconnected whole, into divisible units or spatialized time. See Chapter 3, sections 3.1 and 3.2
355 Lefebvre (n 17) 88-113
356 Mawani (n 71) 259
357 ibid 260
358 ibid 261
are always retrospective. Life and experience continually exceed legality, shoring up the limits of law but often with violent effect'.

She goes on further in the paper to say that:

‘Conceptualizing law as temporality, through a wider and more dynamic view of past, present and future...illuminates law’s claims to authority, legitimacy, and universality...conceptualizing law as temporality queries the ways in which law produces time, orders the nomos, and gains its authority through variegated and discontinuous temporal arrangements. While retaining the past as a critical element in law’s time, law as temporality moves beyond history and historicity and invites an exploration into law’s own deployment of time as a means of capturing and obscuring, albeit not always successfully, the densities of lived time’.

Legal temporality is power and part of that involves obfuscating the ‘lived time’ of the subject of law. How that ‘obfuscation’ is rendered possible, forms the basis of the inadequacies of abstract judgment (later adjudication as cognition). However, most importantly of Mawani’s contributions, Bergsonian temporality provides a novel way to understand the common law, much like the research question that attempts to discern between different forms of judgment with reference to temporality.

In closing, attention is now drawn to the most significant contribution to the thesis, Alexandre Lefebvre’s The Image of Law: Deleuze, Bergson and Spinoza. Deleuze was partially responsible for resuscitating Bergsonian metaphysics with his book Bergsonism, at a time when Bergson was all but a philosophical curiosity. In utilising much of Deleuze’s philosophical apparatus, Lefebvre brings to the foreground its interconnectedness with Bergson and aims to provide a sounder account of adjudication, one that explains the problems of legal lacunae created by ‘hard cases’ and the inherent creativity that is woven into the tapestry of adjudicative practice. The main claim of his work is that time in law is responsible for either its coherency or creativity; and since Bergson’s theory of time is one of creation, this lends toward an adjudication which is creative:

359 Mawani (n 255) 79
360 ibid 93
361 See Chapter 4, section 4.33
362 Riceour can also be considered as reintroducing Bergsonian tropes into philosophy. See also Mark S. Muldoon, ‘Henri Bergson and Postmodernism’ (1990) 34, 2 Philosophy Today, 179
363 Deleuze (n 293)
My major ambition is to use Bergson toward a theory of adjudication, one that creates a concept of judgment sufficient to explain how adjudication works, how creative it is and how law is necessarily transformative. Jurisprudence is a new path along which to renew Bergsonian metaphysics.\textsuperscript{364}

Like Mawani, Lefebvre uses temporality to provide a novel account of adjudication and its creativity. He begins by attacking three major theories of adjudication, Hart\textsuperscript{365}, Dworkin\textsuperscript{366} and Habermas\textsuperscript{367} as neo-Kantian in their permutations of ‘judgment as subsumption’. In other words, all three theories are variations of the idea that judgment is the subsumption of sensible phenomena (cases) to pure concepts (laws)\textsuperscript{368} though Lefebvre doesn’t misrepresent these theories as crudely as such. The criticisms to all three however are the same; they all observe cases as mere instantiations of the legal rule. In the variations of the subsumptive theories therefore, legal rules and concepts are said to have an anticipatory logic that pre-empts all subsequent events (no matter how ‘different’ or ‘new’ they may be).\textsuperscript{369} For Lefebvre, this does not explain how adjudication is an inherently creative endeavour. Legal concepts are by their nature abstract and Lefebvre, based on a reading of Deleuze, attempts to relocate jurisprudence in concrete cases, for here are the first principles of law.\textsuperscript{370}

Lefebvre thus introduces the Deleuzian ‘Encounter’ as the necessary scope of creative and transformative adjudication. The Encounter is a moment which forces us to think rather than to act according to pre-ordained habits (like the anticipatory logic of subsumptive theories of judgment). Thus it aims to describe the relationship between the legal rule and the case, where the latter is not a mere instantiation of the former (as per subsumptive theories of judgment), but singular and unique. For Deleuze, thinking has been unable to escape the dogmatic ‘philosophy of recognition’ in which phenomena are abstracted and placed in pre-ordained categories or concepts as if thinking operates on the basis of recognition.\textsuperscript{371} In effect, the phenomena or thing is cognized merely as an instantiation of the concept. Thus the Encounter can be thought of as the ‘unrecognised’, as that which challenges the legal concept/rule and operates external to it, rather than an as already anticipated interiority. Therefore, the Encounter can be more accurately described, not as a ‘particularisation’ of the rule but as a

\textsuperscript{364} Lefebvre (n 17) 51
\textsuperscript{365} ibid 5-21
\textsuperscript{366} ibid 22-36, 107-114
\textsuperscript{367} ibid 37-52, 107-114
\textsuperscript{368} ibid 6
\textsuperscript{369} This may be likened to Heidegger’s description of recognition in the threefold synthesis - what he calls ‘pre-cognition’. See Chapter 1, section 1.4
\textsuperscript{370} ibid 56
\textsuperscript{371} See Chapter 1, section 1.4
‘singularity’\textsuperscript{372} in effect, a unique case. If adjudication is subsumptive, cases can only be, following the cases recognition, considered as ‘interior’ to the rule, limiting the capacity for legal rules to change. The Kantian subsumption theory cannot deal with the Encounter; ‘Kant’s concept of the transcendental delimits the frame for every possible experience and event before it occurs and defines if not what occurs, then at least what can- or cannot- occur’.\textsuperscript{373} This is the ‘violence of law’, making the concrete abstract, and the particular, or more accurately singular, general \textsuperscript{374} (or for Deleuze, the unrecognised, as that which is recognisable). Adjudication as creative must, therefore, afford the \textit{primacy} of the Encounter that forces rules to change in big or small ways in response to cases which are always different and unique. Deleuze thus calls his philosophy a ‘transcendental empiricism’\textsuperscript{375} that promotes a concrete judgment.

Lefebvre then introduces the notion of the ‘Problem’\textsuperscript{376} as a device which attempts to create rights to improve a situation. Though it should not be considered a \textit{telos}, it is a specific puzzle of a case that confronts the legal rule toward a resolution.\textsuperscript{377} Bergsonian metaphysics states that being appears primarily as the stating of a problem, and the capacity to solve problems; ‘and if life proceeds according to the posing of singular problems with correspondingly singular situations, it is easy to see why evolution is divergent’.\textsuperscript{378} Concepts and rules that are created in adjudication are responses to real Problems that the judge states; ‘they are the transcendental condition of creative adjudication’.\textsuperscript{379} How a Problem is stated therefore holds the key for adjudication’s transformative and creative potential.

Having moved away from a ‘dogmatic image of thought’, allocating ‘primacy to the Encounter’, and identifying the transformative capacity of stating the Problem, Lefebvre now introduces Bergson to articulate a unique brand of Bergsonian legal pragmatism. Unlike American Legal Pragmatism which is oriented toward particular goals (such as fair competition in a market economy, consumer protection etc), Bergsonian pragmatism is open-ended,\textsuperscript{380} instead responding to Problems posited by the judge which are presented by a unique Encounter, but with no ‘goal’ or ‘objective’ to orient toward. To justify this open-ended pragmatism, Lefebvre uses Bergson’s \textit{durée}\textsuperscript{381} as an ontological concept, that ‘time is invention or it is nothing at

\textsuperscript{372} Van Marle (n 57) 241
\textsuperscript{373} Lefebvre (n 17) 71. See also Chapter 1, section 1.4
\textsuperscript{374} Van Marle (n 57) 242
\textsuperscript{375} Lefebvre (n 17) 71
\textsuperscript{376} ibid 85
\textsuperscript{377} This he borrows from Spinoza. See also ibid 197-259
\textsuperscript{378} ibid 96. This is also how Mawani describes the evolution of the US common law. See also Mawani (n 71) 253
\textsuperscript{379} Lefebvre (n 17) 213
\textsuperscript{380} For further discussion as to why Bergson rejects \textit{mechanistic or finalistic} temporalities of law, see also ibid 92
\textsuperscript{381} For a further explanation on \textit{durée} as a time of qualitative change, see Chapters 3 and 4
all. Such an anti-finalist conception of time chimes with creative adjudication which has an undetermined future. Thus the law proceeds by dissociation and division, developing in increasing complexity responding to problems at every moment—this is the ‘internal difference’, applied to law itself. Ultimately, Lefebvre’s theory of adjudication is contingent on Bergson’s theory of time which produces different legal events.

Lefebvre then delves into the workings of how a pragmatic judge may decide a case, but within the vocabulary of Bergson, Deleuze and Spinoza which are seen as providing a sounder understanding of what happens in the process of adjudication. To elaborate upon this process requires a detailed foray into the Bergsonian ‘world of images’.

Distinct from idealist or empiricist epistemological theories that deal in appearances or matter respectively, Bergson establishes in the opening line of Matter and Memory, ‘here I am in the presence of images, in the vaguest possible sense of the term, images that are perceived when I open my senses and not perceived when I close them’. Images are not things, and certainly not appearances as they exist when one shuts down their senses; but they are real. Images, therefore are neither materialist nor representations. Uniquely, they are not static but constantly in motion and thus in perpetual variation. ‘image-universe’ are ‘centres of real actions’ (i.e. humans) that live, act and perceive, and who display the capacity for discrimination and hesitation, and acting pragmatically to respond to problems in the world. Consciousness describes this unique capacity for centres of action to delay and think in a non-dogmatic pragmatically oriented way. To paraphrase Bergson, thought occurs in the service of action not knowledge. Images therefore are not representations but rather what a part is to a whole. How does any of this relate then, to adjudication?

‘We see that the case is an image in the Bergsonian sense that it underlies and exceeds representations. What is the most basic activity of any judge or lawyer? Is it not to select a few relevant points of a case and coordinate these into arguments and judgments? Any case has an infinity of points and sides that go neglected, facts irrelevant to the interest at hand that exceed eventual legal construction. Here, we draw a distinction between a case as it is not yet represented, as it is a pure event or

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382 "Time is invention or it is nothing at all." See also Henri Bergson, Creative Evolution (Arthur Miller tr, Macmillan and Co Ltd 1922) 361
383 For a detailed description of how Holmesian pragmatism may be discussed within the context of Bergson, see also Lefebvre (n 17) 95
384 Guerlac (n 344) 112
386 See Chapter 3, section 3.1
image in the world, and a legal case as it is pragmatically perceived, as it is reflected according to interests. Any case, therefore has an infinity of sides and points available for selection; this selection will yield a case with a set of infinite features. The perception of the case is limiting and subtractive; only certain crucial points are advanced and construed in legal argument, but underlying these points is the case itself, unperceived, or giving to perception that part that interests the perceiving parties'.

As durée is a conception of motioned time that intercalates all of the past with a dynamic present (thus it cannot be quantified or separated into states) Perception is a contraction of certain moments of the Pure Past. This means, paradoxically, that the present is never really ever present as it is ‘of the past’. In fact, to understand the passing of the present is to understand that the accumulating Pure Past is formerly passed presents. The present therefore is presupposed by the past; the present becomes whereas the past is. The difference therefore is ontological. It is qualitative not of degree. The present image is ‘pragmatically defined by actuality, activity, and usefulness. The present indicates a becoming or flux always in the process of being made’ hence why it is dynamic. The present and past differ not by degree (i.e. the latter is x units further past) but in kind. The Pure Past is effectively a priori and thus the grounds for time.

For Lefebvre, the ‘Perception as Judgment’ is the articulation of the legal rule through which it ‘sees the relevant facts’ (‘the legal event’ or ‘what happened’) but as Bergson stipulates, Perception is an occasion for memory. The ‘Pure Past’ is understood as the entirety of all legal judgments or the law’s pure institutional past of which the judge occupies, and is that from which memory is recollected. It is characterised by i) the contemporaneity of the past with the present, ii) coexistence of all of the past with the present, iii) the pre-existence of the past and iv) repetition in the past. Perception as Judgment therefore is the composite of the constructed legal rule (memory from the Pure Past) and ‘facts of the case which it sees’. To understand this process in adjudication however, requires explaining how memory from the Pure Past is recalled in the service of the Perception as Judgment.

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387 Lefebvre (n 17) 123
388 Later it will be argued that, unlike Bergson’s own claim that durée as experiential time is the unmediated consciousness, durée is in fact mediated by the Pure Past.
389 Lefebvre (n 17) 130
390 Ibid 131
391 Deleuze refers to it as the virtual past or ‘virtual’ but for the purposes of this thesis, I shall stick with the Pure Past
392 Lefebvre (n 17) 129
393 Ibid 129
394 Ibid 129-130
395 Ibid 130
Perception as Judgment is about the ‘actualisation’ of the Pure Past as a response to the Problem. Essentially, the exigencies of the present Perception as Judgment will dictate which particular ‘planes’ of the Pure Past are recollected to enrich the perception. Fig. 1 denotes the Pure Past as the cone with Plane P as the World of Images. Point S is the Perception as Judgment (actualized past) and the levels within the cone represent ‘a particular state of tension at which the entire virtual [pure] past is contracted’.

The different levels of tension will contract according to the demands of the Perception as Judgment as set out in the stating of the Problem. The recollection of a legal rule from the Pure Past must be actualized so that raw data can be perceived as a legal case (or legal event) in the Perception S. For it to be a legal perception in the Bergsonian terminology, requires a composite of a rule and the state of affairs which requires an act of memory; ‘the event literally becomes perceived along the lines of the rule and converted into a case’. The legal case or ‘legal event’ is a combination therefore of the (past) rule with the (perception) situation. However, this is not a straight-forward subsumptive application but selected recollections of the Pure Past contingent on pragmatic criteria as appended by the Problem. The process of actualisation in the Perception as Judgment’s recollection requires ‘translation and rotation’. This describes how the law picks out certain rules or parts of rules from its Pure Past. When a judge wants to make sense of an image (the pre-legal case/event), he will have leapt into the institutional Pure Past of Law which recalls legal rules based on their relevance to the

396 ibid 136
397 ibid 146
398 Bergson (n 385) 110
399 Lefebvre (n 17)156
Problem and create the perception which is the newly formed legal rule ‘through which it sees’ and constructs the legal event (‘what happened’). To put it crudely, ‘bits and pieces of past legal rules’ are recollected contingent on the demands of the Problem which will then construct the legal event.

However, crucially this is a dynamic process in which there is a reciprocal or circuitry movement between Perception and Pure Past (entirety of past legal judgments). Lefebvre develops Bergson’s theory to identify two types of judgment, ‘inattentive and attentive’. These are distinguished by their use of either ‘habit or recollection’ memory respectively. ‘Inattentive judgment’ occurs if a judge treats the case as a familiar situation (an unproblematic Encounter such that the case is a mere instantiation of the general legal rule) so that it operates as a representative sign of a general rule (memory) which it summons quickly—this is habit. In other words, it transforms the Encounter into a ‘familiar occasion’. Indeed, ‘perception downplays or minimizes itself as much as possible, and recollections, usually drawn from habit, are given full reign. The consequence is that the composite nature of judgment is disguised by the heavy emphasis on applying general recollections to think perceptions’. Hence it gives the impression that the judgment is subsumptive (and may be likened to abstract judgment). ‘Attentive judgment’ on the other hand, apportions the primacy of the Encounter by ‘interrupting’ the habitual links between Perception and the Pure Past. It sees the situation as ‘unfamiliar, unrecognised’. Because of the demands of the Perception, it warrants a much more thorough selection process in the Pure Past—this is recollection. Rules are ‘senseless’ in that they can be tailored to cases that judges see as unique (as would be the case with the primacy of the Encounter) and so the adjudicative process connects the reconstructed rule from the Pure Past with a new context so that each time the rule is recalled, it is recreated.

Patrick Atiyah makes a similar point to this in his lecture ‘The Strengths of Pragmatism’:

‘Because major premises can so rarely be stated definitively and comprehensively, the courts retain the constant power to qualify or amend previous rulings in the light of other principles of the law, other objectives of the legal system, as new facts come to light, news disputes arise. Even with statute law they retain this power to some degree, though certainly to a more limited degree; and that is one of the main reasons that English law seems to have greater pragmatic power when dealing with the common law than when dealing with legislation.’

See also Atiyah (n 208) 50

These may be likened to abstract and concrete judgement respectively

Lefebvre (n 17) 162

Lefebvre (n 17) 167

Lefebvre (n 17) 169

Lefebvre (n 17) 167
Fig. 2 is ‘the circuit’ that illustrates the dynamic process of recollective memory. If O is the object, A is the immediate memory. To enrich the perception of O, the judge recalls other memories at different tensions in the Pure Past (entirety of legal judgments), say at B, which results in a deeper stratum of image-reality at B’, and this circuit continues at alternate tensions at memory C so that C’ is emergent as a new Perception; and so on. The Encounter demands richness in the Perception as Judgment and necessarily forces the judge to ‘dwell’.406 This situation, unlike subsumptive theories which anticipate situations, is novel and constantly being created in judgment. The Encounter then, interestingly, is not defined by its (empirical) content but its effect; a ‘cognitive stimulant’ that rouses the circuitry movement between different planes of the Pure Past and the ever enriched Perception.

An example that Lefebvre uses to illustrate his complex theory of creative adjudication is *Delgamuukw v British Columbia*.407 The plaintiffs were First Nation Peoples that claimed ownership of a substantial size of land. The claims were dismissed by the Canadian Supreme Court with a retrial ordered on a technicality but the court took the opportunity to define the content of Aboriginal Title which would affect subsequent litigation. The title was referred to as *sui generis* which Lefebvre reads as tantamount to an Encounter, and is thus hostile to recognition. Specifically, it resisted recognition under the traditional concept of fee simple property interest because of the unique origins of the title, and that it was communally held.408 The Problem was set out by Lamer J as ‘the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown’.409 Some of the newly formed concepts, as a result of the attentive judgment were to establish that Aboriginal Title meant occupation is proof of

406 See also Van Marle (n 57) 239
408 Lefebvre (n 17) 209
409 Lefebvre (n 17) 210
possession and results to a right to the land itself. Unlike traditional fee simple property, this cannot be alienated by any other party (bar the Crown) nor can it be used in a manner irreconcilable with the nature the First Nations attach to it. The Encounter provided the basis for the judge to identify the Problem that created the legal event (‘what happened’) and highlighted the limitations of the current concept to make a new one. The dynamic process of judgment would have initially perceived this as incompatible with the traditional legal concept, but subsequent recollections, contingent on the demands of the rule which accepts the case as unique, will reconstruct the legal rule and subsequently the Perception as Judgment, and thus the legal event. 410

ENCOUNTER \(\rightarrow\) PROBLEM \(\rightarrow\) NEW CONCEPT/RULE

Pure historicism is a fallacy. Past legal rules and concepts are connected to new and elevated situations. They are not applied to analogous cases. Therefore, to talk of subsumption is fundamentally misplaced. Lefebvre’s ‘ontological pragmatism’ is a clear blueprint of a transformative judgment wherein time does something creative and effective and where need and action are radicalised as the condition and criteria for ‘perception and recollection’. 411

Lefebvre’s theory of adjudication is incredibly detailed, at times audacious, but hugely impressive. Legal theories can often be distinguished by how they respond to the ‘hard-cases’ and this theory of adjudication is no different. However, the author also offers an understanding of how easy cases are decided (‘habit memory’) and the misunderstanding that adjudication is, therefore, somehow subsumptive. Lefebvre’s work is ambitious and elevates time into the realm of conceptual discussions of law and adjudication that few others do. Simply, adjudication’s pragmatism is contingent on a theory of time. Three key points have been determined as imperative for the ensuing project and build upon the work of Lefebvre.

The first is the permeability of the separation between discussions of the Temporality of Legal Rules (‘TOLR’) and the discussion of time in factual construction (‘TOA’) which will become much clearer in the following chapter. To recall, the former, borrowing from Khan and others,

410 For a thorough analysis of the case law through Lefebvre’s account of adjudication, see also ibid 210-215
411 ibid 111
is understood as the propensity of a legal system and its rules toward either stability ('past-oriented') or change ('future-oriented'); and the latter is an understanding of how it constructs the pasts of the natural persons (subjectivity) and the event (legal event). What is clear however, is that a legal system’s propensity toward change or stability is dictated by its theory of legal decision making. To understand adjudication in the formalist sense means that there is little room for change (except through statutory changes). The effect that has for the ‘TOA’ would be what Lefebvre calls inattentive judgment (or abstract judgment) where the new fact situation is merely a recognised sign of a general memory (recalled through habit). A legal system which acknowledges its own creative power will demand a thorough investigation of the fact situation (Pure Event) as it is unrecognised (the Encounter). Therefore, the type of adjudication (‘TOLR’) seems to be linked intimately to how it will construct the legal event and subjectivity (‘TOA’). If concrete judgment is predicated upon the singular differences of each case, this seems hostile to formalist adjudication.

The second point stresses the Encounter and the Problem as of paramount importance. The Encounter as an unrecognised situation, as a catalyst for change and creativity, for concreteness and thus transformativity is essential. By itself however the primacy of the Encounter means nothing without how the Problem of the case is stated. The Problem has to be specific to the uniqueness of the case for it can be posited in all manners of ways. For example, a theft could be understood as trying to resolve the issue of a break in or it could seek to problematise the very notion of ‘private property as theft’ or ‘theft as a form of distributive justice’; or a university administration policy which has an affirmative action procedure for underrepresented groups- in denying a person from an overrepresented group, it could be said to enable equal access to education or mitigate the effects of historic iniquities. The inclusion of both these devices necessarily means that transformative adjudication is pragmatic in its orientation, with the stating of the Problem being a crucial part of the creative process.

The final point to make about Lefebvre’s theory, which will feature heavily in developing the normative aims toward a concrete temporality of adjudication is re-interpreting some of his understandings of Bergson. This will be developed substantially in the 3rd and 5th chapter but as an example; Lefebvre understands the Pure Past as the situatedness of the judge, or the ‘institutional temporality of the Law’. To supplement this and given that the thesis looks at how adjudication’s temporality constructs not only the legal event but also the natural persons, this thesis will apply the Pure Past to the natural person (and thus a legal subject which is

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412 What constitutes this ‘investigation’ is examined in further detail later. See also Chapters 5 and 6
413 Perhaps this is what Lord Devlin meant when he referred to the differences of administering justice between the personal and social variants. See also Devlin (n 47) 5-6
necessarily situated). Lefebvre doesn’t really say much about the natural persons qua persons of law. One could suggest that the uniqueness of the case (due to the Primacy of the Encounter) says something about the natural persons but this would be mere speculation. To extend the Pure Past to the natural persons will also illustrate what types of pastness are considered material and immaterial in the construction of the subjectivity.

1.7 Common Themes

One of the most pervasive themes from the review of the literature is that of the simultaneous existence of multiple temporalities. Indeed, this particular theme has also been extended to observe concurrent multiple temporalities as a site of conflict, of different commitments and different visions or constructions of reality, most clearly demonstrated in the work of Engel. Another important topic that the likes of French, Mawani, Greenhouse, Khan, Engel and many others touch upon is the marginalisation of time in law. Indeed, ‘we should note that the disappearance of concepts of time and space in the modern law…is only an instance of the more general disappearance of these concepts in modernity. There has been a move toward the general, the objective, and the context independent’. Times epiphenomenality, the manner in which it is incidental to theoretical discussion, could itself potentially be concealing of an exercise of power.

Legal temporality is also often discussed in the context of speed. For example, Stewart’s use of network time, describes the contraction of huge distances with rapid technological advancement. He also explains how the rule of law is similarly characterised by a unique rhythm. Thus questions arise as to whether the speed of the Rule of Law can maintain legitimate expectations for these new developments. This is, of course, referring specifically to adjudication and the common law’s ability to respond to a society in flux.

‘Dominance’ presents itself as another feature of law’s (and adjudication’s) temporality, alluding to something more qualitative about time. Greenhouse offers the main ideas to this effect, with the hegemonic linear temporality of law where one is then exposed to larger

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414 For an exposition of the presumption of time within the continental legal literature, see also Tontti (n 118) 101-124
415 Farmer (n 73) 342
416 Recall the earlier example of fully autonomous robots in war
417 Greenhouse (n 87) 1631
questions of whether laws act as a vantage point to accommodate or subjugate (or even to define the) temporalities of the persons of law.\footnote{More will be said about the ‘legal persons’ later, but for now, it will refer specifically to the parties who enter into litigation, rather than judges or counsel. See Chapter 4, section 4.31}

‘Direction’, as expressed by Wistrich, identify the respective pastness or futurity of the common law and statute. Some of the most recurrent themes however come from temporal descriptions of the legal system and rules and how the temporality of adjudication is understood (‘text, time and reality construction’). The first of these approaches looks at how time can be used as a referent to describe the stability of a legal system or its fundamental ‘internal difference’.\footnote{This is what Lefebvre calls the ‘duration in law’. Lefebvre (n 17) 102} This has earlier been referred to on several occasions as the \textit{Temporality of the Legal Rule (‘TOLR’)} and pre-empts the main discussion in the following chapter, which effectively shapes an old debate within the context of temporality. This is linked to another illuminating approach to time and law, what has elsewhere been called the \textit{Temporality of Adjudication (‘TOA’)} which is the focus of the thesis. To explain once more however, the Temporality of Adjudication takes as its starting point that time, rather than being the object of introspection, is itself responsible, in part, for how adjudication shapes its realities. As adjudication is in the business of fact construction, temporality has a direct role in conditioning how such a (generally) retrospective enterprise constructs the facts (or past). Though the primary focus of the thesis is upon ‘TOA’, these two approaches will shortly be demonstrated to be interrelated in the following chapter.

With Bergson and Gadamer, who can be read as connecting temporality and consciousness/interpretation, and with whom a line can be drawn to from Heidegger, who also emphasises the centrality of time, these theories place us in a good position for developing TOA and what we have thus far labelled as the ‘Kantian axiom’.

The first of the research questions of the thesis was to develop the claim that adjudication’s factual construction is contingent upon temporality and to ascertain what theory of temporality is present in conventional forms of judgment. Kelman, Nousiainen and to a certain extent Khan (with intermittent references to Norrie) have been most illuminating in this regard. However, as the following chapter will show, the exegetic work has in large part anticipated two of the important ways in which law and time will feature in this thesis (‘TOLR’ and ‘TOA’). For that, Wistrich, Stewart, Höland and others provide us with the tools to describe adjudicative and legal theory (‘TOLR’) within the fabric of temporality; and of course Lefebvre provides the theoretical ‘vertebrae’ for the thesis, along with the concise outline of Gadamer’s hermeneutics.
The second research question was to argue that constructions of legal subjectivity in adjudication are in fact contingent on temporality (or can be reframed through time) and at this point, Kelman, and the interpretation I have offered of him, have set the platform to continue that discussion. Importantly, I claim that Kelman's time-framing is the particular temporality that informs conventional abstract judgment (later adjudication as cognition) and makes possible the uniformity component of strict rules and presumed identity of legal subjects. Time-framing allows adjudication to elide and exclude certain types of pastness in which differences would otherwise emerge to produce the problematic but paradigmatic abstract, deracinated, 'rational' subject of law (and to render Ahluwalia for example, a 'reasonable person'). The question is what theory of time makes this 'time-framing' possible? This is dealt with in chapters 3 and 4. The third question, that once time has been argued as connected to reality construction, it is in fact an expression of power, is clearly illustrated by Kelman, Greenhouse and French's contributions. Power suggests that the temporality of adjudication is not only quantitative, but it alludes to a qualitative aspect too, and is relatively unconstrained as Kelman suggests. Finally, the idea that alternative temporalities may produce a form of judgment (earlier described as concrete judgment, later adjudication as understanding) with transformative potential is drawn from the final two sections on Gadamer and Bergson. However, considerable work has yet to be done. The next chapter will try to develop the first research question, linking temporality with adjudication's factual determination of 'what happened', citing some new nomenclature and outlining (and rebutting) some presumptions. However, the bulk of the chapter is dedicated to working out and specifying two important ways in which temporality features in law, why they matter and how they are related; the Temporality of the Legal Rule ('TOLR') and the Temporality of Adjudication ('TOA').
CHAPTER TWO

‘TOLR & TOA’- Two Important and interrelated discussions of Legal Temporality

This thesis claims that reality construction in adjudication is not simply a subsumptive exercise in which laws correspond to ‘facts out there’. The generality of laws, and the nature of legal rules as either sensed or senseless, point toward the relative flexibility in the determination of ‘what happened’. Indeed, it is what Kelman calls the arational choice. The thesis here is not concerned primarily with arguing whether this is radically indeterminate, or a relatively constrained process. What it is more concerned with is the claim that, extending the Kantian axiom, temporality, in part, conditions adjudication’s factual construction of ‘what happened’. Thus time can help explain what is and what is not included in its factual construction.

The original contributions of the thesis develop the claim that adjudication’s factual construction is contingent upon temporality. Adjudication is where the world encounters legal rules and become a part of adjudication’s backward reasoning; its determination of ‘what happened’. It is a historical inquiry that is past-dependant, both on the precedents on which it uses and the facts it aims to settle. I attempt to ascertain what theory of temporality is present in conventional forms of abstract judgment and also try to argue that constructions of legal subjectivity in adjudication are in fact contingent, in part, on temporality. Once time has been argued as connected to reality construction, it will be examined as to how this is in fact an expression of power. It is worth repeating once again Lindsay Farmer’s point that ‘we should note that the disappearance of concepts of time and space in the modern law…is only an instance of the more general disappearance of these concepts in modernity. There has

420 Schauer (n 18) 534
422 Kelman (n 10) 594
423 Hence why I refer to it not just as fact construction, but past construction
been a move toward the general, the objective, and the context independent’. 424 Finally, having proffered a position on the relation of temporality and adjudication’s determination of what happened, the thesis will eventually try to tentatively articulate a concrete form of judgment (later adjudication as understanding) with transformative potential and underpinned by an alternative theory of time (based on Gadamer and Bergson) from that of abstract judgment (later adjudication as cognition).

This short chapter begins with cleaning up some of the terminology used so far by introducing the label ‘retrospective narrative’. This replaces the various synonyms for adjudication’s reality construction. The next part will then quickly rebut a presumption that factual construction is concomitant on the litigant. This anticipates a later discussion pertaining to ‘dominance’ as a feature of abstract judgment’s temporality (later adjudication as cognition). 425 Finally, the main bulk of the chapter focusses upon two important discussions of legal temporality that are related, ‘TOLR’ and ‘TOA’. The latter focusses on the research question linking temporality to fact construction and the former looks at how one can understand theories of adjudication using the referents of temporal direction, and why reshaping this debate provides useful insights the TOA.

2.1 Adjudication, the Retrospective Narrative and the (fallacy) of the Natural Persons as the Primary Epistemic Subject

Adjudication constructs its own reality; its determination of ‘what happened’; its factual construction; its ‘pastness’; the legal event and the natural persons. Though these terms have been used interchangeably and they generally refer to the same thing (past/fact construction), from this point on and for the purposes of clarity, I will refer to this as the retrospective narrative. The term retrospective narrative captures the fact that adjudication is generally ex post and thus invested in the construction of ‘pastness’, as well as embodying the facticity element which this thesis claims is conditioned by temporality. The retrospective narrative is what is differentially constructed, dependent on the form of judgment, which I claim, is distinguishable by the theory of time that informs that particular type of judgment.

424 Farmer (n 73) 342
425 See Chapter 3, section 3.22
The construction of the retrospective narrative is not simply a subsumption of the law to the facts ‘out there in the life world’. This has been argued because of both the generality of legal rules and the nature of these laws (rules or standards, ‘sensed or senseless’). Adjudication is of course complex, multifaceted process but the aspect of it that concerns the thesis are the processes in which the law inquires about the world, the instant in which it cognizes about its environment, and thus acknowledging that it is inhered with a world-making apparatus. Legal decision making may crudely be described as a simple 3-step process; the substantive finding of facts, their subsumption by a legal concept and the normative consequences deduced from these two steps. Of course this generality is more obfuscating than useful. To re-shape this caricature, let us understand adjudication, broadly speaking, as how judges decide cases. One part of how to decide cases, involves ‘the rational reconstruction of segments of law upon the basis of the judicial and statutory materials’ which is the process of selecting the correct law or laws. This task presumes however that judges merely declare laws. Indeed, part of the judicial exercise also requires interpretation and their application which even the most ardent ‘objectivists’ are willing to accept. Whilst the appellate courts appear to quibble and query over points of law, within the lower courts, part of the adjudicatory enterprise also involves determining points of fact, or ‘what happened’ (‘the retrospective narrative’) which is itself an epistemic (or hermeneutical) exercise. Once the facts have been determined as material, the separate process of application can ensue.

If one theory of adjudication is purely subsumptive (or inattentive as Lefebvre would describe it as), it presumes the law and judges have ‘epistemic primacy’. What this means is that judges and the law dictate the retrospective narrative (the facts which laws give meaning to or the legal event and subject of law). The problem arises when one considers, as has been said previously, whether something is missing from how reality is experienced to how adjudication constructs that reality. Gunther Teubner explains it most clearly:

“The reality perceptions of law cannot be matched to a somehow corresponding social reality “out there.” Rather, it is law as an autonomous epistemic person that constructs a social reality of its own…it is not human individuals by their intentional actions that produce law as a cultural artefact. On the contrary, it is law as a communicative process that by its legal operations produce human actors as semantic artefacts”.

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426 See also Ewan Bell, ‘An Introduction to Judicial fact-finding’ 39, 3 Commonwealth Law Bulletin, 519
427 William Lucy, Understanding and Explaining Adjudication (Oxford University Press, 1999) 189
428 See also Owen Fiss, ‘Objectivity and Interpretation’ (1982) 34, 4 Stanford Law Review, 739
429 Emmet Flood contests that factual construction does not occur in the higher courts. See also Flood (n 13) 1795
Indeed, ‘the law is in its own realm. It operates within its own universe of meaning; it has its own guiding principles, precepts and purposes; it has its own conceptual resources; it works within its own intellectual and disciplinary confines. It does not even purport to reflect the real world outside it in any direct or obvious manner.’\textsuperscript{431} I claim this difference is attributable to the different temporalities conditioning adjudication and the litigant’s experience. Thus, far from being ‘natural persons’, adjudication reconstitutes them as subjects of law. A subject of law and natural persons therefore, are not necessarily the same thing, and as such, may not be analogous in adjudication’s retrospective narrative. Once again, the difference between these two, it is argued, can be explained by the distinct temporalities of adjudication and of the self.\textsuperscript{432}

Given that laws, natural and legal persons could each be said to have a characteristic temporality (though what that is yet is unclear), if temporality is linked to reality construction (in keeping with the Kantian axiom), and law is afforded epistemic primacy, then a situation must present itself in which the retrospective narrative, as conceived by the law rather than the legal person, is necessarily primary too. This appears to counter intuitions one may have about how cases are presented to judges in courts. These intuitions direct us toward the natural or legal person as being the primary epistemic subjects, in that they are the ones who \textit{initially} present the facts into the adjudicatory process through evidence, testimonies and expert accounts. Of course, not everything is \textit{relevant} for the world of law.\textsuperscript{433} So though the natural persons will recall the facts of a case contingent on their temporality, adjudication is not obligated to see it the same way. The litigant is ‘de-centered’ as the primary epistemic agent in adjudication. Instead, epistemic primacy lies with the judges and adjudication will therefore infer its \textit{temporal dominance}. This will mean that it is adjudication’s temporality, \textit{not that of the litigants}, which determines the retrospective narrative. The process of de-centring, of course, is nothing new and indeed forms the basis of many critical and postmodern theories.\textsuperscript{434} The centring of the law as the epistemic subject however is essential for the later discussion on adjudication as cognition’s inherent dominance.\textsuperscript{435}

\begin{thebibliography}{99}
\item Naffine (n 43) 2-3
\item Khan (n 60) 78. See also Chapter 1, section 1.4
\item Lefebvre (n 17) 123
\item Douglas E. Litowitz, \textit{Postmodern Philosophy and Law} (University Press of Kansas, 1997) 11; See also Douzinas & Gearey (n 52) 55
\item See Chapter 3, Section 3.22
\end{thebibliography}
2.2 Temporality of the Legal Rule (‘TOLR’) and the Temporality of Adjudication (‘TOA’)

One important contribution of the literature review is that we can understand and explain things with reference to their temporality; or more specifically to take from Wistrich, their temporal direction. This is exactly what he does when he describes his reticence toward past-oriented common law and his favourability toward future-oriented statutory law. Indeed, the section on ‘Some Examples of Legal Temporality’ briefly explained how one can view due process in terms of its speed, or the type of pastness involved in discussions of whether distant crimes should be punished, and the divergent temporal planes of retroactive legislation and so on. However, there is also the treatment of moral and economic theories explained within the context of temporality. Myrtle Korenbaum’s foreword to Georges Gurvitch’s *The Spectrum of Social Time* is enlightening in this respect:

‘We are made aware of the error of treating time as a unity when in fact it is multiple. This is crucial to [one] …who is involved in the attempts to predict and explain. Social roles, attitudes, values etc. move in their own characteristic time. They vary in their duration, in their rhythm, in the degree to which they are dominated by the past or projected into the future’.

Consider the example of *restorative justice* in the *Truth and Reconciliation Commission* in South Africa assembled after the fall of Apartheid, where the Human Rights Violations Committee investigated human rights abuses that occurred between 1960 and 1994. The Reparation and Rehabilitation Committee was charged with restoring victims’ dignity and formulating proposals to assist with rehabilitation. One could reframe the concept of this localised form of justice along the axis of a particular type of past-orientation. This could be contrasted with utilitarianism as a value-system which is primarily future-oriented, concerned with maximizing good consequences (or ‘preference satisfaction’).

Why does it matter that temporality can be used as a referent or to reshape an old discussion of stability and change? The point that Korenbaum is making is that normative systems have their own characteristic time. As systems that invite our normative commitments, it seems reasonable to explore how they construct our pasts and bind our futures. This relates to the very notion of subjectivity. Normative systems such as law, with their epistemic primacy, shape

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436 Blegvad (n 245)
437 Gurvitch (n144) xxii
438 See also Gerald Postema, ‘Melody and Law’s Mindfulness of Time’ (2004) 17, 2 Ratio Juris 203
our pasts and determine the kinds of futures we may have. To this effect, I will now introduce two important respects in which temporality and law can be discussed. Of course, as part of the first research question, the link between temporality and fact construction is of primary concern (‘TOA’) but there is also another important approach to time and law (‘TOLR’) which uses the Wistrich-ian formula of temporality as direction. It is with ‘TOLR’ that I shall begin.

### 2.21 Temporality of the Legal Rule

The *Temporality of the Legal Rule(s)* (‘TOLR’) describes the propensity of the legal rules\(^{439}\) toward change or toward stability; or ‘determination and responsiveness’;\(^{440}\) or ‘calibration and synchronicity’.\(^{441}\) Indeed there are many other ways to describe this enduring debate in Jurisprudence that has been raging for centuries. However, that very debate of ‘stability-change’ can now be cloaked within the lexicon of temporality. So it goes, that legal rules can be described in one of two ways. Firstly, either as a rule that is a timeless norm, immutable and persistent. Laws are permanent, consistent, enduring and when they are applied by judicial bodies, they are merely declared. The declaratory theory and its subsequent mutations bear the responsibility for perpetuating this account (and, arguably, a convenient myth).\(^{442}\) It claims to extol the separation of powers, defeats anxieties of a ‘judicial dictatorship’ by restraining judges to merely declare or apply law. It thus reaffirms principles of legal certainty, *coherency* and general democratic values. Indeed, ‘the plodding positivist, his steps wholly predictable, will at least promote stability in law, a genuine public good’.\(^{443}\) In this way, it could either be argued that legal rules are atemporal, or in praxis (i.e. in adjudication) legal norms venerate what *has-been* in that they are past-oriented.\(^{444}\) The doctrine of precedent affirms this position if one is to take the declaratory theory or its variations on its merits. Certainly, Constitutional Originalists and legal formalists would advocate this position that derives normativity from past laws. In all of this, the important point to be made here is that, regardless of whether one derives stability from the past or the ‘transcendental realm’, it fundamentally avows the permanence and consistency of laws.

This operates in stark contrast to the legal realists or legal pragmatic practice that says the apparent inertia of legal rules is a myth akin to ‘putting new wine in old bottles’.\(^{445}\) The

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\(^{439}\) We may also think about this more holistically as legal systems or the corpus of legal rules.


\(^{441}\) Höland (n 49) 99

\(^{442}\) Interestingly whilst the declaratory theory has been all be dismissed, Allan Beever has sought to resurrect it from the ashes. See also Allan Beever, ‘The Declaratory Theory of Law’ (2013) Oxford Journal of Legal Studies, 1


\(^{444}\) Hutton (n 32) 281, 282-285

\(^{445}\) Hogue (n 193) 11
Declaratory Theory is a legal lore and on the extreme end, what happens in actuality, is that judges make laws in perpetuity. Indeed, one of its progenitors, Oliver Wendell Holmes Jr said ‘the primary rights and duties with which jurisprudence busies itself again are nothing but prophecies’. Thus legal rules are associated with change and ephemerality, and a judge occupying a position in such a legal system ‘always tries to do the best he can do for the present and the future, unchecked by any felt duty to secure consistency with principle with what other officials have done in the past.’ Interestingly, the American Pragmatist literature often makes explicit and implicit references to past and future (and thus temporal direction) in adjudication. For example, Thomas Grey describes pragmatism as both contextual (backward looking) and instrumentalist (forward looking). Richard Posner, on distinguishing it from legal positivism, is far more forthcoming in describing judicial pragmatism in the following ‘temporal terms’:

‘The difference between, say, a judge who is a legal positivist in the strong sense of believing that the law is a system of rules laid down by legislatures and merely applied by judges, and a pragmatic judge, is that the former is centrally concerned with securing consistency with past enactments, while the latter is concerned with securing consistency with the past only to the extent that such consistency may happen to conduce to producing the best results for the future...that judges want to come up with the best decision having in mind present and future needs, and so does not regard the maintenance of consistency with past decisions as an end in itself...the pragmatist is not uninterested in past decisions, statutes, and so forth. Far from it. For one thing, these are repositories of knowledge, even, sometimes, of wisdom, and so it would be folly to ignore them...the pragmatist judge sees these “authorities” merely as sources of information and as limited constraints on his freedom of decision’.

Crucially, this all centres around (and perhaps stresses the focus upon) how laws are changed in a legal system, whether that is reserved for a supreme parliament or a constitutionally superior court. Positivists, natural lawyers and realists will all disagree about how singular laws change (or not), what constitutes change, and the resultant ‘pull or stabilisation’ of the legal system. For example, a UK positivist would articulate the temporality of the legal rule as being either atemporal or that which venerates the past because change is only authorised through the constitutionally supreme legislative chamber. A US pragmatist however, without completely ignoring ‘past authorities’ may subscribe to ‘forward looking’ adjudication where

446 Holmes (n 196) 457
447 Posner (n 443) 4
449 Posner (n 443) 5
the ‘past is valued not in itself but only in relation to the present and the future.’ Figure 3 is an attempt to represent ‘TOLR’.

**TEMPORALITY OF THE LEGAL RULE(S) (‘TOLR’)**

Like Wistrich who uses direction as a basis of time, direction can be used to illustrate the Temporality of the Legal Rule (‘TOLR’). A positivist account of the legal rule would describe them as past-oriented whereas a pragmatist would argue that the legal rules are future oriented. To recall; Höland’s point that German legal orders (un)responsiveness to the zeitgeist is a very clear example of discussing time in law that would fall under the ‘TOLR’. Further, it is also analogous to the old debates of Greek antiquity of being-and-becoming. For the ‘staticists’, the law is, always has been and always will be, but for the ‘dynamicists’, the law is in a constant state of flux, unravelling and revealing itself to us. In other words, the difference between coherency inherited in formalist or positivist theories of law, and creativity embodied in legal realism or pragmatist projects is their past- and future-orientedness respectively. Indeed, the virtues of coherency and creativity take on temporal character.

A cautionary reminder must be made. This is not looking at temporality and fact construction (although they are related as will soon be clear) but how the rules are interpreted in the context of stability and change of the overall legal system. One can therefore reframe different schools of legal thought along the axis of time (as is most vociferous in the pragmatist literature). To

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451 Posner (n 443) 15
sum up; the Temporality of the Legal Rule is the difference between coherency or past-orientedness (formalism) and creativity or future-orientedness (realism, pragmatism).

On its own, this new vocabulary reveals nothing explanatorily illuminating but its originality will become apparent when discussing the second important relation between law and time, ‘TOA’.

2.21 Temporality of Adjudication

The Temporality of Adjudication (‘TOA’), which should partially be familiar,\textsuperscript{452} takes as its starting point that time, rather than being the object of introspection, is itself responsible for how law shapes its realities. Because adjudication is in the business of fact construction, temporality has a role in governing how it constructs its retrospective narrative. However, it is not just the legal event that is inimitably linked to adjudication’s temporality, but importantly, how it thinks about and understands the natural persons. When do the natural persons appear in adjudication? When are legal events said to begin and why? Indeed, ‘many legally significant situations can be defined either within a narrow or a broad time frame. This includes the question of whether different incidents are to be considered separately or as a unified whole’.\textsuperscript{453}

If adjudication’s determination of ‘what happened’ is typified by a temporality, then it follows that adjudication’s temporality will necessarily shape the event and the representation of the natural person (‘retrospective narrative’) as per the Kantian axiom. As has been said, adjudication is also the process in which abstract rules interact with our reality, where they cease to be timeless ex ante rules and become embedded within the concrete world ex post. Indeed, ‘in a way, law exists only through the case alone’.\textsuperscript{454}

Determining the temporality of adjudication however is not primarily an empirical exercise which involves looking at which facts the rules and concepts attach significance to. Melissaris warns that though it is ‘useful to wonder how legislators or judges perceive time or what perceptions of history and historical information are incorporated in the law’\textsuperscript{455} that:

\textsuperscript{452} Recall the ‘Kantian axiom’ and Heidegger’s framing of the enquiry
\textsuperscript{453} Nousiainen (n 68) 26
\textsuperscript{454} Lefebvre (n 17) 13
\textsuperscript{455} Melissaris (n 124) 848
‘It cannot be empirical, in the sense that it is not an observation of facts in the physical world. If that were the case, a number of problems would arise. First, it would be cognitively falsifiable or ascertainable and thus reducible to other statements about facts. Therefore, it would be impossible to determine the ontological limits of a legal order. Second, a claim that the background is empirical would trigger the perennial objection of reductionism. How can the norms at play in legal discourse be reduced to facts? To be sure, that would amount to committing the fallacy of collapsing the descriptive and the normative’. 456

However, taking the route that cases are the first principles of law, 457 and temporality conditions adjudication’s retrospective narrative, it will necessarily mean that facticity is something that will arouse the interest of the thesis. Importantly however, it is not that facts are determinative of adjudication’s temporality but rather, that they are the result of it. The temporality of adjudication is not determined by facts but helps to illuminate that facts are of different kinds- a typology of facts. It explains the different types of facts which may possibly be incorporated (or excluded) in adjudication’s retrospective narrative. Related, temporality also explains how facts are able to be selected. Facts by themselves cannot explain what is responsible for adjudication’s temporality. Rather, theories of time introduce how the very process of fact selection is possible.

Reintroducing the normative aim that seeks to ‘move toward a concrete temporality’ of adjudication, I can now explain the link between these two approaches to law and time and why reframing the old jurisprudential debates within the vocabulary of time, ’TOLR’, is explanatorily illuminating. To recall, a concrete form of judgment is that ‘tempered not just with mercy but also by knowledge: not only of the conduct in question and its context, but knowledge of our character…in all our particularity…we are not strangers but intimates, with a history’. 458 A theory of adjudication that is subsumptive, that anticipates all potential cases as mere particularisations of an all-encompassing rule appears to inhibit a concrete judgment that is characterised by radical differences which emerge in a particular theory of temporality that conditions it. Cases are seen by concrete judgment as new rather than real-world manifestations of pre-ordained rules and thus all the same. Therefore, a form of judgment in which cases are unique and not instantiations of rules is antithetical to rules that retain their rigid adherence to the past (i.e. the uniformity component). This requires a future-oriented legal rule (i.e. a form of pragmatism) that considers them qua standards with a propensity

456 ibid 851
457 Lefebvre (n 17) 56
458 Lucy (n 38) 22
toward change, adaptability and which accepts cases in their ubiquity. For the pragmatist, ‘their decisions are anchored in the facts of concrete disputes between real people’. 459

What this means therefore is that ‘TOLR’ and ‘TOA’ are inextricably linked. If the ‘TOA’ is to embrace an abstract form of judgment, the ‘TOLR’ can happily remain stable and thus past-oriented. This is because it will see cases as mere repetitions of a sensed-rule, eliding certain types of pasts which produce difference (and thus Kiranjit Ahluwalia ceases to be Kiranjit but is a ‘reasonable man’). If, however, the ‘TOA’ is committed to transformative concrete judgment, ‘TOLR’ has to make a similar commitment to change. This is because the temporality of concrete judgment understands the case as different and unique (Kiranjit was a constituted subject of law, not merely a ‘reasonable man’ and it requires a particular theory of time for that difference to emerge). Therefore, though the attention of the thesis lies squarely with ‘TOA’, it ought to be apparent why ‘TOLR’ is also an important part of this discussion. In order to achieve the normative aims of the project, if at all possible, will require a pragmatist judgment that sees the case as singular not particular and that sees legal rules as standards (or to use Lefebvre’s terminology, ‘senseless’) rather than rigid rules.

What is also interesting about adjudication is that, as generally retrospective, it is important to understand the implications of trying to conjure normative rulings that bind futures from historical inquiries. Indeed, ‘law continually seeks to fix subjects and events in time through judgments, definitions, and impositions that are always retrospective. Life and experience continually exceed legality, shoring up the limits of law but often with violent effect’. 460 In order to create ‘new futures’ requires the incorporation of different types of pastness in adjudication in which differences are emergent, thus seeing each case as singularly unique.

To summarise the discussion so far; for the purposes of clarity, I have described the term retrospective narrative (the legal event and subject) to replace the synonyms of reality-/fact-/past- construction. The term is able to capture both the facticity element of the project’s focus and that adjudication is generally invested in the construction of pasts. This section has also stated that the articulation of the retrospective narrative, the ‘epistemic primacy’, lies with the judges and law, contrary to intuitions that it is the litigants who determine authoritative constructions of ‘what happened’. However, the most important discussion was reserved for explaining two important and interdependent operations of temporality in law; ‘TOLR’ which describes the propensity of legal rules toward stability or change and ‘TOA’ which describes

\[^{459}\text{Posner (n 443) 11}\]
\[^{460}\text{Mawani (n 171) 79}\]
the main focus of the thesis of establishing a link between temporality and the retrospective narrative.

The next chapters will begin to outline a creative interpretation of the theories of time that will underpin two antipodal theories of judgment. I will describe adjudication as a spectrum in which cases can tend toward either end. The two ends of the spectrum and thus the two types of adjudication, forming the bases of chapters 4 and 5, which are largely related to abstract and concrete judgment described before, are distinguished, it is argued, by their temporalities and thus their subsequent constructions of the retrospective narrative (the legal event and natural persons). Firstly, *Adjudication as Cognition*, like abstract judgment, is a subsumptive (or inattentive) form of judgment that is characterised by a temporality borrowed from a Bergsonian reading of Kantian time. This will be put forward as the conventional (though not exclusive) form of adjudication. Secondly, at the other end of the spectrum lies *Adjudication as Understanding* which, like concrete judgment, is a responsive form of judgment characterised by a temporality borrowed from an imaginative reading of Henri Bergson and Hans-Georg Gadamer. This will be put forward as a less conventional form of adjudication. To clarify the relation between these two forms of the law-time nexus, see *fig. 4.*
This thesis attempts to posit that theories of temporality may explain how adjudication constructs its retrospective narrative. It rejects the subsumption thesis of adjudication that states, simply put, that laws (regardless of the source) considers facts ‘out there’ as already inhered in the rule. It supports this position on the basis that because legal rules ‘group particulars’ and that they may operate as either rigid rules or flexible standards, they create lacunae which, I argue, temporality may explain, not just from hard cases but even in so-called easy cases too. In addition, I also claim that temporality underpins legal subjectivity (or that subjectivity of law can be reframed through time), that in conventional judgment produces the problematic abstract, deracinated and ‘rational’ subject of law, that it is an unproblematised site for the exercise of unregulated power and that once a convincing account of the link between temporality and adjudication has been made, that an alternative temporality may explain a radically different form of judgment with transformative potential.

This chapter will now detail the theories of time that form the backbone of the thesis; Henri Bergson and Hans-Georg Gadamer. It aims to provide the backdrop for the different ends of the spectrum of judgment, adjudication as cognition (formerly abstract judgment) and adjudication as understanding (formerly concrete judgment), dealt with in the following two chapters. It begins by working through Bergson’s Durée or temporality as duration which is one of his major contributions to the philosophy of time. The proceeding section will move onto describing a Bergsonian reading of Kantian temporality. Importantly, while Bergson sees what he describes as the ‘spatialisation of time’ as an attack on Kant, I will use this account of spatial temporality without necessarily subscribing to a general attack on Kantian legal subjectivity. This is because I will use spatial temporality to level an attack at how it produces an abstract, deracinated and ‘rational’ subject of law, rather than Kantian subjectivity (though some broad parallels may be drawn between abstract, deracinated subjectivity and Kantian constructions of reason).
In addition, part of this section will be dedicated to discussing another qualitative feature of Kantian temporality, dominance, which I attempt to explain and justify with reference to Carol Greenhouse’s work. Thus collectively, this theory of temporality may be referred to as Dominant-Spatial Temporality (‘DST’). I will then move on to a creative working of Hans-Georg Gadamer’s Effective History. It is through Bergson and Gadamer that the thesis finds an explanation of the features of adjudication as understanding and how it constructs its retrospective narrative and with Dominant-Spatial Temporality, it will provide a sounder account of how adjudication as cognition constructs its retrospective narrative. Finally, I’ll briefly restate the framing of the enquiry which is the creative extrapolation of the ‘Kantian axiom’ (that time shapes consciousness) and locates this within Heidegger’s elevation of time in questions of Being.

3.1 Bergson and Durée

Henri Bergson was once considered one of the most brilliant thinkers of his generation. He had true polymathic credentials, illustrated by the fact that he started life as a mathematician, before turning to philosophy, and later winning the Nobel Prize for Literature. He was by all measures the archetypal public intellectual, situating himself both within the ivory tower but also in spaces of political power and public influence. Among his novel ideas, was ‘the life-force’ or élan vital, inhered in his evolutionary biology and his theory of creativity. Bergson reconfigured the Cartesian dualism as a difference of time not space, both which were brilliantly sophisticated in their elucidation and execution. After his final book, Two Sources of Morality and Religion, his work withered in significance, some attributing this to a debate that he ‘lost’ to Albert Einstein, others marking it down to an ascendancy of Hegelian philosophy. However, Bergson’s work has seen a resurgence of late, not only with a renewed interest in the Deleuzian readings of Bergson, but with his reception and application elsewhere.

Despite his mathematics background, Bergson was anxious of the mechanical scientific method encroaching into the fields of social sciences. Examples during his time included the ascendancy of Associationist Psychology which sought to quantify behaviour and emotions,
as well as Gustav Fechner’s Phonometrics, which similarly tried to measure feelings and sensory effects. The brain and consciousness were separate things in Bergson’s view and he saw the intrusion of science as relegating humans to the level of automatons. Thus the projection of his work champions the case of consciousness as the site of free will, unspoilt from the determinism of science. This is one of the reasons Bergson rejected teleological reasoning, declaring fatalistic conceptions of time incompatible with free will. Instead, the course of our own histories did not pull us from the future into it, rather it was the ‘life source behind us’, the compulsion or élan vital. Time was energy, to use the phrase coined by Suzanne Guerlac, and it liberated us from the fatalistic mechanism of science with a future that is open.

The influence of Michal’s musicality, Bergson’s accomplished pianist father, upon his son is apparent in Bergson’s poetic style of writing and the elegance of his philosophical analogies. His popular theory of time, Durée, was saturated with artistic and musical references, aiming to both entice the reader and to clarify his often complex ideas.

Bergson’s Durée or time as duration is considered ‘experiential time’ and thus ‘real time’. It is not the Aristotelian measurement of change between two points, but seeks to invigorate the concept of time with energy. Movement comes prior to that which moves. Indeed:

‘Pure Duration is the form which the succession of our conscious states assumes when our ego lets itself live, when it refrains from separating its present state from its former states. For this purpose it need not be entirely absorbed in the passing sensation or idea; for then, on the contrary, it would no longer ‘endure’. Nor need it forget its former states: it is enough that, in recalling these states, it does not set them alongside its actual state as one point alongside another, but forms both the past and the present states into an organic whole, as happens when we recall the notes of a tune, melting, so to speak, into one another’.

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465 This relates to the point that Alexandre Lefebvre makes earlier which stated that Bergson would have had a prima facie enmity toward the ‘goal oriented’ adjudication of American Legal Pragmatism. See also Lefebvre (n 17) 114
466 Bergson (n 385) 89
467 See also Guerlac (n 344)
468 This has been a bone of contention for some. See also Bertrand Russell, ‘The Philosophy of Henri Bergson’ (1912) 22, 3 The Monist, 321
469 Bergson (n 322) 100
Durée as real, lived time then is characterised by the interpenetration of conscious states. It is not a series of separate states (such as the divisible units of ‘clock-time’) but, as Bergson describes, ‘so solidly organized, so profoundly animated with a common life, that I could not have said where any one of them finished or where another commenced’. Hasten as one might to think however that time therefore is merely an interconnected linearity, Suzanne Guerlac likens it to a melody with an ever-accumulating past:

‘Duration implies a mode of temporal synthesis that is different from the linear narrative development of past-present-future. It involves a temporal synthesis that knits temporal dimensions together, as in a melody. Melody, which implies a certain mode of organization, is a figure of duration. The identification of a melody implies an act of temporal synthesis. Melody performs this work to the extent that it binds past, present, and future together in a radically singular way…Melody is the figure of confused multiplicity, the figure of duration. We are dealing with a succession of qualities and nuances of feeling, but ‘a succession without distinction.’ Elements overlap and interpenetrate in a peculiar solidarity.

In this way, time as durée is said to endure and the past is constitutive. It is exemplified by successive states of consciousness which are ‘confused or interconnected’. To conceptualise of time in this way is to think of it as the intercalation of an accumulating past into an ephemeral and dynamic present. Past and present cannot be delineated stricto sensu; to understand it as the addition of successive states is to fall into the trap of immobilised spatiality. Durée thus may be likened to a whole, rather than composed of distinct parts, and is thus antithetical to ‘clock-time’ or the process of ‘chronologisation’ (the process of distinguishing, selecting, and placing adjacent to one another, states into a sequence that are presume to be causally related). Most significant to durée therefore, is the notion of interpenetration. The adage that the ‘past colours the present’ is a useful metaphor here to describe interpenetration’s intuitive appeal. Thus durée as experience is resistant to division unless it is reflected upon, in which it ceases to be durational time. Importantly therefore it resists analytic intervention.

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471 Gerald Postema also likens law’s intrinsic temporality to melody. Melodies require rhythm (a temporal succession of notes and rests of defined relative duration) and without time, the rhythm ceases. A ‘slice’ of the melody therefore is a contradiction in terms. Listening to a melody involves projecting what has been heard on to what is to come. If what is to come is different, what has been heard is re-integrated into the totality of the melody. If it is as expected, it re-affirms what has been heard. Melody therefore is holistic. Postema holds that intentions (which are partial and indeterminate plans) and law (as normatively guiding social action) share this trait. Normatively guided actions require citizens and officials to use law when executing intentions which require coherence over time. Postema concludes that ‘the normative coherence of momentary legal systems is derivative, depending entirely on their coherence over time.’ See also Postema (n 401) 203. For a recent comment on this piece, see also David Luban, ‘Time-Mindedness and Jurisprudence’ (2015) Virginia Law Review (forthcoming)
472 Guerlac (n 344) 66-67
473 Thus becoming is reality, being is mere appearance
474 Mawani (n 71) 256
differs from a past and present that sit adjacent to one another (like in chronologies); rather they dovetail one another into an indistinguishable whole. The relationship is one of symbiotic mutualism:

‘Within myself a process of organisation or interpenetration of conscious states is going on, which constitutes true duration. It is because I endure in this way that I picture to myself what I call the past oscillations of the pendulum at the same time as I perceive the present oscillation’.475

In addition to its indivisibility, durée is also associated with motion. One of his many analogies, this time of the shooting star, provides a useful illustration; ‘we have the sensation of the space traversed and the indivisible sensation of motion or mobility’,476 wherein durée refers to the latter of these descriptions:

‘In short, there are two elements to be distinguished in movement, the space traversed and the action by means of which one has crossed this space, the successive positions and the synthesis of these positions. The first of these elements is a homogenous quantity. The second only has reality in our consciousness. It is…a quality or intensity’.477

What are some of the central themes that can be deduced from durée? One key feature is of an accumulating past which shapes the consciousness of present perception (in this respect, it has strong Gadamerian overtones as ‘the range of vision that includes everything that can be seen from a particular advantage point’).478 Natural persons are not a tabula rasa, or a subject with transcendental concepts, but our changing beliefs and practices pre-exist and shape our present choices. One cannot consider durée without considering the intrinsic link between what has-been and what is-becoming. Thus durée asserts that the past is constitutive of an ever changing present (hence present as becoming).

Bergson also describes durée as qualitative and resistant to quantification. The feature of quality is ascertained by the ubiquity of the present experience; the past, as the accretion of

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475 Bergson (n 322) 108
476 ibid 111
477 ibid 111-112
478 Sherman (n 331) 389
former presents, consequently pigment the experience of the present. Thus no two ‘presents’ can be said to be the same and their difference is qualitative rather than quantitative.\textsuperscript{479} The combination of time’s quality and its motion, Guerlac calls \textit{qualitative progress}, and another of Bergson’s analogies illustrate this point; imagine watching the oscillations of a pendulum, swaying from side to side, lulling oneself into a state of relaxation till eventually you sleep. Durée suggests that it can’t have been the last swing, singularly disconnected from the others that made you sleep, rather it is the combination of all the previous swings, ‘the rhythmic organization of the whole’.\textsuperscript{480} It was not the quantity of the notes, but the quality exhibited by them. Time thus cannot be reduced to magnitudes as this is a vapid representation of its rich heterogeneity. Durée therefore is ultimately a \textit{time of quality}.

If ‘time is experience’, how could such a theory of time explain a practice like adjudication which is \textit{pathologically representative} by virtue of taking place \textit{ex post} of the experience?\textsuperscript{481} This and other potential limitations about how durée can be represented (or indeed even if one can ‘discuss’ durée) are developed in more detail in the section on ‘Spatial Temporality’\textsuperscript{482} but:

‘No doubt there is a difference between duration itself and an abstract definition of duration…Perhaps, in Bergson’s philosophy, duration is something we cannot have an abstract idea of. Perhaps we can only experience it and not, or not adequately, talk about it. To say this would be close enough to the spirit of Bergson’s philosophy, since if philosophising is an intellectual activity, and therefore involves the ‘freezing of what it is talking about, it would not be surprising if difficulties arose when we tried to talk about the inherently unfrozen’.\textsuperscript{483}

Whilst this clearly hasn’t stopped Bergson himself, it is worth bearing in mind as indicative as to the nature of the solutions proffered in adjudication as understanding’s normative aim to be underpinned by durée (or tending toward it).\textsuperscript{484}

\textsuperscript{479} This idea is developed further in \textit{Matter and Memory} but for an overview, see also Guerlac (n 344) 106-172
\textsuperscript{480} Bergson (n 322) 106
\textsuperscript{481} This is explained in the section on ‘Dominant-Spatial Temporality’ and Bergson’s distinction between the Reflexive - Immediate Conscience and ‘representing durée’ in Chapter 3, section 3.2 and Chapter 5, section 5.1
\textsuperscript{482} See Chapter 3, section 3.2
\textsuperscript{483} A R Lacey, \textit{Bergson} (Routledge, 1989) 28
\textsuperscript{484} See Chapter 5, section 5.1. As a tangential point, it could be argued that Bergson would be a decent contender as interlocutor between modernism and post-modernist traditions. His critiques of stability and spatiality of the former, whilst still retaining a metaphysical framework harnesses a philosophy of motion, that lends to the intransient, ephemeral and differential etiquette characteristic of post-modernism. See also Muldoon (n 362) 179
3.2 Dominant-Spatial Temporality

Dominant-Spatial Temporality is primarily derived by Bergson’s reading of Kantian temporality. The concern here however, will be how the cognitive apparatus mediates time and therefore introduces features of space into time qua durée. ‘DST’ will be read as informing Adjudication as Cognition. Though references are made to Kant, I want to limit the mention of him to avoid the confusion that I am attacking Kantian legal subjectivity, when in fact the critique is levelled at abstract, deracinated, ‘rational’ subjectivity (admittedly, with whom similarities can be drawn) produced by spatial time.

3.21 Temporality as Spatial

How is time spatial? Incidentally, in Kant’s own terms, there is nothing to suggest that time is spatial. Indeed, he explicitly separates the two. To understand time as spatial (as I will) therefore is to read Kant through Bergson (though not to adopt this as ‘Kantian’) and say that time (durée) has been changed with features of space (and not that it becomes space).

Time as spatial, unlike Bergson’s experiential time (durée), is mediated through symbols and other representations. To explain how time introduces spatial features requires understanding what Bergson means by intensity and extensity. Consider the following; Sadiah enjoys reading books about legal philosophy but seeing her friends makes her ‘twice as happy’. Her happiness can be measured relative to the different tasks she undertakes during her day. It is this ‘quantification’ (‘twice’) of ‘internal states’ (‘happiness’) that Bergson took issue with. These intensities or ‘psychic states’ as Bergson refers to them as, cannot be measured in the same way as extensities; that which exists within the external realm or what Descartes called extension. To clarify the point, Bergson invites us to also consider the following example. If Sadiah switches on one bulb, it will emit light which will create the sensation of brightness. If she proceeds to switch on another additional bulb, or better yet imagine a dimmer switch, where she can reduce the output of the light, the sensation of the brightness changes. Though light can be measured in watts or joules, the brightness is something different. It refers to one’s feeling of the quality of the light, not the quantity. Sadiah cannot measure the brightness of

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485 This is in contrast to Valverde’s ‘chronotopic analysis’. See also Valverde (n 83) 33-37
486 Bergson (n 322) 1
487 Bergson differs significantly from empirical or idealist epistemologies. See also Bergson (n 470)
488 Bergson (n 322) 4-5
the light in the same manner as she can measure the light itself. This attempted alignment of intensity with extensity is understandably prevalent. For example, Sadiah can appreciate that her muscles feel (intensity) under more strain with a heavier object (extensity), hence the temptation to equate the increase in weight to the sensation she feels within herself; but Bergson had issue with equating the measurable external magnitude with the intensity. Such a process was what he termed \textit{representative sensations}.\footnote{ibid 90}

This leads Bergson to make the distinction between \textit{difference in degree} and \textit{difference in kind};\footnote{Guerlac (n 344) 45} the bulb changes in the former sense by units of measurement, the brightness in the latter based on sensations. Henceforth brightness and light are not equivalent.\footnote{This is made clearer with the idea of \textit{pure sensations} which are seemingly independent of any external stimuli or extensive magnitude and avoids the trap of equating it with extensity. See also Bergson (n 322) 10-11} Bergson eloquently describes the changing states of these intensities as becoming richer in much the same way a melody does when other instruments join into an ensemble piece. Intensity therefore, is a succession of different conscious states or feelings which naturally interpenetrate one another- what is known as ‘qualitative progress’.\footnote{Guerlac (n 344) 49} This particular phrase of Guerlac’s captures two important aspects; firstly that the nature of the difference is qualitative and not measureable and secondly, the succession of conscious states is a dynamic process. To recall the light bulb example once again, Bergson forces the distinction between the difference of brightness in its qualitative sense, rather than confusing it with the quantity of the measureable light (in joules); and to consider intensities of brightness (quality) which he terms ‘qualitative multiplicity’.\footnote{Bergson (n 322) 40-41}

Having explained the differences between intensity and extensity, the ground work is laid for Bergson to explain the differences between space and thus spatial time and his experiential time or durée (Bergson). Extensities are representative of intensities. Simply put, durée, as a stream of interconnected conscious states, is an intensity, and spatial time is extensity.

Temporality as spatial does not mean that it metamorphosises into space but rather it imbues qualities of space. Unlike durée, spatiality is ‘what enables us to distinguish a number of identical and simultaneous sensations from one another; it is thus a principle of differentiation other than that of qualitative differentiation, and consequently it is a reality with no quality’.\footnote{ibid 95} Objects obtain their exteriority from space. It is the ‘medium which inserts intervals between
them and sets off their outlines'. Space is the empty, uniform scene for the representation of objects, a 'homogenous milieu detached from any content'. Bergson, reading this, understands therefore that the thing that is spatialised (in this instance time) is presumed to be the same.

To illustrate the point of uniformity, consider the process of counting sheep. In order to proceed beyond 'one', the individual must ignore their 'qualitative differences' and assume uniformity among the sheep; otherwise, she or he may be in a situation in which they count one sheep, then another 'one sheep', but which is slightly shaggier so that it is counted separately, and another 'one sheep' that is in fact an ewe, and so on and so forth, without ever proceeding beyond the number one. Counting (i.e. quantification) cannot proceed therefore, without the imposition of uniformity. In the process of counting sheep 'we must retain the successive images and set them alongside each of the new units which we picture to ourselves: now it is in space that juxtaposition takes place'. Objects in space are implicitly juxtaposed and discrete/divisible. Bergson also says that one is able to 'hold things in space' and thus conceive of them all at once. This is what is referred to as simultaneity (think of clock-time).

To explain how the features of space, (uniformity, divisibility, juxtaposition, simultaneity) are introduced into 'real time'; Bergson then proceeds to identify two types of consciousness: immediate and reflective. These not only explain how features of space 'corrupt time' (qua durée) but also paradoxically, why spatial temporality is a seemingly necessary configuration of judgment generally.

Bergson says that the Immediate Consciousness refers to the way something is perceived by us directly, before one stops and thinks about it. Focussing on its prefix reveals im-mEDIATE may translate to un-mediated apprehension of an object (though perhaps Bergson overestimates how un-mediated the immediate consciousness is). The im-mEDIATE consciousness therefore, senses data that stimulates the 'stream of consciousness' (durée or experience). Once one reflects upon experience (durée), it undergoes mediation in representative (and thus spatial) forms and falls into the trap of immobility. The emphasis of

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495 Ibid 98
496 Guerlac (n 344) 64
497 This important point relates to abstraction that Deleuze takes issue with in his critique of the dogmatic philosophy of recognition. For the sheep to be counted, they have to be categorised in a manner that extinguishes them of their qualitative difference (abstraction) so that what remains is their sameness. Therefore, they can only be counted if they correspond to an abstract concept or that which is recognised.
498 Bergson (n 322) 77 (emphasis added)
499 Guerlac (n 344) 62
500 I claim that Bergson’s durée as ‘time which is unmediated’ is in fact mediated, not by concepts, categories or language, but by the Pure Past, thus rejecting the idea of an ‘objective reality’. In this respect, Bergson perhaps underestimates the post-modern/post-structuralist fervour of his durational time.
the immediate consciousness therefore is on the immanence and ‘purity’ of the sense data. The immediate consciousness tries to get into the thing before it is synthesized with concepts. In this way, immediate consciousness is raw data, free from any processing, computation and thus ‘objectivisation’. 501

This type of consciousness can be contrasted with the Reflective Consciousness. Bergson describes it as ‘a medium in which our conscious states form a discrete series so as to admit of being counted’502 in that ‘it delights in clean cut distinctions, which are easily expressed in words, and in things with well-defined outlines, like those perceived in space’.503 The very act of cognition (for example, in the Kantian transcendental apparatus) that synthesizes data with concepts to create phenomena (ie to subsume),504 allows us to think and act. This means that pure data is merely represented and, within the Bergsonian metaphysics, not real. This data can be represented through ‘language, logic, mathematics, and other symbols or means of representation’.505 Thus the very act of cognizing or reflection introduces spatiality into durée (hence why the form of judgment predicated upon spatial time is referred to as adjudication as cognition) and also illustrates the problem of aligning extensity with intensity (or representations that describe interpenetrating conscious states.)

How spatiality is introduced into durée requires a further understanding of why words, symbols or other forms of reflection and representation are inherently static and spatial.506 Reflexivity naturally requires contemplation about an object before one can represent it in some form. The representation mimics that which is akin to space as the object becomes homogenized. In other words, reflection strips the conscious states of their qualitative difference, and places them against one another in discrete categories to create a quantitative multiplicity. To recall the example of counting sheep made earlier; this illustrates the inextricable link between reflexivity and spatiality. Numbers necessarily imply spatiality (divisibility, simultaneity, uniformity and juxtaposition) and thus discrete states rather than continuity or interpenetration; no two numbers can overlap (even though numbers can be divided ad infinitum, they will always be juxtaposed). Like extensive qualities, they are self-contained because of their uniformity. Thus uniformity suggests homogeneity and juxtaposition implies simultaneity. The counting of the sheep deprives them of their ‘difference in kind’. Indeed, ‘we include them all in the same image, and it follows as a necessary consequence that we place them side by side in an ideal space’.507 Counting is necessarily reflective and numbers are a representation

501 This is not to suggest that durée and the immediate consciousness is an ‘objective reality’. See note above
502 Bergson (n 322) 91
503 ibid 9
504 Much like Lefebvre’s critiques of Hart, Dworkin and Habermas’ theories of adjudication
505 Guerlac (n 344) 62
506 See also Muldoon (n 362) 179
507 Bergson (n 322) 77
of the conscious states which are a result of the cognitive process such that they are reflective rather than immediate. Bergson however, reserves his most searing criticism towards language; ‘it is above all language that alienates us from direct experience’. 508 The interpenetration or ‘confused multiplicity’ of our immediate consciousness is whittled into objects presented as words which reduce events to a distinct multiplicity, thus creating a chronology. It falls into the same trap of spatiality as number, in which time is presented as independent entities which are statically isolated. Any representation which necessarily involves some form of cognition, will always introduce space into time. A. R. Lacey sums it up well stating that ‘since philosophizing is an intellectual activity, and therefore involves the ‘freezing’ of what it is talking about, it would not be surprising if difficulties arose when we tried to talk about the inherently unfrozen’. 509 To think of time as durée, in a reflective endeavour such as adjudication, seems unworkable.510

Spatial temporality therefore can be understood as a representation of durée, in which durational time is reflected upon, mediated and represented to subsequently introduce properties of space into it. These include divisibility, simultaneity, juxtaposition and uniformity. Spatial time is operant in the reflective consciousness (reflected) that subsumes ‘lived experience’ (durée) under categories (mediated) in its cognitive process, thus introducing features of space into time (represented). Time considered in this respect, is nothing more than the fourth dimension of space. Spatial time ignores the qualitive aspect that is characteristic of the inner conscious states (durée), instead replacing it with uniformity and simultaneity. As adjudication is positioned ex post, operative as a type of reflective consciousness which proceeds linguistically, spatial time appears to be an a priori feature of adjudication’s temporality. Spatiality, in adjudication as cognition’s temporality will be placed at odds with the temporality of the natural persons which absorbs durée as an ontological concept.

3.22 Spatial Temporality as Dominant

A good starting point here is to recall Carol Greenhouse’s anthropological study of legal temporality as being able to create a myth of linearity that accommodates different cultural temporal logics:

508 Guerlac (n 344) 69
509 Lacey (n 443) 28
510 See Chapter 5, section 5.1
‘Institutions that regulate social change must also, therefore, regulate the play and contestation of the multiple temporal logics that inhere in situations, and make temporal commitments themselves. Thus, the ‘shapes’ of time are not inscribed as fixed geometric blueprints in a culture’s mentality, but are contested, negotiated, defended and transformed in the juxtaposition of persona and institutional forms that comprise social life anywhere’. 511

Greenhouse attributes the success of law’s time in its rigorous dominance that is able to settle conflicts sprouting from these temporal indeterminacies. Indeed, ‘the law represents itself in ways that situate it at precisely these indeterminate points, resolving conflicts one at a time while gesturing toward the totality of all resolutions of all hypothetically possible conflicts’. 512 Greenhouse’s précis is that law is culturally legitimised both by its dominance and the apparent success in mitigating these different temporal logics. Indeed, Rebecca French says that ‘law has the power to create, alter, distort, or even destroy time itself, not simply our experience of it’. 513 This argument is further echoed by Ost who claims that decisive power rests with those who are in a position to impose their construction of time on other social groupings. 514 Indeed, ‘time...is also the subject of power relations through which agents’ engagement with the field can be directed and shaped’. 515

To describe Spatial temporality as being dominant is to put forward the claim that generally, its temporality prevails in dictating the retrospective narrative (passage of events and the construction of the natural persons qua legal subject- the ‘Kantian axiom’) in adjudication. That its temporality prevails does not mean that it will always determine the construction of the retrospective narrative but rather it will dictate the preferential temporality. As has been noted earlier, there are instances in which adjudication may exhibit temporal porosity 516 in which the temporality of law is voluntarily subsumed to that of another system or persons (whether natural or legal).

Dominance is thus about the expression of power in controlling temporality. There are four arguments that purport to support adjudication as cognition’s dominance: firstly, a quasi-formalist argument that adjudication as cognition’s temporal dominance is derived from the claim of law as a hegemonic normative system; secondly, and this argument is linked to the first, is what Lefebvre calls inattentive judgment. This describes the lack of openness toward

511 Greenhouse (n 155) 1633
512 ibid 1641
513 French (n 125) 693
514 Ost (n 281) 22
515 Grabham (n 64) 113
516 Harrington (n 117) 14
the Encounter and thus change; the third argument (which is situated in the antithesis of the modernist project from which the first argument originates) is the claim of 'decentring the subject' which equally leads toward the dominance of adjudication as cognition’s temporality; the fourth and final argument, perhaps the strongest and keeping within the Bergsonian vernacular, is that spatial time, because of adjudication’s positon ex post and the discursiveness of human social relations (and thus adjudication), is necessarily dominant.

The first claim, that which is ‘quasi-formalist’, is that law as the hegemonic normative system, or what is referred to in the positivist literature, ‘law as authority’\(^{517}\) suggests that its inherent temporality is inescapably dominant. Simply put, ‘the law presents itself as a body of authoritative standards and requires all those to whom they apply to acknowledge their authority’.\(^{518}\) Declaratory theories of law, for example, will pre-empt the retrospective narrative and thus have little room for opening up to different temporalities and thus understandings of ‘what happened’ (ie the uniformity component). Since positivism states that laws are intrasystemically validated, the rules which will govern and adjudicate on the conduct of the legal subject will themselves be internally validated. Thus by definition, norms derived from extra- or non-legal sources are obviously not legal.\(^{519}\)

The second claim, linked to the previous point, states that something like formalism could be said to undermine creativity in adjudication. As has been previously stated, Lefebvre calls this inattentive judgment\(^{520}\) which he describes as the moment when the new fact situation is merely understood as a sign of a general memory (recalled through habit), or the case is seen as a particularisation of the general rule. A legal system which acknowledges its own creative power may demand a thorough examination of the fact situation (the Encounter) as that which is unrecognised. In other words, adjudication which is not open to change through the primacy of the Encounter, necessarily sees the present case as merely recalling an old rule without any detailed introspection or differential understandings of its retrospective narrative. In this sense, adjudication as cognition could be described as closed and thus resistant to change.

The third claim rehearses the previous point in chapter 2 which seeks to destabilize certain presumptions about the so-called ‘epistemic primacy of the legal subject’.\(^{521}\) In chapter 2, I

\(^{517}\) See also Raz (n 16) 3-37
\(^{518}\) Ibid 33
\(^{519}\) Does ‘dominance’ however, undermine the neutral commitment of participants to legal rules in Hart’s Internal Point of View? Does this confl ate (and thus require a theoretical leap from) rational commitment to rational laws to a more insidious expression of power and thus dominance? Also on another note, it is possible that adjudication’s temporality could be dominant without being spatial though I will articulate later why it is spatial. See Chapter 4, section 4.1
\(^{520}\) See Chapter 1
\(^{521}\) The first and third arguments appear to be of convenience than of coherence, both originating from antipodal intellectual traditions. How can they be reconciled? There is a similarity in the sense that the positivist argument and
discussed how the displacing of the individual as the epistemic centre in adjudication was a truer reflection of what happens in legal decision making, presenting the law as the epistemic centre of adjudication which would be characteristic of the dominant feature of adjudication as cognition’s temporality. This attempts to undermine the modus operandi of methodological individualism upon which the modernist tradition of Anglo-American jurisprudence reposes upon and it ‘rules out the naïve assumption that human actors through their intentional actions make up the basic elements of society’.522

*The fourth claim*, perhaps the most compelling, develops the themes from Bergson that temporality can either be *real* or *represented*. When temporality is represented or reflected upon, it introduces spatiality which embodies time as uniform, made of distinct, juxtaposed and simultaneous states. Adjudication, as that which proceeds *ex post* (thus reflected) results in a reflective consciousness, meaning that spatial temporality is *necessarily* projected onto the natural persons. Durée is also represented because adjudication is naturally a discursive practice. Therefore, both adjudication’s positioning and its discursive nature means that it is *necessarily* representative, and thus spatial. Hence spatial temporality is *practically* dominant. It would be impossible to proceed with any legal argumentation and reason without representation. Thus there is a sense of the inevitability in spatial time:

‘Language is of course necessary for social life, and to this extent it is required for self-preservation. Indeed, the very act of projecting a common spatial world, the world implied by language, is itself a step toward social life…He [Bergson] suggests that the pressure of social life requires the doubling of the subject, the engendering of a second self that covers over the first, like a second skin made up of dead leaves, or dead cells’.523

‘It is very natural, we must repeat, that we should lay emphasis on the state and not upon the change; indeed, the breaking into states of a continuous change allows us the possibility of perceiving objects and acting upon them, and so our interest in states is of great importance and practical utility’.524

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522 Teubner (n 430) 730
523 Guerlac (n 344) 76
524 Algot Ruhe and Nancy Margaret Paul, *Henri Bergson: An account of his life and philosophy* (1914, Macmillan and Co Ltd) 81
Whilst legal rules and concepts inevitably alienate us (le moi superficiel) from our immediate experience (le moi fondamental) it is wholly necessary. Legal rules and their actualisation in the retrospective narrative cannot capture the ‘realness’ of durée- its motion, its indivisibility, its interpenetrative-ness, its accumulatory past.\footnote{However, Bergson appears to make a concession on the representation of durée both in Essai and his later works as has been acknowledged. In the concluding chapter of Essai, Bergson closes by asking and replying, ‘can time be adequately represented by space? To which we answer: Yes, if we are dealing with time flown; Not, if we speak of time flowing’. Adjudication, as that which is ex post, clearly deals with time flown- so surely that is the end of it? However, this cannot be used as a reason to entirely disconnect from any attempt for adjudication to capture real time qua durée (and thus submit to spatiality); for importantly, though adjudication takes place ex post, it emphatically attempts to understand the events ex ante. See also See also Mark S. Muldoon, ‘Henri Bergson and Postmodernism’ (1990) 34, 2 Philosophy Today, 184-188; Henri Bergson, \textit{Time and Free Will: An Essay on the Immediate Data of Consciousness} (J H Muirhead ed, F L Pogson trs, Forgotten Books 2012) 221; Kevát Nousiainen, ‘Time of Law, Time of Experience’ in Jes Bjarup & Mogens Blegvad (eds), \textit{Time, Law and Society: Edited Proceedings of a Nordic Symposium at Sandbjerg Gods} (Franz Steiner Verlag, 1994) 23}

This final argument therefore is that the dominant aspect of spatial temporality derives from its practical import. The result is that dominance and spatiality share an intimate and symbiotic relationship in which dominance feeds into spatial time through practicality. In later describing adjudication as cognition’s temporality as being dominant therefore, is to imagine that this form of adjudication controls, in part, the construction of the retrospective narrative in adjudication. That this form of adjudication is dominant derives from the fact that (a) legal rules prescribe and proscribe the standards of future conduct, (b) that adjudication without an inherent creative capacity will not be open toward divergent temporalities (and thus differential constructions of the legal event and natural persons), (c) that the claim presents law as the epistemic centre of adjudication and finally, (d) and most paramount, that because of adjudication’s positioning ex post and the linguisticality and sociality of human relations, it is both dominant and spatial. Collectively termed Dominant-Spatial Temporality (‘DST’), these arguments will help us to understand how adjudication as cognition constructs its retrospective narrative.

### 3.3 Gadamer and Effective History

Gadamer, like Bergson, harboured a reticence toward the encroachment of the natural sciences on human understanding and playful readings of Gadamer may be able to construe him in some sense as ‘neo-Bergsonian,’ or with whom many parallels between his and Bergson’s work can be drawn. Working under the tutelage of Heidegger and Husserl,
Gadamer was inspired primarily by the former in seeing interpretation, not as a method, but as ontological. He was renowned for the post-Romantic shift in hermeneutics, observing the epistemic limitations in humans’ inherent situatedness. Gadamer claimed that one always projected one’s own prejudices, or ‘effective history,’ onto their understanding of texts. The task for the interpretive being was to challenge their ‘horizons’ with that of the text until there was a synthesis or ‘fusion of horizons’.

At this point, some provisional points can be made as to what would such natural persons and legal event (‘retrospective narrative’) may look like with a predilection toward Gadamer’s thought. A ‘Gadamerian natural person’ would be ‘influenced’ by an immanent effective history which it is necessarily immersed in and thus constituted by. Its past would project into its present and shape its own understanding and experience. Thus, in the creative application of Gadamer, to transfer the effective history of the judge to the effective history of the natural persons would require adjudication to introspect into the traditions that shape the natural person’s experience. This is what is meant by the past as constitutive. As for the legal event, this very much ties into what one understands as the constituting horizon of the natural persons, as Gadamer is concerned, not with method (and thus what causes successful understanding), but the conditions of the possibility of understanding. This suggests the incorporation of conditions (whatever they may be) as part of the retrospective narrative in adjudication predicated upon this type of temporality.

3.4 Recalling Heidegger and the Kantbuch

What I have termed the ‘Kantian axiom’ states that time (along with space) is an a priori feature of the intellect that allows us to make sense of data and to produce phenomena. The orientation of the thesis therefore attempts to creatively extrapolate this axiom, that time frames consciousness, to posit that time similarly frames adjudication’s construction of ‘what happened’ (or its pastness). This ‘extrapolation’ is detailed in the following two chapters.

526 See Chapter 5, sections 5.21 and 5.3
527 What those traditions are will be discussed in Chapter 5, sections 5.2 and 5.3
528 Warnke (n 324) 3
529 Much of Bergson and Gadamer could be re-shaped within the threefold synthesis that Heidegger provides a temporal structure for. However, the discussion of Heidegger and Kant and the Problem of Metaphysics is to, like Bergson and Gadamer, focus the relation between time and consciousness/interpretation/Being.
Earlier, I framed this axiom within Heidegger’s reading of Kant’s *Critique of Pure Reason*. In short, the schema in Kant are that which link the a priori concept of understanding with sense perception in apprehension- and it is temporality that connects the two. Time therefore becomes the condition of the possibility for experience and is that from which Being is experience. The transcendental knowledge that must be presupposed for there to be experience, all rests upon the primordial ‘ecstatic-horizontal’ time of the Imagination as the interlocutor of Sensibility and Understanding.

The comparisons between Gadamer and Heidegger are also mentioned in the previous chapter. Gadamer employs a *thrownness* resulting in our being-in-the world which Heidegger articulated as presupposing theoretical elucidation. In addition, his dialogic approach, explained elsewhere as the *Fusion of Horizons*, is suitably Heideggerian. Further, Gadamer attempted to articulate a hermeneutics which identified the conditions of the interpretive style. Thus being-in-the-world, or the *effective history* as Gadamer puts it, is prior to any understanding. Our contexts of involvement, our horizons shape our interpretive endeavours. Gadamer offers a theory of time that is contextual, in which an ‘effective history’ necessarily situates and shapes our present. Within the framework of Heidegger’s *Kantbuch*, Gadamer and Bergson are read as connecting temporality to consciousness (or hermeneutics). Indeed, for Bergson, the two are inseparable as his theory of time is ‘the form which the succession of our conscious states assumes when our ego lets itself live’.

To summarise, the chapter has described three theories of temporality. Bergsonian durée is a time of motion, with an interpenetrative, accumulating and constitutive past and ephemeral present. It is analogous to experience and is resistant to any form of analysis which necessarily neutralises its interpenetrativenss. Spatial temporality is durée which is reflected upon, through the cognitive apparatus, and thus introduces features of space such as uniformity, divisibility, juxtaposition and simultaneity. Additionally, it is also characterised by its dominance in that it preferentially determines the construction of the retrospective narrative. Gadamer, like Bergson, formulates a temporality that ‘impairs’ a timeless reason with a necessarily constitutive ‘effective history’.

The next two chapters will now develop these theories of temporality to explain how they underpin the ‘antipodal theories’ of the judgment spectrum, formerly abstract and concrete judgment, now adjudication as cognition and adjudication as understanding respectively. The

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530 See Chapter 1, sections 1.4 and 1.5
531 Bergson (n 322) 100
features of ‘DST’ temporality (uniformity, divisibility, juxtaposition and simultaneity) provide the basis for adjudication as cognition's retrospective narrative; and Bergson and Gadamer explain the same for adjudication as understanding. They will both be said to produce legal subjects and legal events which, in turn, impact upon responsibility attribution.
CHAPTER FOUR

Adjudication as Cognition- ‘Dominant Spatialised Temporality’

Earlier, I described that judgments can tend toward either adjudication as cognition (abstract judgment) or embrace the features of adjudication as understanding (concrete judgment); and that both are distinguished by differing theories of temporality upon which they are contingent. Adjudication as cognition (as the conventional form of judgment) and its construction of the retrospective narrative is predicated upon, it is claimed, dominant-spatial temporality. This chapter will detail how such a theory of judgment, because of its theory of time, constructs its retrospective narrative and some of the merits and demerits of such a construction. In explaining its construction of the retrospective narrative therefore, this will attempt to deal with the research question pertaining to legal subjectivity’s contingency on temporality and, also, some of the issues concerning temporality and power.

From the start of the first section of this chapter, I will limit the use of the term abstract judgment and exclusively refer to it as adjudication as cognition for reasons that have been alluded to previously.\(^{532}\) As a reminder, such a form of adjudication ‘judges us (i) not in all our particularity but as identical abstract beings; (ii) by reference to general and objective standards equally applicable to all such beings; and (iii) the application of these standards being mitigated only by a limited range of exculpatory claims’;\(^{533}\) William Lucy identifies abstract judgment (adjudication as cognition) as morally problematic for the reason that all natural persons are reduced to formally equal legal subjects exercising reason (what is part of my attack on the abstract, deracinated, ‘rational’ legal subject), which is ‘the principal means by which the law treats those before it as abstract beings rather than as the beings they actually are’.\(^{534}\) Adjudication as cognition therefore is similarly characterised by presumptive identity that does not detail the natural persons in their specificity (social, cultural or economic milieus); and the uniformity component in which legal rules are disinterested in the natural persons specificity

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\(^{532}\) See Chapter 3, section 3.21
\(^{533}\) Lucy (n 38) 23
\(^{534}\) ibid 25
and are applied indiscriminately.535 The claim is that dominant-spatial temporality may explain the presumed identity and uniformity component of adjudication as cognition.

The chapter will begin with explaining the general merits and demerits respectively of adjudication as cognition’s ‘Dominant-Spatial Temporality’ (‘DST’) in the construction of its retrospective narrative. It may seem unusual to first address the merits and demerits of ‘DST’ before looking at actual examples of how it constructs its retrospective narrative. However, in identifying the general claims of ‘DST’, it will make clear the problematic nature of its manifestations in the construction of its retrospective narrative. Thus the final section will move onto discussing concretely how ‘DST’ constructs the retrospective narrative. As adjudication is generally ex post and may be considered as invested in the construction of pasts, adjudication as cognition will be known to produce a spatial past and the section will look at the elements of subjectivity and event construction concomitant with this type of past.

4.1 The Merits of Dominant Spatial Temporality in the Retrospective Narrative

I argue that because ‘DST’ informs adjudication as cognition, it explains how it constructs its retrospective narrative (the legal event and legal subject). In the chapter so far, ‘DST’ has been understood as the temporality of the archetypal form of judgment, adjudication as cognition, basing it on a reading of Kantian time by Bergson.536 To describe time as dominant spatial is to say that it is divisible, formed of discrete states (or events) that are uniform, can be juxtaposed, and as a result are simultaneous and that it has preferentiality in the construction of the retrospective narrative for the reasons discussed earlier.537 Adjudication as cognition, as that which is generally ex post, occupies the Reflective Consciousness. Importantly therefore, what does the Reflective Consciousness and ‘DST’ mean for adjudication as cognition in its construction of the retrospective narrative (and thus its pastness)?

Adjudication as cognition (and thus DST) primarily lends to categorising experienced social reality (durée) into discrete events that can be distinguished, placed adjacent to one another, selected, and generates what one may understand as a chronology. To chronologise the

535 ibid 26
536 This is not an attack on Kantian legal subjectivity, but the paradigmatic abstract, deracinated, ‘rational’ subject of law
537 See also Chapter 3, section 3.2
retrospective narrative, therefore, is to describe the process of ‘distinguishing, selecting, and placing adjacent to one another, states into a sequence that are presumed to be causally related’. DST thus provides the theoretical basis of Kelman’s time framing as the unconscious construct in criminal law adjudication, which allows it to construct the world and natural persons in narrow or broad time-frames (as with Nousiainen and Norrie) and to consider certain types of pastness immaterial. This affords the judge the ability to distinguish certain events, include others or even create a narrative in which certain things never happened. As ‘DST’ produces a ‘pastness externally in space’, this translates to the construction of the world into discrete units capable of being counted and measured, and thus the apprehension of a world as if it were static and immobile. By thinking of adjudication as cognition’s temporality as spatial and thus as fixed, this may allow for differences emergent in other types of pastness (made possible with other theories of time) to be elided, laying a claim to sameness. This is what this chapter understands when Greenhouse says that law’s time is able to mediate amongst ‘competing temporalities’ (and subsequently, competing accounts of ‘what happened’ in the adjudicatory exercise).

Spatial temporality allows for things to be measured, numbered, sequenced, manipulated, and to demarcate the commencement-termination of the parameters of the legal event. Judges will use temporal triggers\(^{538}\) that appear to suggest time (\textit{qua durée}) when in actual fact this is nothing more than ordering in space. Such temporal triggers can either be dates or conduct which denote the initiation of legal relations, such as acceptance of a contract (and the other pre-requisites), \textit{mens rea} etc. The temporality of adjudication as cognition therefore, imbues the difference of degree, not of kind, a difference between broad or narrow time frames of the legal event or natural persons.

If one accepts the practical necessity of spatial thinking,\(^{539}\) then in effect all cases \textit{chronologize} their retrospective narrative. In the case of \textit{Mcloughlin v. O’Brian}, Lord Wilberforce’s outlined the facts as follows:

‘My Lords, this appeal arises from a very serious and tragic road accident which occurred on October 19, 1973, near Withersfield, Suffolk. The appellant’s husband, Thomas McLoughlin, and three of her children, George, aged 17, Kathleen, aged 7, and Gillian, nearly 3, were in a Ford motor car: George was driving. A fourth child, Michael, then aged 11, was a passenger in a following motor car driven by Mr. Pilgrim: this car did not become involved in the accident. The Ford car was in collision with a

\(^{538}\) Khan (n 60) 87
\(^{539}\) Given that adjudication is \textit{ex post} and therefor reflective. See Chapter 3
lorry driven by the first respondent and owned by the second respondent. That lorry had been in collision with another lorry driven by the third respondent and owned by the fourth respondent. It is admitted that the accident to the Ford car was caused by the respondents' negligence.⁵⁴⁰

He then goes on to explain how the appellant had discovered her family's injuries and arrived at the hospital. Speculating as to how Bergson would describe this passage, it could be that it is a representation of the lived experience of the litigants, articulated (and thus operant in the reflective consciousness) through the judges. The very act of expression, severs durée into separate parts such that the judge is able to 'provide points of application' upon.

As was mentioned earlier, Khan's temporal trigger 'is a point in time (t) that initiates or terminates a legal event. A time trigger (tt) activates or terminates laws, powers, rights, and obligations'.⁵⁴¹ This allows for facts to be taken 'out of their context', or more in tone of the Bergsonian vernacular, their 'interpenetrating qualitative multiplicity'. This is what Patrick Nerhot describes when he says that 'a fact is the result of an operation whereby a particular element is taken out, isolated from a context of its own to be placed in another context that gives it a particular meaning'.⁵⁴² Adjudication as cognition, operant in the reflective consciousness, takes events from out of their durée (their characteristic interconnectedness), places them in space and into a retrospective narrative that gives it a particular meaning, independent of the context inhered in durée. The qualities of space are needed to individuate lives and subsequently ascertain rights and responsibilities. The projection of spatiality permits the creation of these various indices that allow for the formation of the legal event. It apportions control in determining what is and what is not relevant in the retrospective narrative of adjudication and allows 'a provisional hooking together of elements into something that looks cohesive'.⁵⁴³ Time as spatial therefore is a form of sorting into a coherent representational narrative. Once again, to chronologise is the process of distinguishing, selecting, and placing adjacent to one another, states into a sequence that are presumed to be causally related.

Pursuant to the second of the research questions, that subjectivity is dependent upon temporality (and specifically that adjudication as cognition produces the abstract, deracinated, 'rational' subject of law), another of 'DST's merits is that it lends toward the construction of a free-willed subject of law. When Mark Kelman and Meir Dan-Cohen⁵⁴⁴ say that criminal law

⁵⁴¹ Khan (n 60) 87
⁵⁴³ Grabham (n 58) 4
⁵⁴⁴ Dan-Cohen (n 284) 959
embraces the free-will paradigm, without spatiality which crucially allows for framing a narrow conception of the event, that very paradigm, I argue, would not be otherwise realisable in adjudication’s construction of pastness. Indeed, ‘in order that we may lay hold upon and describe the living process within ourselves, we are obliged to direct attention upon selected and therefore fragmentary parts of an undivided whole, and these we afterwards call states’.  

Spatiality as that which lends to selection allows the judge to elide, exclude and extinguish this difference and produce the paradigmatic abstract, ‘rational’ subject of law, which creates a legal subject that transcends difference (differences which destabilise its abstraction and ‘rationality’) through that very selection. Spatial temporality tries to construct certainty everywhere and apportions this by allowing the possibility to disconnect from difference emergent in durée (and thus a particular type of ‘pastness’). This has the effect of producing in law, the liberal idea of sameness in adjudication (‘all are equal before the law’).

Chronology, therefore, is nothing but the result of the features of space trespassing into durée. The effect of spatiality to delineate states allows adjudication to dissect and divide a natural person’s life into events on a ‘time-line’; to contain them within the confines of a spatio-temporally constructed past. If real time is motion and spatial time, as representative of it, is fixed, adjudication as cognition can be said to ‘stabilize becoming, and to provide points of application for our actions’. In other words, it presumes the sameness of the natural persons throughout time.

‘DST’ also enables the recollection and contemplation of facts that are not present or lived but can be reflected upon. Thus spatial time allows the decision maker in adjudication to circumvent this problem, proceeding to speak and adjudicate on matters that are no longer becoming. The result of spatializing time is therefore to re-create a representative past ‘in extensity’, from which one can select and establish an order of ‘what happened’:

‘We could not introduce order among terms without first distinguishing them and then comparing the places which they occupy; hence we must perceive them as multiple, simultaneous and distinct; in a word, we set them side by side, and if we introduce an order in what is successive, the reason is that succession is converted into simultaneity and is projected into space’.

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545 Ruhe (n 524) 56  
546 Winter (n 281) 1449  
547 Guerlac (n 344) 165  
548 Bergson (n 322) 102
Spatial time also prevents some apparent absurdities. The main one is that if adjudication’s temporality was predicated upon durée (which elevates the interpenetrative quality of pastness with the present and is thus fundamentally resistant to division) all legal events would surely start *ab aeterno*. This is where spatial temporality derives its practicality from, protecting one from the nauseating dynamism of reality; ‘our intelligence in fact, is so constituted that it attends by preference to rigidity- to fixed points taken out from the flowing current of reality. When human thought follows its natural bent towards the furtherance of practical action these fixed points alone seem to be of importance’.  

Imagine the quagmire of difficulties if judges had to recall events without the precision that words to appear allow them or indeed having to navigate the multiple causes and effects of events from the beginning of time. Representations serve significant analytical ends for the adjudicatory exercise ‘because of their iterability; this means that they stabilize, or fix our experience when they attach names to it’. Whilst the language of the judge or law maker immobilises lived time, there is merit to the legal system of representations, particularly language; ‘as the self thus refracted, and thereby broken to pieces, is much better adapted to the requirements of social life in general and language in particular, consciousness prefers it, and generally loses sight of the fundamental self’. From the testimonies of witnesses, the examinations of the defendant and most crucially, the judgment that establish new laws or the legislators in Parliament, law is a discipline that demands fixity which language, premised on an apparent stability of meaning, is able to offer. Another of the merits is that if cases are seen as particularisations of rules, and thus as factually analogous, spatiality can also provide precedent for demarcation points for future analogous cases which promote overall stability, legal certainty, determinacy and ultimately legitimacy. These are the promises that stem from the inertia of formalist adjudication that is predicated upon ‘DST’.

A legal decision that tends toward adjudication as cognition therefore, lends toward a process of abstraction. DST enables the judge to identify junctures of when legal relationships or rights or duties or infringements have been established within the boundaries of the legal event. Indeed, Manuel Castells points out that ‘in the modern world in particular, time is conceived of in spatial terms: it is continuous and measurable, divided into spaces that can be filled, it can be vacant or unoccupied, and it is taken to imply limits or deadlines’. The primary effect on the retrospective narrative is to chronologise the legal event (the facts which law gives

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549 Ruhe (n 524) 67  
550 Guerlac (n 344) 69  
551 Bergson (n 322) 128  
meaning to) to prevent the absurd *ab aeterno* legal event, to produce the paradigmatic abstract, deracinated, willed subject of law which it can to attach rights and responsibility to.

### 4.2 The Demerits of Dominant Spatial Temporality in the Retrospective Narrative

Curiously, many of the arguments that are posited as merits could also be reinterpreted as demerits. The reason for this curiosity lies in whether adjudication is oriented toward analytical convenience or concreteness. Thus what is practical for analysis may be disadvantageous for concreteness and vice versa. While spatial time is practically necessary, it can also be viewed as one which alienates the judge from real time as durée, a tradition which is based on a form that *represents time* and naturally introduces aspects of space into it, targeting its imperative focus on analysis, rather than concreteness. For example, some may say that the law is simply not interested in capturing concreteness.

‘Chronologisation’ or a ‘general linear reality’ therefore can be re-interpreted as a substantial disadvantage. The creation of such distinctions and divisions, what Kelman refers to as the arational choice, could be seen as a wholly inorganic and indeterminate process. The production of such ‘punctuation marks’ means that a judge delineates reality in a manner that is seemingly arbitrary (or entirely politicised). For example, does the ‘reasonable man’ standard consider varying levels of experience of drivers in negligence cases or the pre-existing conditions in which natural persons inhabit, both of which would only be emergent in durée? Indeed, ‘these results are practically efficacious, but not true...they falsify the actual character of the world in the interests of action…reality is known intuitively, not discursively.’

Greenhouse further adds that linear time (as analogous to chronology) ‘intrinsically demands a single principle of selection… but real life is not so neatly arranged’.

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554 Melanie G. Wiber describes a similar bifurcation of time to that of analytical and perspectival time but names it ‘general linear reality’ and ‘actual time’. Indeed, ‘General Linear Reality tends to dominate methods of sampling reality. These often miss complex interactions that may be related to ‘erratic time.’ In the GLR method, we set up analysis of one particular variable as if it was dependant on a set of antecedent variables, such that ‘causal time’ takes the place of ‘actual time’, thereby map[ing] the processes of social life onto the algebra of linear transformation.’ See also Melanie G. Wiber, ‘Syncopated rhythm’s Temporal patterns in natural resource management’ (2014) 46,1 The Journal of Legal Pluralism and Unofficial Law, 123
555 Kelman (n 10) 594
556 *Nettleship v. Weston* [1971] 2 QB 691
557 Norrie (n 11) 137-141
558 Bergson (n 470) 15
559 Greenhouse (n 155) 1636
saying ‘objects and facts have been carved out of reality. Philosophy must get back to reality itself. That which is commonly called a fact is not reality as it appears to immediate intuition’.560

However, it is not just that ‘DST’ provides for the possible extinction of antecedent moments that the legal event could be extended toward (creating longer causal chains as it were), but that the vapid representation also ignores the natural persons constituted as well as constituting proclivity which are ostensibly inhered in forms of pastness that exist beyond spatiality.561

‘The time that is followed by the law and legal institutions is a time that generalises and universalises and fails to embrace particularity and difference. Therefore, the law will always attempt to create false new communities, urge us to forget, or at least construct memory in a way that forces us to negate all risk. Such an institutional approach, because of its limits, will strive for speed and closure’.562

4.21 ‘Time-Frames’ and indeterminacy

This produces the abstract, deracinated rational subject of law. To make this point of arbitrariness clearer, I’ll now reframe the debate of legal indeterminacy within the context of time-frames. A R Lacey’s assessment of spatial time identifies the arbitrariness of ‘picking out points’ which again provide further theoretical ammunition for Kelman’s time frames as arational:

‘Take a coloured expanse varying smoothly in hue from one end to the other, or an experience similarly varying over time. It may be arbitrary how many colours we distinguish but we can still distinguish and count them, and even if they are non-denumerable like the points on a line we still presumably have a multiplicity; we certainly call them points (plural). The variegated experience can only be called a multiplicity in so far as we do consent to single out stages of it and count them, but Bergson could be justified in pointing to the arbitrariness of how we do this’.563

560 Bergson (n 385) 99
561 See Chapter 5, section 5.3
562 Van Marle (n 57) 255
563 Lacey (n 443) 26
Are these temporal triggers determinate, arbitrary (as Lacey suggests,), or political (as Kelman suggests)? This can be bound into the larger debate of legal (in)determinacy. If spatiality results in punctuations marks made at the same places in cases that are seen, not as unique singularities, but as particularities of the legal rule, then dominant spatial temporality ought to make a claim to the determinateness of law. For example, if two cases are analogous, adjudication as cognition will delineate the legal event and construct the natural persons in the same consistent manner, ‘at the same points’. After all, this is what we understand as the uniformity component and presumed identity of adjudication as cognition, but reconceptualised in ‘time-frames’.

Determinacy is important for many reasons but primarily because it ensures legitimate expectations and legal certainty. Legal determinacy presupposes that laws constrain a judge’s decision in adjudication and that there is always one right answer to every case. Any apparent fissure in the ‘coherent tapestry’ of law, often characterised by the so-called ‘hard cases’, can be mended with reference to various sources, interpretive methods or forms of reasoning. Brian Leiter identifies four components of what he calls the Class of Legal Reasons.564 First are legitimate sources,565 second are legitimate interpretative operations performed on sources to derive rules from,566 third are the legitimate rational operations that are used to synthesise facts and law to produce judgments567 and finally, the legitimate interpretive operations on the facts of record in order to generate facts of legal significance- in other words, how one frames legal events for analysis. The last of the Class of Legal Reasons is of particular interest in that it refers to the interpretive operations that generate facts of judicial significance.

The relation of temporality to adjudication and how temporality generates facts of legal significance in its construction of the retrospective narrative is of course the main research question of this thesis. A legal rule or concept will outline facts which it gives legal meaning to but the level of abstraction required to make laws general will mean, at the very least, some cases will exist which contain certain situations that have not been legislated over. Here, the determinacy debate rears its head, attempting to formulate a legal response to this case that is not referred to explicitly in the text. This kind of indeterminacy, however, is different from the ‘natural indeterminacy’ of language (whether golf carts or roller skates are vehicles) but looks at whether judges are bound in their determination of the facts which are deemed

564 Brian Leiter, ‘Legal Indeterminacy’ (1995) 1 Legal Theory 481
565 Such as statutes, common law, constitutions, policy, morality
566 Interpretive methods such as the literal interpretation, ‘mischief rule’, ‘golden rule’, precedent
567 Such as deductive/analogic reasoning
relevant; or to put this another way, whether broad or narrow time frames are adopted. This is a question of temporality. Spatial temporality allows for this selection and is a key element of adjudication as cognition. To demonstrate this particular type of indeterminacy within the framework of temporality and reality construction, I will briefly re-introduce Mark Kelman.

Recall that Kelman posits that legal argument in criminal law proceeds in 2 stages; first, by way of ‘interpretive construction’ which is how judges construct both the retrospective narrative and how they frame the legal rule to handle it (either as a rule or standard); and second, ‘rational rhetoricism’ which gives the first part of the legal argument a ‘quasi-reasoned/rational’ gloss of legitimacy. Interpretive constructs can either be unconscious or conscious. Unconscious interpretive constructs include the use of ‘broad or narrow time frames’:

'We prosecute particular acts-untoward incidents that these people commit. But even these incidents have a history: Things occur before or after incidents that seem relevant to our judgment of what the perpetrator did. Sometimes we incorporate facts about the defendant’s personal history. Other times, we incorporate facts about events preceding or post-dating the criminal incident. But an interpreter can readily focus solely on the isolated criminal incident, as if we can learn of value in assessing culpability can be seen with that narrower time focus'.

It also includes ‘broad or narrow views of intent’ of the ‘defendant’ or ‘disjoined or unified accounts’ that describe the separating of events as a coherent coalesced whole. Thus ‘by varying our interpretive focus, by particularizing at times and categorizing at others, substantive criminal law reaches all manner of results’.

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568 Kelman (n 10) 591
569 The arational choice between narrow and broad time frames helps to avoid, according to the author, the conflict between the free-will paradigm and determinism. However, rather than seeing this as the difference between free-will and determinist analysis, I will take Kelman’s time framing as being the difference between the rational free-willed actor and a situated, constituted actor. Also, the interpretive choice between narrow and broad time frames affects not only doctrinally tricky legal cases, but also easy cases as narrow time-framing fends off, at the methodological level, the possibility of doing situational analysis. See also Kelman (n 10) 594
570 ibid 595
571 ibid 596
573 ibid 596
What is interesting about these unconscious interpretive constructs is that they can *either* invoke an intentionalist or determinist analysis contingent on the basis of the judge’s *arational choice*. So for example, establishing the responsibility for criminal damage is an exercise of adjudication’s arational choice; the judge may either choose a *narrow time frame*, such that the natural person only appears within the ‘temporal triggers’ of the event (starting from the *mens rea*) or the judge may *broaden the time frame* of the event such to include different facts (contingent on different types of temporality which are resistant to division and thus ‘time framing’) which may mitigate responsibility. Note, in this hypothetical situation, it is not a defence or a normative ruling that broadens the construction of the retrospective narrative, but the time frames used.

Recalling the argument of (in)determinacy that Leiter describes as legitimate interpretive operations on the facts of record in order to generate facts of legal significance; for adjudication to be determinate in this respect, it ought to have a uniform method of how it generates such legally relevant facts, in identifying which cases it adopts narrow time frames for, and in which cases it adopts broad time frames for. However, to repeat Lord Bingham once again; ‘in deciding facts, the judge knows no authority, no historical enquiry and (save on expert issues) no process of ratiocination will help him. He is dependant, for better or worse, on his own judgment’. Kelman has demonstrated that there is a relatively unfettered discretion between these narrow and broad time frames that can be predicated upon the same legal rules and consequently disjoined or unified accounts of the legal event and how the legal rule is framed to handle it. The examples cited earlier of *R v. Ahluwalia* and *R v. Baillie* illustrate the indeterminate use of time frames upon the same provocation defence. Therefore, the same legal rule can be actualised to construct two wildly different legal events, ideas of intent or the defendant, both narrowly and broadly, which ultimately has very real consequences for normative ascriptions of responsibility. This particular type of indeterminacy is inexorably linked to adjudication and temporality, where responsibility is linked to the arbitrary use of time-frames.

That the judge is able to shift from broad to narrow time frames of the event, intent and the defendant in criminal law, that it is able to oscillate between the differential overall complexions of the retrospective narrative as either ‘unified or disjoined accounts’, is attributable, I claim, to adjudication as cognition’s temporality as dominant-spatial. It provides for the phenomenon of relatively unconstrained selection, to choose whether the legal event is inclusive or

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574 The varying time frames will not be understood as the difference between determinism and the free-will paradigm, but the difference between the natural persons as constituted and the free will paradigm.
575 See Chapter 5, section 5.3
576 Bingham (n 26) 3
577 See also Chapter 1
exclusive; narrow or broad in its time frames. By articulating a theory of time that separates and individuates, rather than expressing a time of adjudication that tends toward capturing central elements of its interconnectedness (as per durée), adjudication as cognition lends toward arbitrariness. It allows judges to reign over what is and what is not considered significant for legal analysis, ‘to create, alter, distort, or even destroy time itself’.578 Lindsay Farmer, on restating Kelman’s arational account of criminal law adjudication describes it as ‘non-rational processes of selecting from all potentially available facts, which excluded certain possible arguments and favoured a particular ideological view of the criminal law’.579 Thus in addition to arbitrariness and indeterminacy, spatial temporality and the ‘time-framing’ that it lends credence to, is political. This perhaps goes a little way to destabilizing the myth of determinacy with respect to adjudication, time, the event and the natural persons. What it illustrates is the pliability of legal rules to construct events and natural persons in broad/narrow-unified/ disjoined ways and to illustrate the interest in interpretation580 and how this has an overall impact on ascribing responsibility.

Whilst the impact of temporality has been discussed generally, the following section will try to be more precise in exacting adjudication as cognition’s retrospective narrative and specifically its construction of the natural persons qua legal subject. Hopefully, the merits and demerits become more lucid with the introduction of the next section.

4.3 The Spatial Past- Constructing the Natural Persons qua Legal Subject

The focus of this thesis exclusively deals with adjudication that takes place ex post factum. In this sense, when I argue that temporality is linked to factual construction, elsewhere I have described this synonymously as past construction, using these terms interchangeably. Past construction as a term will be presently useful when explaining what types of past (and thus facts) adjudication as cognition’s dominant spatial temporality produces. It is the type of past that it produces which is, I claim, responsible for the construction of the paradigmatic abstract, deracinated, rational subject of law.

578 French (n 125) 693
579 Farmer (n 73) 340
580 See also Paul Brest, ‘Interpretation and Interest’ (1982) 34, 4 Stanford Law Review, 765
4.31 Who/What is the Subject of Law?

When laws encounter the life-world, as they do in adjudication, they take on a retrospective narrative in adjudication’s backward reasoning. Part of the retrospective narrative of ‘what happened’ requires adjudication and the laws to construct a ‘pastness’ of which the natural persons is a part. Here is where I develop the argument that the legal subject (the paradigmatic, abstract, rational subject of law) is contingent on DST and, thus, this particular theory of time is what produces this presumed subjectivity of modern law. This is useful in the broader aim of the project as it helps to identify why certain types of pastness are considered immaterial in adjudication as cognition’s retrospective narrative.

Before elaborating any further, I want to provide some general background on the legal subject. J M Balkin in a footnote to an article where he seeks to ‘transform the subject of jurisprudence into a jurisprudence of the subject’, 581 provides a worthwhile starting point;

‘A subject is a person who understands something; that something is the “object” of her understanding. Hence a “legal subject” is a person who attempts to understand the law, legal doctrine, and the legal system; these, in turn, are the “legal objects” she apprehends. Concern with the legal subject is thus a concern with how our processes of understanding affect and help constitute the cultural objects we comprehend. One might also use the term “legal subject” to describe how law or legal culture constructs how we think about people—how law and legal culture ascribe particular identities and features to people, defining some characteristics as salient and others as irrelevant. The “legal subject,” in this sense, is a subject as seen (and dealt with) through the eyes of the law or legal culture’. 582

Balkin’s closing remarks, of how the subject is seen through the eyes of the law, arouses the interest of this chapter. The ‘eyes through which it sees’ resonate with the notion that adjudication’s temporality projects its time upon the natural persons as part of its constructivist endeavour and that legal subjectivity can be reframed as a particular construction of time.

582 ibid 106
That the legal subject and indeed the natural person is a construct of sorts is by no means revelatory however.\textsuperscript{583}

It is important to note that the term legal subject is often used interchangeably with similar nomenclature that identifies different or sometimes the same entities within legal proceedings. These include terms such as the legal persons,\textsuperscript{584} legal participants,\textsuperscript{585} legal entity,\textsuperscript{586} juridical man,\textsuperscript{587} or juristic person,\textsuperscript{588} to name but a few of the synonyms. To add to the confusion, the legal subject can refer not just to litigants, but to judges;\textsuperscript{589} and this is not even to entertain the wider perennial debate about non-human legal persons as the subject of rights. For the purposes of this thesis, it will assume that these are interchangeable and focus specifically on litigants as natural persons as a person or subject of law.

Ngaire Naffine provides the most recent and vivid codification of legal personality in common law jurisdictions, drawing upon cases from the UK, US, Canada, New Zealand and Australia. She deduces 3 types of legal personalities, variations of which are contingent upon whether or not law is interested in trying to capture the true nature of personhood; ‘should it even be law’s task to try to capture and preserve and protect what it takes to be our essential natures, to mirror life? Or should the life of the legal person remain an independent legal reality, not part of the non-legal world of fact’.\textsuperscript{590}

The first type of legal persons is anecdotally named ‘the Cheshire Cat’, defined later in Naffine’s writings as the ‘Legalist position’\textsuperscript{591} which is:

‘Nothing more than the formal capacity…it does not depend on metaphysical claims about what it is to be a person. Subscribers to this definition of person tend to insist on the abstract and purely legal nature of the concept and in so doing they appear to set law apart from moral theory and also from the social, political and historical sciences’.\textsuperscript{592}

\textsuperscript{584} Bryant smith, ‘Legal Personality’ (1920) 37, 3 The Yale Law Journal, 283
\textsuperscript{585} Dworkin (n 122) 14
\textsuperscript{586} Alexander Nekam, The Personality Conception of the Legal Entity (Harvard University Press, 1938)
\textsuperscript{587} Norrie (n 11) 21
\textsuperscript{588} Naffine (n 43) 33
\textsuperscript{589} Pierre Schlag, ‘The Problem of the Subject’ (1991) 69 Texas Law Review, 1627
\textsuperscript{590} Naffine (n 43) 30; This is particularly pertinent for the earlier discussion which briefly looked at whether adjudication invests in analytical convenience rather concreteness.
\textsuperscript{591} ibid 31-58
\textsuperscript{592} Naffine (n 280) 350-351
This type of legal persons is nothing more than operations in mathematical equations devised for legal calculations devoid of any moral or empirical content. Simply, to be a legal person is to be the subject of legal rights and duties. Thus to confer legal rights or to impose legal duties is to confer legal personality. Bryant Smith similarly states that it is ‘an abstraction of which legal relations are predicated, or as a name for the condition of being party to legal relations’. This conception of the legal person operates at its highest level of abstraction and presupposes a normative closure of law that does not care for metaphysical speculations of personhood. Because of its abstraction, this functions as the most inclusive conception of the person whilst being the most empirically bankrupt and morally empty.

Second is ‘any reasonable creature in being’ who ‘in this context means a human someone, becomes a legal person…at birth, which is also legally defined, and stops being a legal person at whole brain death, legally defined…it is necessarily linked with biological and also metaphysical definitions of humanity’. Naffine later describes this in her work as the religionists and the naturalists approaches to legal personality. Here the law contemplates conceptions of human-ness, absorbing contributions from medicine as well as theological and philosophical canons. Its most emphatic presence is of course in human rights law in which legal personality precedes positive rights (contra the Cheshire Cat) and often come to the fore in debates over birth and mortality, such as abortion and assisted dying. It is also thoroughly scrutinised in relation to extending the circle of persons of law to animals.

Third, perhaps the most pervasive, is the paradigmatic rationalist or ‘responsible subject’ that is ‘an active, autonomous actor: someone who is positively able to bear legal duties and to assert legal rights in their own capacity. This person is imagined as an attentive, articulate litigant or defendant, who can appreciate the complexity of law’s demands and respond

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593 In this sense, it is the most inclusive form of legal personality as arguably anything can qualify as a right-conferring subject. See also Naffine (n 43) 31-44
594 Smith (n 584) 283
595 ibid 284
596 Naffine indulges in the problems with this conception of legal personality in its theoretical (in)consistency. See also Naffine (n 43) 45-58
597 Naffine (n 280) 351
598 Naffine (n 280) 357
599 Naffine (n 43) 23, 99-118
600 ibid 24, 119-162
601 Collectively known as the Metaphysical Realists along with the rational actor below.
602 See also Harrington (n 117) 1
603 Naffine (n 43) 24, 119-142
604 The Rational legal subject is ‘the paradigmatic rights holder.’ See also Matthew Kramer, ‘Do Animals and Dead People Have Legal Rights?’ (2001) 15, 1 Canadian Journal of Law and Jurisprudence, 36
605 Naffine (n 43) 24, 59-98
directly and personally, for his own reasons'. 606 He is essentialised with attributions of will and foresight, the ‘normal person’, 607 Indeed, ‘he represents to many the ideal (if not the actual) legal actor’. 608 Specifically in criminal law, exists a highly rational agent 609 that seeks to sustain a coherent theory of responsibility; ‘the central organising idea, which is accepted by leading criminal law theorists, is that criminal law communicates its freedom-limiting norms directly to us, as rational agents’. 610

There is analytical convenience in the idea of a unitary, autonomous, impermeable, deracinated, rational subject with presumed agency. Indeed, it is perhaps one of the most saleable aspects of modernity, linked to our own individual physicality, that preserves the idea and world view which is the extension of the ‘thinking ego’ and considers the individual as a rational, unified subject, that can transcend history, situatedness and thus difference. The centrality of the subject is a prominent metaphysical presumption of modern theories. Gary Minda speaks of the legal person ‘back there’ in control of analysis and reason. 611 The subject is not only centred, but seemingly ‘objective’. The Critical Legal Tradition in particular has sought to deal with this theoretical fiction 612 and it is most emphatically denounced within the postmodernist movement that problematises the essences of a unified, autonomous and rational self. 613 Within the legal milieu, as a system of power that seeks to ‘guide’ future conduct, the idea of the individual is constantly undergoing change and redefinition. The self is not impermeable and different theories offer a miscellany of explanations to this effect; from calling for its very death 614 to the idea that subjects are constituted as well as constituting.

I will make two points about the three types of legal personality and then relate their shortcomings to the discussion of temporality. The first looks at legal subjects as ‘types or categories’ and the second discusses the absence in Naffine’s analysis of how the legal subject is constructed in adjudication.

606 ibid 60
608 Naffine (n 280) 364
609 Naffine (n 43) 69-72
610 ibid 71
611 Gary Minda, Postmodern Legal Movements: Law and Jurisprudence at Century’s Ends (New York University Press, 1995) 241
613 For a short introduction on the problems of the rational actor, see also Naffine (n 43) 76-80
614 Boyle (n 2) 495
What all three types of personality have in common is that they are categories of legal subjectivity that infer sameness. For example, once $x$ and $y$ are recognized by either three of these categories, they are considered the same as other members of that category. Thus it submits its members of the categories to the liberal notion of sameness or presumed identity:

‘When we insist on formal equality, we can do so only by drawing a very narrow picture of what it is to be a legal subject, the universal and formally defined actor of civil society. I am equal to one of the Rockerfellers because we are both political subjects, we are both formally equal, and the ‘form’ is very narrow. Disparities of wealth, power, and status are defined out of existence precisely because they are placed outside the realm of political subjectivity. Does he have the vote? Is he a citizen? Does he have the right to speak freely? Then of what relevance is it that he has no political power, that he is effectively disenfranchised and that he does not have the resources to make himself heard? As a political subject he is equal to anyone’.615

In other words, it ‘objectivises the natural persons’ by ‘transcending’ the very difference which would otherwise be inerred in durée. In the context of adjudication, therefore, this sameness (‘transcending difference’) is achieved by spatiality (the features of space) allowing for ‘divisibility, uniformity, selection’ of adjudication’s pastness, rather than a theory of time that is necessarily connected to that history. Thus ‘difference’ can be ignored through its non-selection (thus inhibiting the normative aims of producing a form of judgment with transformative potential).616 The natural person is seen as a member of a category of a legal subject,617 eviscerated of their difference, and shaped in the pre-ordained concepts of a legal subject (or a reasonable man, or a testator) resulting in principles such as ‘all are equal before the law’ and ‘justice is blind.’ Therefore, the second critique is that what is not clear from Naffine’s analysis is how these subjects are created in adjudication. The thesis asks the question ‘whether temporality creates the persons of law or if subjectivity constructs the pastness of adjudication’. Naffine’s analysis is limited as it focusses upon ‘who’ or ‘what’ is a person of law rather than, as is the orientation of this thesis, how the subject of law is seen through the eyes of adjudication.618 It is to this that the chapter now turns.

615 Boyle (n 2) 512
616 Douzinas & Gearey (n 52) 75
617 Douglas Kroop, in his analysis of equality jurisprudence in Canada’s Supreme Court, asserts that it is its presumption of a fixed subject and the ‘categorical approach’ which is ‘inadequate to deal with the complex reality of discrimination today’. See also Douglas Kroop, ‘Categorical Failure: Canada’s equality Jurisprudence- Changing notions of Identity and the Legal Subject’ (1997) 23 Queen’s Law Journal, 204
618 Emily Grabham provides an insightful examination into how the temporal mechanisms of ‘permanence’ and ‘waiting’ in the Gender Recognition Act 2004 shape the experiences of social space for trans subjects. Predicated on the goal of social cohesion within the context of a ‘homonationalistic’ rights agenda, the temporal mechanisms indicate a desire to ‘place the potential citizen, temporally, in relation to particular histories and futures, and not merely in relation to the putative citizen’s immediate goal.’ See also Grabham (n 64) 107
4.32 Legal Subjectivity and the ‘Spatial Past’

As part of the second thesis question, I am trying to reframe discussions of legal subjectivity through temporality. Adjudication’s retrospective narrative involves, I will claim, the construction of multiple, different and varied pasts. The retrospective narrative constructed by adjudication as cognition certainly includes part of the natural person’s past but, it is claimed, ‘a very particular past that is constructed by ‘who done it’ inquiries, judicial and otherwise’.619 The simple chronology of DST homogenizes these different types of pastness in adjudication as cognition and thus the past of the natural persons is similarly spatialized. This is what produces, it is claimed, the pervasive abstract, deracinated, ‘rational’ subject of law.

What will be termed the spatial past is a particular type of pastness created by the dominant spatial temporality of adjudication as cognition. In spatial time, the difference between the points in time or, to use Khan’s lexicon temporal triggers $T_1$ and $T_2$ (which can be equated to the beginning and end of a legal event respectively) are measureable in units of time that are uniform and separable (hours, days, years). In other words, they have all the features one would expect of space (divisible, uniform, juxtaposed, simultaneous etc). What does this mean for how the natural person’s pastness is represented in a case decided in the manner of adjudication as cognition?

The conventional legal subject in law, rational and deracinated is the ‘reasonable man.’ He (and that pronoun is used deliberately),621 though a legal fiction, provides the presumed hypothetical standard for legal conduct. Consider the Tort of negligence where ‘we must judge the defendant by the standards of a reasonable person who is undertaking the task or activity in the course of which negligence is said to arise. The ‘reasonable person’ test is generally an objective one, which is not adjusted to fit the particular qualities of the defendant’.622 Lord Macmillan in *Muir v. Glasgow Corporation* identifies the reasonable man as follows:

‘Some persons are by nature unduly timorous and imagine every path beset with lions. Others, of more robust temperament, fail to foresee or nonchalantly disregard even the most obvious dangers. The reasonable man is presumed to be free both from

619 Valverde (n 83) 12
620 See Chapter 4, section 4.3 and Chapter 5, section 5.3
621 See also Mayo Moran, *Rethinking the Reasonable Person* (OUP, 2003)
over-apprehension and from over-confidence, but there is a sense in which the standard of care of the reasonable man involves in its application a subjective element. It is still left to the judge to decide what, in the circumstances of the particular case, the reasonable man would have had in contemplation, and what, accordingly, the party sought to be made liable ought to have foreseen'. 623

The reasonable man reflects Naffine’s ‘responsible subject’, rational and free from contingencies and, to creatively use Kelman’s terminology, curtailed in a narrowly time-framed legal event. As part of the retrospective narrative, the legal event (the facts which the law gives meaning to) places the reasonable man edifice upon the natural person. It is not that time makes the subject of law rational, but that it constructs it in such a way in the retrospective narrative, that presumes it is rational. They are anticipated in a category of sameness, fixity and thus above their differences. The natural person *qua reasonable man* only appears within the narrowly time-framed legal event. In effect, the natural person is contained within the spatial past-legal event and this is what can newly be understood as legal subjectivity. In the fullest embrace of adjudication as cognition therefore, everything else, such as more remote antecedent moments or pre-existing conditions (mental or physiological conditions, the environment in which s/he grew up in, perhaps certain episodes or epochs that effected groups of people to whom s/he belonged) are elided or framed out in the construction of the spatial past. *Fig.4* illustrates a representation of the *delayed appearance* of the natural person as a reasonable man. In determining responsibility, the judge (or the jury under the judge’s tutelage) will consider the action only within the confines of said legal event within this spatial past (ignoring generally, societal constraints, historical transgressions and so forth).

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The natural persons qua reasonable man only *appears* within the spatial past-legal event. The dotted lines represent indexes of relevance for adjudication which ‘cut off’ other parts of their pastness. This is what Kelman understands by the narrow time frame that is conducive to the ‘free-will’ paradigm of criminal law. It follows that ‘cutting off’ from other pastness (that may include other more remote causes or conditions that constitute the natural persons) leaves only that past which is considered material and allows the natural person to retain the ‘reasonable man’ standard. Outside of these indexes, the natural persons are not able to engage their legal rights. Indeed, ‘right regimes are therefore often conceived and implemented through temporal mechanisms that rely, at least, on a ‘before’ and an ‘after’.\(^6\)

Outside of these indexes, they cease to be reasonable. With no other pastness, it is as if the *natural person is born, killed and reborn at each moment*. Importantly, this means that even if a legal event is broadened as will be detailed shortly, it still maintains the paradigmatic willed

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\(^6\) Grabham (n 64) 108
subject of law. Normative ascriptions of responsibility therefore are only considered within these confines. The legal subject can thus be redefined along the lines of time as the containment of the natural persons within the strictures of spatial past-legal event. A decision tending toward adjudication as cognition therefore, shuts down any further discussion about pastness.

To further describe the spatial past, the following sections will be dedicated to three of its salient features. These include the process of broadening the legal event, the nature of the broadening and the nature of its pastness.

4.33 Broadening the Legal Event

Broadening is the process of switching from a narrow time frame of the spatial past-legal event to a broader time frame. This tends to occur with some defences in criminal (ie loss of self-control) and civil law (ie consent). Take for example strict liability cases. In their retrospective narrative, they tend to contain the natural persons within a very narrow time framed legal event. Narrowness presumes rationality (and thus responsibility) as it ‘cuts off’ difference emergent in durée (and thus other pasts) that may otherwise compromise this agency. Consider section 5 of the Sexual Offences Act 2003 which makes sexual intercourse with a child under 13 a strict liability crime irrespective of the age of the defendant and as such calls it rape. All that is required for the offence is proof of the intentional penetration of a child under 13 for which there is no defence. This is based on the principle that intentional sexual activity of that proscribed in s.5 with children below that age should not be permitted in any circumstances. In the case of R v. G the appellant, 15 at the time of the offence, had intercourse with the complainant who told him that she was 15, only she was actually 12. He was convicted and appealed on the grounds firstly that an offence of criminal strict liability pursuant to s.5 infringed his Article 6(1) and (2) right to a ‘fair and public hearing’ and presumption of innocence rights respectively; and secondly that the conviction was incompatible with his Article 8 rights such that ‘as he was only 15 at the time of the offence, the Crown acted unduly harshly by prosecuting him under section 5 rather than under section 13, which deals with sexual offences committed by persons under 18 and carries a maximum penalty for imprisonment for 5 years’.

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625 [2008] UKHL 37
626 ibid [8]
How is this case’s retrospective narrative constructed? The appellant is strictly contained within the spatial past-legal event, ‘starting’ from when he intentionally penetrated the complainant’s vagina. Everything else was extinguished (or ‘framed-out’) and thus no other types of pastness were woven into this retrospective narrative. Though the courts at both appellate stages accepted the applicant’s version of the events, namely that he believed her to be 15 when she had expressed words to that effect, the ‘eyes through which the law saw the legal subject’ was in a ‘sensed’ and thus strict application of that rule (uniformity component). This may seem entirely reasonable given moral and practical considerations in protecting child welfare, but could we envisage a case where there ought to be some discretion? What may emerge if other types of pasts were incorporated into the retrospective narrative?

Indeed, Lord Hope hinted indirectly at the absence of multiple pasts in the retrospective narrative which would seek to ‘contextualise’ the transgression, by identifying the difficulty confronting the prosecuting authorities in ‘discriminating between cases where the proscribed activity was truly mutual on the one hand and those where the complaint was subjected to an element of exploitation or undue pressure on the other’.627

In effect, the case is seen merely as a particularisation of s.5 rather than in its unique and concrete sense. For strict liability cases therefore, ‘context’ or ‘particular types of pastness’, contingent on a non-spatial temporality (it is later claimed)628 that jeopardise the free-will paradigm, are an anathema. The absence of moral blameworthiness was irrelevant as were the unique circumstances. Even though there may be course to mitigate responsibility of the appellant, only emergent in other pastness, strict liability for ‘reasons of principle’ ignores these.

R v. G may be contrasted with the ‘asbestos litigation’629 for their vastly different use of time-frames for the legal event. In the latter, the natural persons as claimants (rather than just defendants) appear earlier. These cases sought to bring actions against the parties’ old employers for negligently exposing them to asbestos. Over a period of time they had worked for several companies and contractors which had exposed them to the fibres. The issue however, was that the latent period for the onset of pleural mesothelioma contracted from the asbestos fibres took many years and it wasn’t clear which of their previous employers were responsible. Lord Bingham said that the ‘balance of probabilities test’ for establishing causation was inappropriate for this particular case and instead ruled that causation could be established if the defendant(s) had materially increased the risk of harm.

627 ibid [14]
628 See Chapter 5, section 5.3
629 Fairchild v. Glenhaven [2002] 3 WLR 89
Surely such a comparison is a case of apples and oranges, in that the contrasts between these cases lie in the use of obviously different legal rules. A critical response to this however, would be to ask why one legal rule considers it important to construct the retrospective narrative, specifically the legal event (rather than the natural persons in these cases) in a narrow manner, and thus ignore ‘context’ (which Lord Hope in *R v. G* appeared to be hinting at) yet the other legal rule is happy to construct the legal event in the asbestos litigation on the basis of medical knowledge using a broader time frame. Are only physiological causes worthy of broad time frames of the legal event? What about social causes or conditions that may have affected the defendant in *R v. G*? What interests or world views are reinforced by these constructions? Does this ruling on causation entrench a particular vision of social and economic organisation? Do strict liability crimes tend to target a particular disenfranchised class of society?

Though broad time frames, used to accommodate the latent period for the onset of mesothelioma, contrast to the narrow time frames adopted in *R v. G*, what is particularly interesting about these cases is that despite both claimants and the defendants appearing earlier, this did not necessarily entail a determinist analysis. The defendant employers, despite the latent period, were still seen as causally responsible agents who had ‘materially increased the risk of harm’ to the claimants, the reason being, that the litigants were still seen in a narrow time-frame, born, killed and reborn at each moment.

Another example of a broadening of the legal event includes the partial defence of contributory negligence that mitigates the defendant’s tortious responsibility due to the claimant’s negligent action as a contributory factor. This particular act, as an instant or point in time, differs in degree from a normal negligence claim by a magnitude of uniform units from the point in time of the defendant’s negligent (in)action (hence features of spatial time). In the case of *Froom v. Butcher* the defendant sought a reduction in damages after he had crashed into the claimant’s car, injuring the driver and his wife and daughter, because they were not wearing seatbelts. The judges allowed the appeal and reduced the damages accordingly. In terms of the construction of the legal event, Mr Froom’s actions (or rather inaction of not wearing his seatbelt) preceded Mr Butcher’s crashing into him. The event broadened in that the difference between $T_1$ and $T_2$ increased, and thus the liabilities of the legal subject(s) similarly changed.

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630 Kelman (n 53) 91
631 See Chapter 4, section 4.35
632 [1976] 1 QB 286
Broadening of the legal event along the axis of dominant spatial temporality mitigates responsibility, in the case of contributory negligence, for the defendant (see fig.6).

A fair question would be to ask whether this construction of the legal event in adjudication's retrospective narrative is the work of 'arbitrary time frames' courtesy of spatial temporality or primarily the normative assessment of relative responsibility? A weak reply would be to admit that the judges were primarily motivated by making a normative assessment and that Kelman's 'time frames' are *unconscious* interpretive constructs or mere retrospective justification. A stronger reply however, would be to ask in the case of Froom, 'why stop there'? Perhaps there is something that Mr Froom had internalised from his past which meant he would not wear his seat belt (interestingly, this was not a legal requirement at the time). This may seem tenuous in this particular case but the impetus behind the question is to inquire as to the value of 'cutting off' at this moment following a *process of broadening* the legal event and why a past that is separable, rather than interconnected (as far as is possible) is normatively useful. How would a normative judgment change with a considerably broader time frame, as it clearly changed with the claimant's antecedent action?

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**LEGAL RULE (S)**

**FACTS WHICH LEGAL RULE GIVES MEANING TO**

**LEGAL SUBJECT**

**LEGAL EVENT**

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"VARIEGATED PAST" OF **NATURAL PERSON**

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**Adjudication—*ex post***

**Reflective consciousness**

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*Fig. 6*
4.34 The Nature of the Broadening

The process of broadening occurs with instances or points in time. Instances refer to a particular type of fact(s) that the law considers relevant, which form points in spatial time. For example, the contributing negligent act in *Froom*, the inaction of wearing seatbelts, broadens the legal event back to this earlier point. It is called an instant because it refers to a point in time which starts and ceases, a fleeting moment. The significance of this point will be explained in the next section.

4.35 The Nature of its Pastness

Another factor that is characteristic of the spatial past can be elucidated by considering why it is past. I will now briefly think of time not as tensed such that one can consider something as inherently past, present or future but instead, as describing the relation between a person and an event or state of affairs. Focussing primarily on the proposition that the past, present, future can be used as referents to describe relations will help to elucidate a point as to the nature of the spatial past. The retrospective narrative (specifically the legal event) can be considered past by virtue of adjudication being *ex post* so the tensed relation between it and adjudication is that the retrospective narrative is past- which is obviously why adjudication is described as constructing 'what happened'. When the event was happening however, it was by definition present. The reason I make this point will be developed in more detail later but briefly; the spatial past can be contrasted with other types of pasts (or facts) such as pre-existing conditions, whether physiological or mental (such as insanity, battered woman syndrome) or societal (such as social or economic duress). Conditions, which will be taken up when considering the variegated past, cannot be considered past in the same way as the constituents of the legal event operant in the spatial past. This is because when the event was happening, these conditions were and continue to be. In other words, they preceded the legal event when it was present and continue to be a condition of the world. In that sense, they are not fleeting like the spatial past, but *enduring* (like durée); and though they are a type of pastness, unlike the spatial past, this is *not* by virtue of adjudication’s positioning *ex post*. This key difference between the spatial past and the variegated past which is emergent in

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633 See Chapter 5, section 5.3
634 See Chapter 5, section 5.3
adjudication as understanding relates to differences between causes and conditions as typologies of facts (pasts).

**Summarising the key themes:** this chapter has tried to provide an overview of adjudication as cognition, as the principal form of decision making, in its purest form (which is likened to abstract judgment). Its temporality is conceptualised in a manner that imposes uniformity, divisibility and simultaneity, features of which can be described as spatial. By dominance, it is understood that it asserts the preferentiality in the construction of legal decision-making’s retrospective narrative. This provides a theoretical basis for Kelman’s time-framing or general chronological constructions (the process of distinguishing, selecting, and placing adjacent to one another, states into a sequence that are presumed to be causally related) of the retrospective narrative. This allows selection and delineation that ascribes rights, duties and relations and eliminates the absurd possibility of legal events that commence ab aeterno. The drawbacks are that spatiality lends to arbitrariness and, linked to that, indeterminacy (which may further be considered as an expression of power), a general inability to represent social reality in any of its complexity, including the natural persons in their situatedness (alluding to the second of the research questions that temporality constructs legal subjectivity in the retrospective narrative). Indeed, the construction of the legal subject can be innovatively considered as the containment of the natural persons within the legal event of the spatial past which presumes a problematic abstract, deracinated, rational subject of law.

The legal rule constructs the legal event and thus forms the parameters through which it ‘sees the natural persons qua legal subject’. The legal event can be constructed narrowly (R v. G), widely (Fairchild v. Glenhaven) or undergo a process of broadening (Froom v. Butcher). However in all these cases, despite the differential time frames, the natural person remains ‘trapped’ within the spatial past-legal event, regardless of broadening, because the natural person is born, killed and reborn at each moment. In its construction of the retrospective narrative, adjudication as cognition excludes radically contextual information, such as pre-existing or societal conditions which situate the natural persons. How it frames (and that it can ‘frame’) events can have a direct impact on the ascription of responsibility. For it to be the case that such radically contextual information forms part of adjudication’s retrospective narrative, requires a qualitatively different type of past. Adjudication as cognition is limited therefore to variations of broad or narrow time frames and seeks to maintain the free-will paradigm of the abstract, deracinated legal subject. In effect, decisions that tend toward the end of the spectrum of adjudication as cognition, shut down disputes about certain types of pastness.
CHAPTER FIVE

Adjudication as Understanding-

‘Durational Temporality’

The thesis states that event and subject construction of adjudication (the retrospective narrative) can be, in part, re-articulated through temporality. Further, a theory of time different to that which informs conventional forms of judgment (dominant-spatial temporality) may produce a form of adjudication with transformative potential.\(^{635}\) The conventional form of judgment, adjudication as cognition\(^{636}\) suffers from a crisis of representation, primarily directed toward the construction of pastness that is conducive to analytical convenience rather than concreteness. Thus legal events and the determination of what happened become relatively unconstrained, constructed chronologies, containing the natural persons qua legal subjects where they only appear within the narrow confines of said event. This is problematic as it may impact upon ascriptions of responsibility. Adjudication as understanding is instead oriented toward concreteness rather than analytical convenience and, in the spirit of this thesis, it is argued that an alternative temporality makes this concreteness possible. As a reminder, adjudication as understanding is ‘tempered not just with mercy but also by knowledge: not only of the conduct in question and its context, but knowledge of our character…in all our particularity…we are not strangers but intimates, with a history’.\(^{637}\) In attempting to advance a radically different retrospective narrative, theories of temporality will be creatively drawn from both Henri Bergson and Hans-Georg Gadamer. Whereas adjudication as cognition produces a homogenous\(^{638}\) chronology of ‘what happened’ contingent on dominant-spatial temporality, adjudication as understanding’s retrospective narrative invokes Bergsonian ideas of interpenetration and Gadamerian ‘fusion of horizons’ that produce retrospective narratives which are resistant to division and incorporate multiple types of pastness. ‘Understanding’ therefore, can be described as an exercise in contextualisation, by identifying the horizon of

\(^{635}\) For the general purposes of this thesis’ normative aims that is ‘toward a concrete temporality’, transformative potential is understand as concerning itself with social justice rather than personal justice, either breaking a status quo or anticipating a shift in the zeitgeist. See also Lord Devlin, ‘Judges and Lawmakers’ (1976) 39, 1 Modern Law Review, 7; Armin Höland, Calibration and synchronisation of law by Zeitgeist (2014) 46, 1 The Journal of Legal Pluralism and Unofficial Law

\(^{636}\) The spectrum of adjudication I outlined earlier, with adjudication as cognition at one end and -understanding at the other, does not aim to caricature how cases are decided. In other words, it is not that judgements are made in an either-or fashion but that they tend toward either end of this spectrum.

\(^{637}\) Lucy (n 38) 22

\(^{638}\) It is characterised by one type of past- spatial
the natural persons as a way to situate their conduct beyond the confines of the spatial past (much like in the case of Ahluwalia). An alternative theory of temporality, it will be argued, can produce observable changes in adjudication as understanding’s construction of the legal event, including how the natural persons qua legal subject is seen through the eyes of the law, and what impact this may have on normative ascriptions of responsibility.

This chapter will begin by entertaining the possibility of how adjudication as understanding may even be premised on a theory of time that is fundamentally ‘lived’ and thus resistant to a reflective enterprise such as judgment. In developing the theories of time from Bergson and Gadamer, the following sections outline the departure from their conventional use which identifies the situatedness of the judge and instead, is used to situate the natural persons. This anticipates the proceeding discussion on what pasts adjudication as understanding produces in its retrospective narrative, as a counter to the spatial past in adjudication as cognition. Collectively called the variegated past, Durée and Effective History as temporalities that shape adjudication’s perception (extending the Kantian axiom) introduce conditions as well as causes into its retrospective narrative. The final section will then be dedicated to revisiting the Encounter and the Problem from Lefebvre’s working of Bergson. The Encounter will be important for forcing adjudication to appreciate that each case is radically unique and different by virtue of the variegated pasts and the Problem will enable the engaging of these very different types of pasts. This will end by anticipating some potential problems with adjudication as understanding.

5.1 Tending toward Durée

A potential difficulty alluded to earlier, requires circumventing the problem of capturing ‘lived’ durée in a representative endeavour such as adjudication. Earlier, it was explained how Bergson distinguishes between the Immediate Consciousness (IC) and the Reflective Consciousness (RC). Real time as durée exists in the IC and is characterised by the unmediated sensations of the consciousness that are accumulating and interpenetrative, varying by quality rather than by degree. The past ‘states’ melt into the moving present and cannot be considered separate from it. Memory (a process of actualising, what will later be explained as, the Pure Past) and Perception are entangled in a dynamic and reciprocal relationship in which the entirety of the past is always immanent to the present. RC however is a static

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639 See Chapter 3, section 3.22
640 ‘State’ is an inevitable representation of the durée of the immediate consciousness. It is fatal to the movement inherent in it. However, for more on the paradoxes of discussing durée see Chapter 3, section 3.2
representation of this pure, unmediated consciousness. For example, the very ‘linguisticality’ of human sociality spatializes and thus represents the IC.

Adjudication, as that which is both generally ex post and discursive therefore ‘naturally’ operates within the RC. Adjudication as cognition for example subsumes the experiences of the person (immediate consciousness) and the world of images (reality prior to representation) under (legal-) concepts and rules to produce representative phenomena. As detailed in the previous chapter on legal subjectivity, adjudication as cognition appears to operate on a philosophy of recognition in which the Pure Event (the natural persons and the ‘raw facts’ prior to their incorporation into the retrospective narrative) is merely a particularization or instantiation of the general rule; in effect, the case was always in the rule. What this also means for the construction of the legal event is the use of time frames resulting in the delayed appearance of the natural persons (even with broad time frames, as the natural persons is born, killed and reborn at each moment). What is later described as the variegated pasts of the natural persons emergent in durée, reveal difference which make the case unique and singular rather than a mere particularization of the rule. Time-frames not only stifle creativity in adjudication and the pragmatic orientations of this project, but occasion an abstract judgment that defectively represents the subject (as abstract, deracinated and ‘rational’) and the event in the retrospective narrative.

It is obvious therefore that one cannot ‘go back’ to the IC from the RC. If it is posited that durée embraces the real self and the world of images, how can a form of adjudication be predicated upon it- indeed how does one ‘get there’?

‘What would a return to the immediate mean? To detach oneself from space without leaving extension. Here Bergson returns to the problem of language. And could not immediate consciousness find its own justification and proof in itself, if one could establish that these difficulties, these contradictions, these problems arise primarily from the symbolic figuration that covers them over, a figuration that we have come to identify with reality itself and whose thickness can only be pierced by an exceptional, intense effort?641

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641 Guerlac (n 344) 158-159
Therefore, a ‘return’ to the IC requires ‘moving forward’ to understanding, attempting to circumvent the problem of representation by a creative embrace of some of the central features of Bergson’s durée (and Gadamer’s effective history). To summarise:

Intuitionism (IC) → Cognition (RC) → Understanding

Adjudication as Cognition
Adjudication as Understanding

(Abstract Judgment) → (Concrete Judgment)

Durée as prima facie ‘lived time’ and thus resistant to representation, could still be said to be mediated by the Pure Past. Resigning to the fact that spatiality appears to be ‘inevitable’ given adjudication’s discursiveness and positioning, means that normative aspirations for a different adjudication premised on durée can only tend toward it as a theory of time upon which it is contingent, which will mean it will capture the central elements of Bergsonian-Gadamerian temporality in order to achieve an alternative construction of the retrospective narrative. Perhaps this says something about the fundamental ‘limits of law and adjudication’.

5.2 Shifting Focus from Judges to the Natural Persons: Gadamer’s Effective History and Bergson’s Pure Past

Earlier, I stated that because adjudication is generally ex post factum, it could alternatively be considered as ‘investing in the construction of pasts’. Indeed, the terms ‘facts’ and ‘pasts’ have

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642 This can be likened to ‘slowness and delay’ in which singularity and difference emerges. See also Van Marle (n 57) 239
643 Bergson’s durée (as unmediated experience) is represented by spatial features once mediated and represented through language, numbers etc. This seems to suggest that lived experience (rather than reflected upon experience) and thus reality, is never mediated. However, even in the immediate consciousness, I claim that experience could be said to be mediated. After all, Bergson’s ephemeral present is shaped (and thus mediated) by an immanent Pure Past. Bergson will not have been able to anticipate the post-modern fervour of his theory, in that reality is always mediated, not by language or concepts but by our past. Indeed, Gadamer’s effective history could be said to share this point of view.
644 In effect, these theories of adjudication may be considered as variations of different types of spatial thinking.
been used interchangeably. Like adjudication as cognition, adjudication as understanding produces a spatial past in its retrospective narrative however, I argue that it also incorporates qualitatively different types of pastness made possible by the different temporalities upon which this form of judgment is contingent.

Predicated upon an (admittedly) adventurous reading of Bergson’s *Pure Past* and Gadamer’s *Effective History*, this creative re-imagining takes as its starting point that both authors consider temporality and interpretation respectively as ontological; whether this is Gadamer’s Heideggerian-inspired interpretive being,645 or the Deleuzian reading of Bergson’s internal difference.646 Part of this re-imagination will be to shift the focus on where these theories of time have commonly been used within contemporary legal scholarship, which has typically been applied to the judge (or institutions) as historically situated. This thesis seeks to shift this application to ones understanding of the natural persons. Therefore, contrary to adjudication as cognition, which only identifies a spatial past and variations within that spectrum (‘the process of broadening’), adjudication as understanding exhibits what will later be detailed as variegated pastness in its retrospective narrative. Inventive readings will look at how adjudication as understanding, in light of these alternate temporalities, construct the natural persons and the event in their retrospective narrative and how this may affect notions of legal responsibility. To lay the ground work for the variegated past, I will firstly draw inspiration from Gadamer’s *Effective History* and then to Bergson’s *Pure Past* in Lefebvre’s theory of adjudication.

### 5.21 Effective History of the Natural Persons

Gadamer647 states that ‘understanding is, essentially, a historically effected event’.648 He has predominately been understood within the terrain of statutory interpretation649 (locating him firmly within the scope of the Temporality of the Legal Rule or ‘TOLR’). Thus post-Romantic hermeneuticists such as Gadamer have tended to focus upon the situatedness of the judge and the inevitable projection of his effective history into the reading of the legal text. Whilst there is a clear shift from the Romantics to Gadamerian hermeneutics, there has been little movement in terms of how he has been used; primarily focussing on the finitude of the judge in his understanding of the legal rules.650 Ignoring for the moment that Gadamer is anti-

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646 Lefebvre (n 17) 92-93
647 For another summary, see Chapter 1, section 1.5 and Chapter 3, section 3.3
648 Gadamer (n 327) 300
649 Flood (n 13) 1795
method, anti-aestheticist and anti-historicist, it is perhaps surprising that given Gadamer’s interpretation is ontological (which it presumes of the judge) this is not similarly extended to the natural persons and how the judge may subsequently construct the legal event when taking this into account. I will make a few general comments on how such a shift would change the construct of the legal subject, legal event (retrospective narrative) and judgment overall. This will pre-empt the later discussion on the ‘variegated past’ in adjudication as understanding.

What would such natural persons look like with a predilection toward Gadamer’s thought? Arguably, unlike the abstracted, willed and sovereign individual, able to transcend history, a ‘Gadamerian natural person’ would be defined and shaped by an immanent effective history which it is necessarily immersed in and thus constituted by. Its past would project into its present and shape its own understanding and experience. For an adjudication as understanding to operate therefore, an effective historical consciousness would require, not exclusively an openness toward the judges own prejudices, but primarily openness toward the constituting past of the natural persons. Thus in the creative application of Gadamer, to transfer the effective history of the judge to the effective history of the natural persons would mandate adjudication to introspect into the traditions that shape the natural person’s experience. This is what is meant by the past as constitutive. Adjudication as cognition’s ‘prejudice toward prejudice’, incredulity toward this effective history, would be to not recognise the a priori constitutive-situatedness of the natural persons. Indeed, the application of the reasonable man would generally be ignorant of such effective history of the natural persons.

What would such a legal event look like with a predilection toward Gadamer’s thought? This very much ties into what one understands as the constituting horizon of the natural persons. The event in adjudication as cognition, when undergoing broadening, varies by degree. Does Gadamer’s effective history therefore pertain to broadening akin to that of the spatial past in adjudication as cognition? This doesn’t quite seem to be the same thing as what this novel application of Gadamer is hinting at. Instead, effective history could be said to be qualitatively different from the broadening or narrowing of the event spatially (quantity). This is because Gadamer is concerned, not with method (and thus what causes successful understanding),

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Gadamer rejects a method of interpretation as this assumes an ahistorical (transcendental) reasoning is possible. Such reason is ignorant to the contingencies of the interpreting agent. Similarities are observed between Bergson’s reticence toward the natural sciences encroachment in the human and social sciences and Gadamer’s similar distaste for the objectivising tendencies imposed upon by the scientific method. Gadamer’s rejection toward Enlightenment rationale, what he described as a prejudice toward prejudice, preferentially introduces horizons as an inevitable part of the hermeneutics of practical action. Whereas Enlightenment reason ‘blocks this out’, Gadamer, like Bergson, identifies ‘the real’ within this contingent self.
but the *conditions* of the possibility of understanding'. This is perhaps one of the most startling distinctions between adjudication as cognition and understanding. Whereas the former is principally concerned with *causal relations*, the latter also includes *conditions* in which the actions take place. Conditions therefore can be understood as a particular *type of pastness* which may be incorporated in the retrospective narrative to situate the natural persons.

*What would judgment look like therefore with a predilection toward Gadamer's Effective History?* Of course this is the crux of the chapter so a more thorough examination will be reserved for a little later, particularly when looking at the functions of the *Encounter* and the *Problem*. However, a few preliminary points are worth recalling about how Gadamerian hermeneutics operates in spite of its *anti-method*. In its standard application to statutory interpretation, it functions through a *dialogic process* where there is a ‘to-ing and fro-ing’ between the situated interpreter and the text. Rather than the interpreter attempting a futile quest to discover authorial intent for example, she ‘instead challenges and questions its assumptions to get at its truth-value. Similarly, the interpreter places her own pre-judgments at risk, by opening them to questions and challenges from the text’. Thus there is a dynamic back and forth between the present text and the effective history of the interpreter (which is why *durée* as motion is essential for the process of dynamic judgment which will come to characterise adjudication as understanding later). Assuming that the interpreter is aware of her temporal situatedness (and thus embodies the ‘effective historical consciousness’) the dialogic process continues until there is a *fusion of horizons*. In adjudication as understanding however, the present is not just the reinterpreted meaning of the text, but is the resultant retrospective narrative. Awareness and challenge by the text of the effective history demands us to be critical of how our pre-understandings shape the horizon of our present. In adjudication as understanding therefore, judgment that is Gadamerian can challenge the truth claims of the legal text with the effective history, not of the judge, but of the natural person, to create and enrich the picture of the retrospective narrative in this dialogic movement. The

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652 Wamke (n 324) 3
653 Gadamer (n 327) 362-369
654 Eskridge (n 325) 623
655 This could be used to explain a case such as *R v. R* [1991] 3 WLR 767 (in which the matrimonial exception to rape, was reversed without legislation) with Lord Keith’s comments being particularly illuminating:

'It may be taken that the proposition was generally regarded as an accurate statement of the common law of England. The common law is, however, capable of evolving in the light of changing social, economic and cultural developments. Hale’s proposition reflected the state of affairs in these respects at the time it was enunciated. Since then the status of women, and particularly of married women, has changed out of all recognition in various ways which are very familiar and upon which it is unnecessary to go into detail...In modern times any reasonable person must regard that conception as quite unacceptable.'

656 Habermas and Gadamer engaged in a fruitful debate in which the former accused the later of inherent conservatism which Gadamer refuted. For a succinct summary of these arguments see also Eskridge (n 325) 630
approach is one of dynamic judgment which moves back and forth between the horizon of the legal rule(s) and that of the natural persons to produce the retrospective narrative.

5.22 Pure Past of the Natural Persons

Now to Bergson and a dazzling reconstruction657 of Lefebvre’s theory of creative adjudication; because of the complexity of his pragmatic theory of adjudication, the first part is dedicated to a brief restatement658 followed by a section on how the thesis reimagines the theory, in an effort to enrich the understandings of the natural persons and legal event (retrospective narrative). Lefebvre’s ontological pragmatism is a novel account of adjudication’s inherent creative capacity. In its anti-teleological pragmatist bent, wherein ‘time is creativity or it is nothing at all’, Bergson’s ‘world of images’659 provide the epistemological milieu.

Bergson’s metaphysics demands an entirely new lexicon for describing a world that is ephemeral and changing. Unlike the idealist or empiricist nomenclature that deal in appearances or matter respectively, Matter and Memory states that, ‘here I am in the presence of images, in the vaguest possible sense of the term, images that are perceived when I open my senses and not perceived when I close them’.660 Images are neither things nor are they phenomenal but real and are constantly in motion, ‘act[ing] and react[ing] the ones with the others in all their elementary parts’.661 Images do not subscribe therefore to materialist or representational forms, and because they are constantly in motion, they are in perpetual variation. The self occupies the role of a special kind of image amongst the universe of images as centres of real action that live, act, perceive and which display capacity for discrimination and hesitation to act pragmatically in response to problems. The self possesses the unique capacity to delay and think in a non-dogmatic, pragmatically oriented way; thus thought occurs in the service of action not knowledge. Therefore, Perceptions of the world of images are not representations but rather what a part is to a whole. Lefebvre then applies this to his novel account of adjudication as follows:

657 This is the term that Kyle McGee uses to describe Lefebvre’s application of Bergson to adjudication. My applications of Gadamer and Bergson employ similarly ‘dazzling reconstructions’. See also Kyle McGee, ‘Creation, Duration, Adjudication: A Review of Alexandre Lefebvre’s- The Image of Law: Deleuze, Bergson, Spinoza’(2009) 21 Law & Literature, 480
658 See Chapter 1, section 1.5
659 Guerlac (n 344) 112
660 Bergson (n 385) 9
661 ibid
‘We see that the case is an image in the Bergsonian sense that it underlies and exceeds representations. What is the most basic activity of any judge or lawyer? Is it not to select a few relevant points of a case and coordinate these into arguments and judgments? Any case has an infinity of points and sides that go neglected, facts irrelevant to the interest at hand that exceed eventual legal construction. Here, we draw a distinction between a case as it is not yet represented, as it is a pure event or image in the world, and a legal case as it is pragmatically perceived, as it is reflected according to interests. Any case, therefore has an infinity of sides and points available for selection; this selection will yield a case with a set of infinite features. The perception of the case is limiting and subtractive; only certain crucial points are advanced and construed in legal argument, but underlying these points is the case itself, unperceived, or giving to perception that part that interests the perceiving parties’.662

The **Perception as Legal Judgment** is the combination of the reconstructed legal rule and the relevant facts (or retrospective narrative). Bergson stipulates that Perception is an occasion for the process of memory from the Pure Past; or more specifically, the transitory (present) Perception is *constituted* by the Pure Past. Understood in the context of adjudication, the Pure Past is the entirety of all judgments (the law’s pure institutional past) which the judge occupies and exercises, and is typified by these four criteria; that it is contemporaneous with the present,663 that all of the past co-exists with the present,664 the presumption of the pre-existence of the past665 and the fact of repetition in the past.666 Durée, as *motioned* time, is important for the reasons that it intercalates all of the Pure Past with the transitory (present) Perception and makes possible these four criteria of the Pure Past. This means, according to Bergson, that Perception (as the dynamic present) is a contraction of certain moments of the Pure Past.667 Durée being time as energy means that Perception is ‘pragmatically defined by actuality, activity, and usefulness. The present indicates a becoming or flux always in the process of being made’. Returning to adjudication, **Perception as Legal judgment** is therefore about the *actualisation* of the Pure Past (the entirety of judgments) as both a response to the Problem and the *primacy of the Encounter*. Recall that the Problem is, to put it idiomatically, ‘life’s obstacles’; or more eloquently that, ‘life proceeds according to the posing of singular problems with correspondingly singular situations’. 668 The Encounter describes the relationship and effect that the **Pure Event** (or raw pre-legal facts) has on the legal rule/concept.

662 Lefebvre (n 17)123  
663 ibid 128  
664 ibid 129  
665 ibid 129-130  
666 ibid 130  
667 Paradoxically, this means that the present is never really ever present as it is of the past. To understand the *passing* of the present is to understand that the accumulating Pure Past is formerly passed presents. The present therefore is presupposed by the past.  
668 Lefebvre (n 17) 96
The Encounter presents the Pure Event in its concreteness and singularity rather than as a particularisation of a pre-ordained rule. Thus its primacy is essential for a creative, pragmatically oriented adjudication. In Lefebvre’s ontological pragmatic adjudication therefore, the stating of the Problem guides how the legal rule and concept are reconstructed and how they approach the Encounter to subsequently construct the legal event (ie providing a unique solution to a unique problem). The exigencies of the Perception as Legal Judgment, given the stating of The Problem and the primacy of The Encounter, will dictate which particular planes of the Pure Past (parts/whole of legal rules) are recollected to create the reconstructed rule and to enrich the Perception as Legal Judgment (see fig. 1). Thus the Perception as Legal Judgment is always unique. The reconstructed rule becomes the eyes through which the Pure Event (because of the primacy of the Encounter) can be perceived as a legal event (or the retrospective narrative). Importantly however, as durée is time as motion, this is a dynamic process of circuitry movement between Perception and the Pure Past of Law (see fig.2); so the rule is refined, as is the legal event it sees, and thus the Perception as Legal Judgment is summoned.\footnote{This may be likened to the dialogic process of Gadamer’s ‘Fusion of Horizons’} In other words, the legal event becomes perceived along the lines of the legal rule as it is \textit{becoming} reconstructed along its pragmatic axis.

How can one extrapolate these complex ideas into adjudication as understanding? The first point to mention is that, like Gadamer, Bergson through Lefebvre has been used primarily to recognise the contingencies of the judge in the institutional setting of law and both theories approach adjudication as variations of hermeneutical endeavours wherein the sites of contestation are the legal rules (rather than facticity). As a result, Lefebvre’s working of Bergson operates within the ‘TOLR’. Indeed, when Lefebvre refers to durée, he refers to duration in law as law’s continuous difference from itself.\footnote{Lefebvre (n 17) 102}

Though Lefebvre seems to be operative within the ‘TOLR’, his theory is still crucial in attempting to build adjudication as understanding as transformative. He paves the way for a creative and pragmatic adjudication that apportions the Encounter with primacy. If the Encounter is understood as the relation of the Pure Event and legal rule in which the former is seen in its concrete singularity and radical difference, rather than an instantiation of the legal rule, this can provide a challenge to the dominance of adjudication as cognition’s temporality. Whereas adjudication as cognition ‘traps’ the natural person into the spatial past-legal event as the legal event is construed as a mere particularisation of the rule (and thus creates the legal subject as a contained natural person), Lefebvre’s inventive adjudication reverses this by allowing the Encounter to tailor legal rules, or to give ‘sense’ to them, rather than the other way around. The primacy of the Encounter therefore is the privileging of the Pure Event (case)
and thus a commitment to the case’s inimitableness. This paves the way for difference to emerge in the interconnected retrospective narrative (possible through engaging the variegated past).

As with the shift in focus of Gadamer, one may understand Bergson’s Pure Past, not in the context of the judge and (specifically) the rules, but as the Pure Past of the natural persons and how this enriches the construction (and reconstruction) of the retrospective narrative inhered in the Perception as Legal judgment. Where for Lefebvre, the Pure Past refers to the legal rules, instead the Pure Past here is understood as that which constitutes the natural persons. As with Gadamer, I will make a few cursory points on how such a shift may change the retrospective narrative (and thus potentially normative ascriptions of responsibility).

What would such natural persons and a legal event look like therefore with a predilection toward Bergson’s thought? In his reading of Bergson's durational time, Deleuze identifies durée as an ontological concept or internal difference. Durée is not exterior or superior to the thing but crucially, ‘difference is the thing itself’. Indeed:

‘It is the very being of the subject. A being is neither an indifferent and stable subject, nor is it modified through multiple states; instead, a being is nothing other than its continuous modification in time...Beings are, and express nothing other than, difference (duration). This is the meaning of Bergson’s most famous concept, duration: time as internal difference, as becoming.’

This suggests a notion of the natural person that lacks fixity, stabilization and is qualitatively different at each ‘moment’. To put it crudely, one is today not the same as they were yesterday because of an accumulating and constituting past. Internal difference suggests a fluid, constituted and changing self in which the present being is ephemeral. To fix the self or frame them narrowly, or contain them within the spatial past-legal event as adjudication as cognition does, is to ignore this accumulatory (and thus constituting entirety of the whole) past and ephemeral present.

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671 See also Elizabeth Grosz, ‘Bergson, Deleuze and the Becoming of Unbecoming’ (2005) 11, 2 Parallax, 4
672 Deleuze (n 293) 99
673 Lefebvre (n 17) 94
674 See also Muldoon (n 362) 184
It has already been submitted that the Pure Past, as both contemporaneous with a dynamic present and pre-existing it in its entirety, is qualitatively different from the spatial past and thus it varies in kind rather than in degree (it pre-exists it rather than precedes it). As an ontological concept and thus extending it to our understanding of the natural persons, several themes emerge. First, when understanding and constructing the natural persons in adjudication as understanding’s retrospective narrative, they cannot simply appear in the legal event (spatial past), as they are fundamentally characterised by an immanent and whole past. Second, where durée is used by Lefebvre as a site of creativity and freedom, the role of the Pure Past and durée will be reconfigured as the constitutive horizon of the individual (like Gadamer). Suzanne Guerlac says:

‘In inner experience there is an analogy to the necessary ordering of things in space. He [Bergson] calls this ‘character’ and it conditions, without determining, our present state. Our previous psychological states live on in this condensed manner because we carry them with us all the time. The past is always with us. It informs everything we do’.675

Since adjudication is a retrospective endeavour, the Pure Past is considered, not as a site of freedom and creativity, but as a constitutive horizon. Crudely put, it provides a useful way to describe how disconnected events (‘disjoined accounts’) become connected events (‘unified accounts’) and how one can incorporate enduring identities and constitutive horizons of the natural persons into the retrospective narrative. The Pure Past’s qualitative difference from Perception means that it can shed light upon the conditions for action and not exclusively focus on causes. Herein lies the claim that temporality can explain typologies of pastness (fact). Causes operate in spatial time and conditions operate in durée; thus they are qualitatively different.

Though the body is seen as a ‘centre of action,’ it is still constituted by the conditions of the Pure Past that define the Perception image, contingent on its needs. Like Gadamer’s effective history, the natural person is always situated. The relation therefore, is one of constitution (rather than a fatalistic determinism thus moving beyond the ‘free will-determinist paradigm’ suggested by Kelman and others).676

675 Guerlac (n 344) 147
676 For a parallel with Gadamer, his analogy of ‘play’ in aesthetic understanding is illustrative. Gadamer (n 327) 101
What one understands as the natural person in this light is that they are fluid and not fixed. They are not transcendental or ‘rational’ but embedded within a context or ‘situated’:

‘Situatedness is, rather, a way of describing the epistemological ecology in which we are simultaneously constituting and constituted. We are constituting because meaning arises in the imaginative interaction of the human being with the environment. We are constituted because the situated quality of human existences means that both the physical and social environment with which we interact is already formed by the actions of those who have preceded us.’

What would judgment look like therefore with a predilection toward Bergson’s thought? Durée and the Pure Past work in the service of concrete perception, intercalating the past and present to enrich the Perception as Legal judgment (ie the reconstructed ‘newly sensed’ rule and the retrospective narrative) ‘with their contour, their colour and their place in time’. The role of adjudication as understanding would be to explore the content of the Pure Past of the natural persons and associate this with its construction of the retrospective narrative in the Perception as Legal judgment, as a way to problematise and give sense to the legal rule. This would not be limited to variations of the spatial past (asbestos litigation contra strict liability, qualifying trigger in Loss of Self-Control Defence) but the enduring qualities of the natural persons or societal factors that may be internalised and normalised (what have more generally been called conditions). Thus it will adopt a critical and potentially transformative attitude by introspection into the Pure Past of the litigant. What type of introspection the judge engages into these horizons is more briefly illustrated in the final chapter’s case law analysis.

Naturally, such a form of adjudication will adopt a rule-sceptic approach affording primacy to the Encounter inhered in the difference of concrete cases rather than from their subsumption to abstract rules.

677 "Difference is the thing itself; it is the very being of the subject. A being is neither an indifferent and stable subject, nor is it modified through multiple states; instead, a being is nothing other than its continuous modification in time...Beings are, and express nothing other than, difference (duration). This is the meaning of Bergson’s most famous concept, duration: time as internal difference, as becoming.” Lefebvre (n 17) 94
678 Emily Graham discusses how s.2 Gender Recognition Act 2004, which requires a trans subject to live in their acquired gender till death in order to receive a certificate of gender recognition, as freezing otherwise fluid trans subjects. See also Grabham (n 64) 110
679 Winter (n 281) 1486
680 Bergson (n 385) 88
681 See Chapter 6, section 6.25
The principal shift in these novel applications of Bergson and Gadamer has been to attribute them, not to the judge *qua* interpreter (‘TOLR’) but, to adjudication’s understanding of the natural persons and resultant configuration of the retrospective narrative (‘TOA’) which follows from the natural extension of ontological understandings of Gadamerian interpretation and Bergsonian durée. Adjudication as understanding becomes a venture, not just of establishing (non-)casual relations, but of looking at the *conditions* in which human behaviour is situated and how this may change designations of responsibility if at all; and from the theoretical perspective, it aims to illustrate ‘what is missed out’ in adjudication as cognition’s principle selection and why. Thus adjudication as understanding adopts critical and introspective attitudes into these different types of pastness that correspond to conditions as well as causes and in effect, encourages judges and jurors to take on the reigns of social scientists.682

The next sections are dedicated to detailing the *types of pastness* that these theories of time produce in the retrospective narrative and end by embarking on a discussion on the role of the Problem and the Encounter as necessary elements of adjudication as understanding; without which, the variegated pasts cannot be engaged and *potentially* incorporated into the retrospective narrative. A final point is then made about the normative direction of adjudication of understanding.

5.3 The Variegated Past

One reason why *R v. G* seemed problematic was in its construction of pastness. The narrow time-frame allowed no difference or opportunity for the case to present itself as unique (D’s mistaken belief or the condition of social norms of hyper sexualisation which he internalizes). Instead, it was just another mechanised instantiation of the general legal rule of strict criminal liability. It presumed the sameness of persons, made possible through a spatial temporality that is conducive to ‘framing out’ difference. The ‘eyes through which it saw the legal subject’ viewed the 15-year-old appellant as fixed and defined prior to and independent of such constitutive factors. This is *not* to say that an enriched retrospective narrative ought to necessarily result in mitigating responsibility, only that within this approach it *may* reveal differences which are worth considering as well as, from an theoretical perspective, illustrating how and why certain things are excluding from judicial-factual analysis.

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682 Hale (n 67)
The aim of this section seeks to explain what other types of pastness (facts) Gadamer and Bergson’s theories of time produce in adjudication as understanding’s retrospective narrative. In adjudication as cognition, fact construction is characterised by a spatial past. Adjudication as understanding (or tending toward it) instead is epitomized by an altogether different pastness that is collectively described as variegated. The variegated past consists of the spatial, the enduring and the sedimented with the latter two sharing features of durée and effective history. A case which has been decided in a manner that tends toward adjudication as understanding therefore can be identified by reference to the facts it considers relevant in the rendering of the retrospective narrative. Different types of past (facts) exist contingent upon temporality as will soon become apparent.

The Spatial Past; to recall, the spatial past can vary by degree (ie calculable units of clock/calendrical time), which is initiated and ceased by instants in time (mens rea-actus reus). Its pastness is characterised merely by virtue of adjudication’s positioning ex post. The spatial past is presumed to be causal and may undergo broadening along its ‘spatial axis’ (such as the qualifying trigger in Loss of Self Control Defence or Contributory Negligence). The natural person is cognized as a legal subject by virtue of its containment within the spatial past-legal event, outside of which it does not exist for the purposes of law.

The Enduring Past; enduring qualities of the natural person resemble the immanent entirety of the Pure Past as necessarily constitutive. Unlike the spatial past which is composed of instants in time (illustrated in particular with broadening time-frames of the legal event) and whose pastness is explained by virtue of adjudication’s positioning ex post, the enduring past is altogether different. Recall in chapter 4 which discussed the ‘Nature of Pastness in the Spatial Past’, the enduring past precedes (or more accurately pre-exists) the legal event when it was happening (unlike the spatial past) and, resembling the accumulatory nature of Bergson’s Pure Past and durée, it is not a fleeting moment, a point in time that starts then ceases (such as contributory negligence). Take Ahluwalia once again. It would be unusual to say that the fact (or past) of the defendant’s Battered Woman Syndrome was a point in time and that it did not pre-exist the legal event in question. It seems entirely reasonable however, to describe it as enduring and having pre-existed the event in question. This is how pre-existing conditions are manifested in the retrospective narrative of adjudication’s backward reasoning. Indeed, this particular fact of a defendant (eg BWS) is qualitatively different from a qualifying trigger, for the reasons that the former is enduring and the latter is fleeting. In other

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683 See Chapter 4, section 4.43
words, the former embraces the characteristics of durée, while the other embraces the features of spatial time.

*The Sedimented Past;* this third type of pastness which is a development from the earlier re-reading of Gadamer, establishes a constitutive horizon or effective history as the situational context of the natural persons. In his anti-method approach, Gadamer describes his hermeneutical exploration as providing the ‘conditions for understanding’. The conditions for understanding can be suitably applied to enrich the retrospective narrative and may result in changes of responsibility attribution. Whereas the spatial past is presumed to be glued together by causal associations, the sedimented past introduces *conditions* to enrich the understanding of the retrospective narrative. The term sedimentation is borrowed from Steve Winter’s reading of Maurice Merleau-Ponty and can be understood as ‘the deposit of the subjects past interactions with its physical and social situation’. 684 Rosemary Coombe, in describing what Gadamer means by context says that, ‘it would seem to include historical and social factors’. 685

To expand upon how the variegated past introduces *conditions* into the retrospective narrative, Alan Norrie’s account of the distinction between causes (spatial past) and conditions (variegated past), in his effort to problematise the causal and voluntary underpinnings of criminal law, is particularly useful. To help illustrate this point, he refers to the Scarman Report, published in 1981 following the Brixton Riots and quotes him saying ‘deeper causes undoubtedly existed, and must be probed: but the immediate cause of Saturday’s events was a spontaneous combustion set off by the spark of one particular incident’. 686 Norrie then goes on to analyse the report:

‘Which factor ‘makes the difference’, the ‘deeper causes’ or the ‘immediate cause’? If those ‘deeper causes’ (relating to poor social environment, racial discrimination, police harassment) are part of the ‘normal conditions of life in the late twentieth-century, are they for that reason excluded from our account of what caused the riot? It would perhaps be convenient for the law, with its emphasis on the individual, if they were. Elsewhere in his report, Lord Scarman did draw a distinction between the ‘causes’ and the ‘conditions’ of the riots (1981,16). This was shortly before he argued

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684 Winter (n 281) 1488
685 Coombe (n 33) 603
that the conditions of young black people cannot exclude their guilt for grave criminal offences which, as causal agents, they have committed.\footnote{Norrie (n 11) 137-140}

It is interesting to note Norrie’s description of ‘deeper causes’ and how this is differentiated from ‘immediate causes’. One could convincingly interpret that deeper causes are equivalent to conditions as they share the characteristics of the variegated past and that ‘immediate causes’ share the characteristics of the spatial past. In this example, the immediate causes were presumably the damage to property that was caused during the riot. Like the spatial past, these immediate causes (in effect narrow time-frames) are past by virtue of adjudication’s positioning ex post and are characterised by fleeting moments. The ‘deeper causes’ qua conditions however, which includes the ‘poor social environment, racial discrimination and police harassment’, like the variegated past, are qualitatively different. These conditions do not derive their pastness from adjudication’s positioning as they pre-exist the rioting when it was happening and continue to exist. This is the defendants’ horizon, their effective history. Indeed, this particular fact of a defendant (societal conditions) is again qualitatively different from say a qualifying trigger, for the reasons that the former is enduring and the other is fleeting, and that the former embraces the characteristics of ‘effective history’, while the other embraces the features of spatial time.

Arguably, the sedimented past would be the most controversial and radical inclusion into adjudication as understanding’s retrospective narrative. Can conditions not only include socio-economic duress, but periods of history that have affected groups from which the natural person belongs eg. Apartheid, colonialism, slavery? Clearly these social factors go beyond the dominant spatial temporality of the legal subject in adjudication as cognition. Robert Sullivan makes an important point about Norrie’s ‘relational account’ that is an attempt to introduce a defence of social duress, which would necessarily weave the sedimented past into adjudication as understanding’s retrospective narrative:

‘Many will agree with Norrie that large inequalities of resources and power are a bad thing…the link between social deprivation and the incidence of criminal offending is undeniable…Norrie argues that if the criminal justice system is to advance the case of justice for defendants, the grip of the Kantian model must be eased. Norrie does not dismiss as chimeras the Kantian values of autonomy and freedom…his argument is that an exclusive stress on personal agency excludes far too much of the whole picture. He emphasis time and again that conduct is a compound of the social and the
personal. Accordingly, the pressures and exigencies of social circumstances and forces should feature in determining criminal liability...this perspective would allow claims that at least certain criminal acts are justified forms of defiance and/or appropriate exercises in distributive justice...Norrie insists he is not bent on a dismissal of legal ordering and legal values. In keeping with that, he nowhere claims directly that social disadvantage justifies criminal acts...his position seems to be that social factors should constitute grounds of excuse and that these excuses currently go unheard because of the Kantian model. Thus we are not dealing with a macro rejection of the right of the institutions of an unjust society to condemn and punish. We are within the realm of the micro examination of the circumstances of individuals, the realm of excuses'.

Whilst this is not an attack on Kantian legal subjectivity, but abstracted, deracinated, rational legal subjectivity, this description by Sullivan of Norrie's relational account embraces qualities of adjudication as understanding. The 'grip of the Kantian model' is the Problem, the 'whole picture' one may liken to the variegated past, the 'compound of the social and personal' as referring specifically to the sedimented past, 'he nowhere claims directly that social disadvantage justifies criminal acts' chimes with the idea that a variegated past is not to absolve, but to reveal, contextualise and understand conduct, the 'micro examination of circumstances' is resolutely a prelude to the Encounter, an appreciation of a case in its unique and concrete singularity rather than a particularisation of the general rule. The enduring and sedimented pasts inculcate difference and destabilize the imposition of sameness, imparting the idea of each case being unique.

Again, adjudication as understanding is not about including all potentially mitigating factors through a richer retrospective narrative of 'what happened', but to observe what is 'missed out' and how an enriched retrospective narrative may mitigate responsibility. This process of normalising conditions as the sedimented past, which Norrie mentions, may be what allows a decision that is embraced by adjudication as cognition to ‘cut off’. It is interesting to note how Norrie cynically describes deeper causes (conditions) as that which is normalised. To that end, another commentator describes conditions as ‘normal everyday events or circumstances that were a precondition but not the reason why the consequence happened at the time and in the manner it did’. Therefore, the inclusion of the sedimented past in adjudication as understanding's retrospective narrative poses tough questions beyond law, about the very fabric of society, and the process of normalising conditions through ‘framing them out' could

689 Which with, incidentally, broad connections to Kantian constructions of reason may be made
690 Here, the abstract, deracinated, ‘rational' subject of law
691 Williams Wilson, Criminal Law: Doctrine and Theory (Pearson Education, 2003) 99
be read as an attempt to prevent the plummet of the normativity of law into a nihilistic abyss by imposing a stability of sorts.

Adjudication as cognition therefore, in building the retrospective narrative, is primarily concerned with immediate causes whereas adjudication as understanding is also concerned with the incorporation of conditions. Causes and conditions can be connected to qualitatively different types of pastness which are contingent on particular theories of time—hence typologies of past (fact). In effect, facts from the Pure Event (the pre-legal case/raw facts) can be ‘temporally distinguished’ and will be indicative of the types of pastness that are being engaged in the retrospective narrative.

What is especially useful about introducing conditions that are emergent in engaging the variegated past, is that it responds to the problem of legal events beginning ab aeterno. The enriched legal event in adjudication as understanding’s retrospective narrative does not derive its richness and complexity from an excessive broadening of the spatial past (as this would still contain the natural persons qua legal subject which is ‘born, killed and reborn at each moment’) but rather supplementing it with the qualitatively different enduring and sedimented pasts in the construction of its retrospective narrative.

When constructing the retrospective narrative in adjudication as understanding from the multiple pasts that correspond to different forms of temporality, these are ignored in a decision that tends toward adjudication as cognition. Allowing the natural persons in through the gates of adjudication as cognition requires extinguishing the enduring and sedimented pasts. It is these variegated pasts therefore that disrupt the linearity inherent within the spatial representation of time as chronology and that ignores the exigencies of the Encounter. When adjudication as understanding tends toward durée and effective history, it embraces these three types of pastness in which difference is emergent and thus the singularity of the case is affirmed.

5.4 ‘Releasing the Subject’: the Encounter and the Problem

The Pure Past of the Law and the variegated past of the Natural Persons undergo the same dynamic process to indicate the different planes of their respective pasts that may be called
up in the service of an enriched retrospective narrative (see fig. 2); so as well as antecedent points in time (qualifying trigger), adjudication as understanding also tries to uncover aspects of pre-existing conditions (enduring past) or societal facts (sedimented past) as potentially mitigating factors. In adjudication as cognition, the legal subject is the term used to describe the containment of the natural persons within the spatial past (see fig. 5). The natural persons only appear within the confines of spatial past-legal event. Releasing the subject means that the appearance of the natural person occurs beyond the spatial past. The construction of the legal event embedded within the retrospective narrative is not a linear process but as fig. 2 demonstrates, is a circuitry and mobile process. The engagement of the variegated past allows the retrospective narrative to be constructed and reconstructed. It becomes multi-layered, more complex, enriched by interlocking the enduring and sedimented past with the spatial past.

Having established the variegated past as emergent in adjudication as understanding, the final part of the process looks at how adjudication as understanding engages these pasts by re-working Lefebvre’s use of the Problem and the Encounter.

5.41 Revisiting the Encounter

For adjudication as understanding to engage the variegated past requires restating the imperative nature of the Encounter and the Problem. For Lefebvre, the Encounter is acknowledging the uniqueness of the case that does violence to the anticipatory nature of the legal rule (the dogmatic philosophy of recognition). The Encounter is unrecognised, not by its empirical content but how it stimulates the actualisation of the Pure Past, through either habit (recognised) or recollection memory (unrecognised). Importantly therefore, the Encounter describes the relationship between the rule and the openness to the pasts before their incorporation into the retrospective narrative.

For the purposes of adjudication as understanding however, the Encounter is tweaked slightly. It is durée and effective history which does violence to dominant spatial temporality. For adjudication as understanding, the Encounter describes the legal rule(s) openness to see cases in their radical difference and singularity which is emergent in the variegated pasts. No two natural persons and their constitutive horizons are the same. It provides the basis for

692 As an example, in an interview for Abécédaire, Deleuze agonised over how the unique atrocities of the Armenian Genocide were displaced and subsumed under the framework of human rights, rather than prioritising their sui generis nature. See also Lefebvre (n 17) 84.
openness to differential temporalities, resisting the dominance and recognition inhered in adjudication as cognition’s temporality. When the Encounter is described therefore, as that which is singular and unrecognised (as the catalyst that stimulates transformativity in adjudication) it refers to the variegated past (conditions) as that which is unrecognised. The variegated past, whether it is the enduring or sedimented pasts of the natural persons, exist exterior to the presumption of the autonomous, abstracted, deracinated, rational subject (made possible by spatially in adjudication). These are, as Norrie describes, the excuses that currently go unheard because of the Kantian constructions of rationality. It is the situational context inhered in the sedimented past that is unrecognised by the abstract subject, or the syndrome of a battered woman and the history of violence that is unrecognised by the that transcends that very history. The Encounter, to emphasise once again, describes the relation between the legal rule of the facts emergent in the different types of past. It is what presents each case as unique such that the incorporation of the variegated past is similarly unique. So whereas Lefebvre reads the Encounter, not by the richness of its factual content but by its exteriority to thought (and thus the effect on the circuit between memory-perception), the Encounter here is understood by ‘durée’s exteriority to spatial temporality’ (and thus the facts which are contingent on those temporalities), the variegated past as external to the spatial past. What is alien to the legal rule/concept therefore, is to conceptualise of the natural persons in the manner in which durée and effective history does, as constituted by the variegated past. What is unrecognised is the singular distinctiveness of the natural persons that resists recognition by the abstract, deracinated, ‘rational’ subjectivity imposed upon it by dominant spatial temporality.

The Encounter however, is entirely redundant without its primacy. A case which affords the primacy of the Encounter such as in adjudication as understanding means that the legal rule(s) recognises, not only that the case is unique by virtue of the variegated pasts, but also that such difference ought to be meaningfully acknowledged. ‘Meaningful acknowledgement’ therefore provides the judge with two choices; either the incorporation of these types of pasts into the retrospective narrative and honest engagement with them in the normative ascription of responsibility or, if they are not incorporated, an explanation as to why they ought to be rejected. Thus, the primacy of the Encounter is not about absolving responsibility entirely through identifying all manner of potentially mitigatory elements (and the blurring of the subject and conditions), but acknowledges which conditions are ‘cut out’ (normalised) and why.

The Encounter is the point of confrontation with the legal rule, the resistance to subsumption by it and so what is meant by the primacy of the Encounter is the legal rules’ openness to it, and the acknowledgement of the Pure Event’s singularity. It means that each case will be
treated as unique and thus it forms an essential composite of adjudication as understanding’s openness to alternate theories of time (and thus its construction of the retrospective narrative).

5.42 Revisiting the Problem

The Encounter and Problem work hand in hand. Indeed, ‘the situation is an encounter that forces the law into the invention of a problem which creates rights to modify and improve that situation’.693 The stating of the Problem is equally as important for it dictates how the rule is reconstructed (how it is ‘sensed’) through which it sees the Pure Event (and to thus construct the retrospective narrative). In other words, it produces a unique solution by stating a uniquely articulated Problem. Therefore, a particular positioning of the Problem determines whether it requires the variegated past to solve it. The example that Lefebvre uses is in the case of Delgamuukw v British Columbia.694 To recall, this involved an Encounter with an unorthodox land claim from Canada’s First Nations People. The Problem could easily have been stated such that the Aboriginal land claim was not justiciable as it did not appear to satisfy the conventional requirements of a fee simple absolute as well as other ‘peculiar features’ of the purported right.695 Instead, the court stated the Problem as attempting to reconcile these competing claims to land.696 Take Ahluwalia for example, the Problem could have been stated as a limitation of the provocation defence with women who were victims of prolonged domestic violence. This would require the inclusion of the variegated past (‘history of violence) to ‘solve the problem’ of the limitations of the provocation defence. It could be argued that the absence of even stating the problem resulted in the failure of this particular defence.

The stating of the Problem therefore, will be responsible for which types of pastness are engaged in adjudication as understanding’s retrospective narrative. It appreciates that the natural persons before it are exceptional and that to represent that singularity and the difference of the persons in adjudication requires engaging qualitatively different types of pastness. If the natural persons only appear within the legal event, they are merely ‘systematised, predicted and foreseen’ regurgitated as an abstract, deracinated, ‘rational’ legal subject. Tending toward adjudication as understanding therefore requires that the default

693 Lefebvre (n 17) 85
694 Delgamuukw (n 407)
695 Aboriginal title was unique in that it was inalienable to anyone (other than the Crown) and it’s origins pre-dated the very legal system that sought to settle the claim. See also Lefebvre (n 17) 209
696 Douglas Litowitz provides a radical example of how the judge may state the Problem in a theft case, not as respecting the sanctity of private property but of questioning the very schemata of legal relations. Though the author is vague about this, it does outline ways in which an argument from an external point of view (that private property is a form of theft!) could translate to an internal point of view for the legal actors (providing a defence of economic duress or distributive justice). See also Litowitz (n 434) 20-25
697 Van Marle (n 57) 251
setting of judicial decision making as it were, is one characterised by the variegated pasts rather than merely a spatial one. The operation of the Problem for adjudication as understanding is particularly illustrative in the case law analysis in the following and final chapter.

5.42 A Fairer Adjudication?

Some of the following issues in this final section will hopefully become clearer in the proceeding chapter in which I will undergo a creative reading of case law. Given that the normative aspirations of this thesis attempt to articulate a form of judgement that has transformative potential, does adjudication as understanding produce a fairer type of judgement? Could adjudication as understanding aggravate theories of responsibility given the potentially exculpatory effects of conditions as a type of pastness? Does adjudication as understanding require selection between different types of pastness which is in fact symptomatic of adjudication of cognition?

If adjudication as understanding seeks to incorporate conditions as a particular type of pastness into the retrospective narrative, a problem emerges as conditions may have exculpatory force. Thus one could claim that any concept of legal responsibility is in danger of dissolution if such inclusions of conditions are necessary. A limit which adjudication as cognition introduces therefore, is preventing the collapse of a theory of responsibility by allowing legal events to be demarcated at certain points and excluding potentially exculpatory conditions as types of pastness.

Adjudication as Understanding may also produce seemingly unsettling results by mitigating, aggravating or even altogether dissolving responsibility (potentially for heinous crimes or civil infringements) purely because of some obscure constitutive past which may have exculpatory force. This point is later illustrated in the discussion pertaining to the changes of the provocation defence but imagine a father had killed his daughter because she was to marry a person of colour; could he be exonerated because of some vague past in which he had internalised racist sentiments? Or recall the example used at the beginning of the thesis of an impressionable young man, harassed by the intelligence services that had committed heinous

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698 See Chapter 6, section 6.12
acts abroad - what other conditions constitute him other than his harassment? His faith? His up-bringing? How do we select among these qualitatively different but also multiple pasts?

From this, two important and interrelated points can be made. Firstly, once adjudication is opened up toward other types of pastness (conditions) through an alternative temporality, it will necessarily have to select amongst these. Thus adjudication as understanding would appear to collapse into adjudication as cognition, as the latter’s spatial temporality allows for the ‘distinguishing, selecting, and placing adjacent to one another, states into a sequence that are causally related’. However, the crucial distinction is that adjudication as cognition is selection between narrow or broad time frames and not different conditions as in adjudication as understanding. Also, the argument at the beginning of this chapter stated that the features of spatiality were inevitable given that adjudication is always ex post factum. Secondly, to determine which conditions ought to be selected from a selection of multiple conditions, admittedly, requires a normative criterion independent of Bergsonian-Gadamerian temporality. Intuitions seem to view favourably decisions such as Ahluwalia which, I will claim in the following chapter, is informed by Bergsonian-Gadamerian temporality in its rendering of the Battered Woman Syndrome defence. However, our example of the bigoted father would seem entirely counter-intuitive.

What, then, should this independent normative criterion be? A detailing of this is beyond the scope of this thesis which is primarily concerned with problematizing time in adjudication’s fact construction (though secondarily attempting to articulate some kind of transformative judgement). However, part of the process of selection amongst the conditions can in part be answered by the posing of the Problem. The Problem is the genesis of how the case ought to be decided and thus what pasts ought to be included. The question then becomes however, what is the normative criteria of how the Problem is posed.

Adjudication as understanding has durée and effective history as its theories of time and with it, produces the variegated pasts with which it shares features of those temporalities. Thus conditions as well as causes can be incorporated into the retrospective narrative. Causes and conditions are qualitatively different types of facts (or pastness given that adjudication is generally ex post) contingent on ‘DST’ and Bergsonian-Gadamerian time respectively. The radical incorporation of conditions (for example socio-economic backgrounds, relations of oppression or historical aberrations committed against groups to which one of the litigants belongs) is what situates the natural persons, rather than containing them, as in adjudication as cognition. Such inclusion of conditions, it is argued, may impact upon ascriptions of responsibility. The primacy of the variegated pasts means that courts have to ‘meaningfully
acknowledge’ these conditions which results in their incorporation into the retrospective narrative which may affect attributions of responsibility, or an explanation of their non-inclusion.699 ‘Meaningful acknowledgement’ of the variegated past (following the primacy of the Encounter) does not mean therefore the necessary inclusion of potentially exculpatory pasts.

The final chapter is dedicated to illustrating how the spectrum of adjudication manifests in a case law analysis that will require an adventurous reading of judgments. It will concretely describe the kinds of ‘introspection into the variegated pasts’, or the ‘to-ing and fro-ing’ that the judge embarks upon (or ought to) in adjudication as understanding.

699 Norrie refers to these as normalised conditions. See also Norrie (n 11) 137-140
CHAPTER SIX

Temporality in Practice: A Case Law Analysis

One of the aims of this thesis has been to claim that temporality shapes how adjudication constructs its multiple pasts or retrospective narratives (an extension of the 'Kantian axiom' and Heidegger’s elevation of time). If multiple pasts do exist, what enables adjudication as cognition to discriminate between these different types of pastness requires an understanding of the theory of time that lends to such discrimination. Related to this, time is also important for its claimed jurisgenerative nature. Put simply, notions of subjectivity in adjudication’s retrospective narrative can be reframed as contingent on the particular theories of time inhered in the particular form of adjudication (and its subsequent construction of pastness) and thus effect the normative assessment of responsibility.

Dominant-Spatial Temporality is designated as the archetypal temporality of adjudication (specifically, what has been referred to as adjudication as cognition and describes the process of abstract judgment). Thus to say that adjudication’s temporality is spatial is to say that it is ‘what enables us to distinguish a number of identical and simultaneous sensations from one another…it is a reality with no quality’. Therefore, because of the characteristics of spatial time, judges are able to ‘chronologize what happened’. This is the process of distinguishing, selecting, and placing adjacent to one another, states into a sequence that are presumed to be causally related. In effect, it sees the world through a lens that allows reality to be separated (and thus parts elided), as well as natural persons, in constructing their pasts, to be similarly ‘carved and delineated’ such that they become disconnected from either more remote causes or conditions. Kelman has interpreted this process of spatial carving as adopting narrow time-frames which he argues prevail in most cases, observing this as an exercise of political will. To describe its temporality as dominant is the presumption that generally, the temporality of adjudication prevails in dictating the content of adjudication’s retrospective narrative. Elsewhere, I have stated that fact construction can also be considered ‘past construction’

700 Bergson (n 322) 95
given that adjudication is generally *ex post*. Adjudication as Cognition’s retrospective narrative is characterised by a *spatial past*, the variations of which are only the broadening of the legal event (say from a strict liability case to one of contributory negligence) wherein the natural persons *qua* legal subject appears only within the borders of said legal event. This presumes an abstract, deracinated, rational subject of law. This is the theory of time that lends toward discriminating between multiple *types of pasts* in adjudication.

Durée as a theory of time is mobile, interpenetrative, accumulating, qualitative, ontological, *mediated* and is designated as the temporality of adjudication as understanding. In its construction of multiple types of pastness, it is described as variegated, composed of spatial, enduring and sedimented pasts, with the latter two sharing the features of this particular conceptualisation of time. Enduring pasts can include pre-existing conditions (i.e. pre-existing the legal event as it was happening) such as insanity or Battered Woman Syndrome, whereas the sedimented past is ‘the deposit of the subject’s past interactions with its physical and social situation’ or ‘conditions for understanding’ in an effort to enrich the retrospective narrative (or what Lefebvre called the Perception as Judgment). The judge who decides a case in the manner of adjudication as understanding would inquire into these very conditions as the factors which might explain (though may not necessarily fully exculpate) the natural person’s transgression and will have to explain their non-inclusion if they decide that it is not incorporated into the retrospective narrative. The paradoxical ends of the adjudicative spectrum may be tabulated as follows.

<table>
<thead>
<tr>
<th></th>
<th><strong>Adjudication as Cognition</strong></th>
<th><strong>Adjudication as Understanding</strong></th>
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<tbody>
<tr>
<td><strong>Type of Judgment</strong></td>
<td>Abstract Judgment</td>
<td>Concrete Judgment</td>
</tr>
<tr>
<td><strong>Temporality</strong></td>
<td>Dominant-Spatial</td>
<td>Durée/ Effective History</td>
</tr>
<tr>
<td><strong>Type of Pastness</strong></td>
<td>Spatial</td>
<td>Variegated- spatial, enduring and sedimented</td>
</tr>
<tr>
<td><strong>The Encounter</strong></td>
<td>Sees the case as a particularisation of the general rule that is interior to it</td>
<td>See the case as radically unique by virtue of the variegated past</td>
</tr>
<tr>
<td><strong>The Problem</strong></td>
<td>States the problem in a manner which does not engage the variegated past.</td>
<td>Identifies specific problems based on the concrete case that guides the construction of a new legal concept/rule</td>
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</tbody>
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701 Recall, my earlier re-reading of Bergson’s durée which states that it is mediated, not by concepts and categories as per the Kantian Transcendental Aesthetic, but by the Pure Past.
The focus on temporality therefore seeks to provide a myriad of original insights including the ‘typologies of pastness’, subjectivity construction within the context of temporality, ‘what is missed’ from adjudication’s determination of ‘what happened’, and whether this would change the normative assessment of responsibility attribution. It may also highlight moral iniquities that exist in a form of judgment that ignores certain conditions or observe whether temporality is an indeterminate and unregulated expression of power through the use of relatively unconstrained time-frames.

This chapter will primarily look at a series of criminal law cases that invoke defences. Defences are one possible avenue in which ‘what is missed’, may become absorbed into adjudication’s retrospective narrative. However, though defences seek to alter legal responsibility, contingent on the time frames adopted as in contributory negligence for example, even legal rules without defences may be tailored in such a manner to adopt radically different temporalities. This is of course most keenly discussed by the Realist and CLS traditions in the ‘rules v. standards’ debate.702 The first case therefore will be R v. Ahluwalia703 where Battered Woman Syndrome as a pre-existing condition was newly considered under the partial defence of diminished responsibility to homicide. This case is explanatorily illuminating as the two defences of provocation and diminished responsibility that were used illustrate, it is argued, tendencies toward adjudication as cognition and understanding respectively. Next will compare and contrast some famous civil disobedience cases that sought to engage the defence of Lawful Excuse. The cases are factually similar but resulted in divergent outcomes that, it will be claimed, can be explained by the differential temporalities underpinning the construction of the retrospective narrative. The subsequent differences in the retrospective narratives meant that apportioning responsibility similarly changed.

It may appear that some of the readings of the cases are creative in their rendering. Firstly, considering the cases within a relatively new context of temporality requires an imaginative reading which may produce seemingly unusual deductions. Secondly, when Kelman describes time-frames as interpretive constructs, he says that they are subconscious. Judges

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702 Kelman (n 53) 15-63
703 Ahluwalia (n 1)
therefore will rarely discuss time in any overt or explicit sense and certainly not in the manner
described thus far. However, as has been said, facts (or pasts) are indicative of the presence
of different temporalities (conditions contra. causes) so reading into these will provide insight
into the theories of time being adopted (and overall which type of adjudication is being used).
Thirdly, appellate cases deal with points of law rather than points of fact\textsuperscript{704} so this makes the
job doubly difficult (especially as lower court cases are not systematically reported)- though
not impossible.Fourthly, in attempting to identify ‘what is missed’ and which types of pastness
are considered immaterial, will require some speculative gap filling as one will not always have
the Pure Event to hand as a barometer to determine what is missed. However, these will not
be fatal limitations in the analysis.

Following the case law analysis, the chapter will end by making a few short points about the
nature of the introspection into these variegated pasts by judges. Adjudication as
understanding has been described as a dynamic or dialogic process involving a ‘to-ing and
fro-ing’ between the variegated pasts and the legal text to produce the retrospective narrative.
It will be important therefore to outline how this dynamic process is practiced.

Having used this case throughout, it is apt that I begin with \textit{Ahluwalia}.


The case of Kiranjit Ahluwalia is famous, both within and without legal circles, having prompted
substantial media interest, a film\textsuperscript{705} and the support of the \textit{Southall Black Sisters},\textsuperscript{706} a South-
Asian women’s anti-fascist collective who supported her throughout the ordeal, eventually
helping her to obtain leave to appeal. On the evening of the 8\textsuperscript{th} May, Ahluwalia poured petrol
on her husband and set him alight whilst he was asleep. He survived for only six days, badly
burnt, before passing away and Ahluwalia was promptly charged with murder. At the trial, she
said that she did not have the requisite \textit{mens rea} for murder, claiming she only wanted to inflict
some pain and that the conduct was partially justified on the basis of provocation.\textsuperscript{707} This was
rejected by the trial court but Ahluwalia appealed on the grounds, firstly, that the trial judge’s

\begin{footnotesize}
\footnotetext{704}{Though Emmet T. Flood contests this. See also Flood (n 13) 1795-1814}
\footnotetext{705}{\textit{Provoked} starring Aishwarya Rai and Robbie Coltrane (2006)}
\footnotetext{706}{\textit{Southall Black Sisters} <http://www.southallblacksisters.org.uk/>}
\footnotetext{707}{This has since been amended by the Coroners and Justice Act 2009 and will be dealt with below. As a general
rule, the courts have said that most of the case law relating to the old provocation defence is to be disregarded. See
Chapter 6, section 6.12}
\end{footnotesize}
direction to the jury on applying Duffy\textsuperscript{708} in the provocation defence was incorrect and secondly, that that the defence of diminished responsibility, not disclosed at trial, was open to the appellant. The case was held on the former grounds but the judge allowed the appeal on the basis of diminished responsibility. At the re-trial, the crown accepted her plea of diminished responsibility manslaughter for which she was sentenced for a time in prison that she had already served. She walked away a free woman to a throng of supporters.

In order to demonstrate what was problematic about the case requires summoning the Pure Event as the gauge of ‘what is missed/considered immaterial’ and thus how the multiple pasts in the retrospective narrative are discriminated against (of course, one cannot have the full range of information and thus a few assumptions will be made as to the content of the Pure Event). Fortunately, this was partially illustrated in the backstory narrated by Lord Taylor C.J. The result of an enriched retrospective narrative will help understand how, if at all, ascriptions of responsibility are altered. What one does know, at the very least, is that the appellant was clearly a victim of sustained domestic violence so it would seem important that this be considered in the construction of adjudication’s retrospective narrative.

\textit{Ahluwalia} is important for the fact that within the case, it demonstrates divergent tendencies toward both adjudication as cognition and understanding. The portion of the analysis that deals with the failed provocation defence is an example of adjudication as cognition. Taking the Pure Event as the barometer, it is problematic for the reasons that it seems to ‘cut-off’ the ‘pastness of the domestic violence’ committed against the appellant. Therefore, some of the limitations of spatial temporality can be demonstrated with the invocation of the provocation defence, and how this demonstrates the shortcomings of adjudication as cognition. This will be set adjacent to the operation of battered woman syndrome diminished responsibility as engaging the variegated past and thus a tendency toward adjudication as understanding which was successful in incorporating this history of violence into the retrospective narrative and altering the normative ascription of responsibility.

\textsuperscript{708} Duffy (n 21)
The first limb—sudden and temporary loss of self-control; the defence of provocation was given its classic exposition in Duffy as conduct ‘which would cause in any reasonable person and actually causes in the accused, a sudden and temporary loss of self-control’. The defence failed because there was a lapse of time between the most recent provocation and the act of setting the husband on fire that appeared to undermine ‘an essential ingredient of the defence’. Indeed, a longer lapse of time had also been rejected in the earlier case of R v. Thornton. A latent period had often considered ‘cooling off’, in which the defendant is assumed to have regained level-headedness, as neutralising the defence. The appellant however articulated the possibility, based on expert evidence, ‘that women who have been subjected frequently over a period to violent treatment may react to the final act or words by what he calls a slow-burn reaction rather than an immediate loss of self-control’. Though this was rejected, Lord Taylor CJ did not eliminate the possibility that a latent period between the provocation and the transgression may be successful in future litigation and encouraged the courts instead to adopt a piecemeal approach.

The second limb—reasonable person; the reasonable person can be understood to be operative within the spatial past, appearing only within the causally related spatial past-legal event. The appellant also argued that the trial judge was incorrect when directing the jury on determining the reasonable ‘person limb’ by excluding her being a battered woman as a relevant characteristic. The judge summarily rejected this, not on the basis that it could not be admitted as a characteristic of the reasonable person but that there had been no evidence to this effect before the trial judge. However, what was particularly interesting about the trial judge’s direction on the reasonable man limb is that he directed the jury to consider the whole history of the marriage. This sounds a lot like the third form of the variegated pastness, the sedimented past that may include, amongst other things, pre-existing conditions or structural violence such as is clearly apparent here. This would have the effect of ‘releasing the subject’ from the boundaries of the spatial past-legal event through engaging the sedimented past. However, despite the jury being directed to the conditions in which the defendant committed

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709 Ahluwalia (n 1) [138]
711 This is important for the reason that even a defence which appears on the face to adopt narrow time frames (‘sudden and temporary loss of self-control’) can be tailored (ie as a standard rather than a sensed rule) in such a way to produce a broader event, for example the ‘slow-burn’ approach. This was demonstrated in the Court of Appeal case R v. Bailie (John Dickie) [1995] 2 Cr. App. R. 31 where the trial judge was criticised for taking too austere an approach to the ‘sudden and temporary loss of control’ limb.
the act for the purposes of this limb, they still returned a negative verdict on the basis of provocation—why?

Explaining the failure of the provocation defence; building the legal event through the two limbs of the provocation defence in this particular case, is an example of tending toward adjudication as cognition and can explain the reticence in accepting the ‘slow-burn’ rationale and why the reasonable person, despite apparently being destabilized by seemingly engaging the variegated past (history of violent conduct against the appellant), still returned a negative verdict on this defence. With regards to the first limb and the ‘slow-burn’ rationale; provocation would be considered an instant in time that broadens the time frame of the event beyond the mens rea; this is the only variation that is observed (ie spatially). Affirming the ‘slow-burn’ approach (‘that women who have been subjected frequently over a period to violent treatment may react to the final act or words by what he calls a slow-burn reaction rather than an immediate loss of self-control’) would allow for a lengthier lapse between the provocation and the act of killing and would broaden the event even more so. The judge’s dismissal of the slow-burn is effectively adopting a narrow time-frame; to do otherwise would be antithetical to the abstract judgment inhered in adjudication as cognition with its predilection toward adopting narrow time-frames. Efforts toward broadening the time frame of the legal event (or incorporating conditions as the next paragraph states) are met with caution and resistance. Indeed, it could be argued that this demonstrates a general principle in law against remoteness that maintains this paradigm or proximity, with the slow-burn operative as a kind of novus actus interveniens. On the basis of this limb, it understands Ahluwalia only in this narrowly framed event, and thus devoid of her idiosyncrasies emergent in the variegated past (ie the history of violence).

The second limb looks at why Ahluwalia’s variegated past (the history of the marriage) did not destabilise the reasonable man container. This can be explained due to the absence of the primacy of the Encounter (symptomatic of tending toward adjudication as cognition). In other words, though the trial jury entertained that there was a history of violence, this was not considered a condition for understanding her transgression and thus contextualising the killing (on this specific ground) to produce a situated reasonable person nor was its exclusion from

As with the note above, the reasonable man could potentially be understood in a context which ‘situates’ him, but in the current case, it fails to situate the ‘reasonable man’ due to the absence of the primacy of the Encounter. The tension (indeterminacy) between the ‘cooling off’ and ‘slow burn’ approaches was mentioned as a problem in the Law Commission’s consultation paper of reforming provocation. See also ‘Murder, Manslaughter, and Infanticide; Proposals for Reform of the Law’ (2008) CP19/08 Ministry of Justice, 8 <http://webarchive.nationalarchives.gov.uk/20110218135832/http://justice.gov.uk/consultations/docs/murder-manslaughter-infanticide-consultation.pdf>.

Lord Taylor CJ did imply that if the right sort of evidence was brought before the trial judge, it may be considered as part of the characteristics of the reasonable person provided they were permanent. This, in effect, is a type of situated reasonable person possible by constructing the natural persons qua reasonable person with a variegated
the retrospective narrative explained— or meaningfully acknowledged. Ahluwalia, given her history of violence, cannot be said to respond to a provocation as a reasonable person would. Affording primacy to the Encounter, engaging the history of violence as a type of sedimented past and incorporating this into the retrospective narrative could only understand such sensitivity. Without the primacy of the Encounter, the dominance of spatial temporality prevails and the history of violence is not meaningfully acknowledged. The common law rule of provocation is therefore, ‘sensed’. Thus the natural person stays trapped within the narrow time framed legal event as constructed by the defence, and the history of violence is effectively ‘framed-out’ of adjudication’s retrospective narrative. The absence of the primacy of the Encounter as that which fails to recognise the variegated past (the history of violence as the sedimented past) is subtly mentioned when Lord Taylor CJ says:

‘True, there was much evidence that the appellant had suffered grievous ill-treatment; but nothing to suggest that the effect of it was to make her a different person from the ordinary run of [woman] or to show that she was marked off or distinguished from the ordinary [woman] of the community’.

This can be read as meaning ‘yes there is the Encounter, and the Pure Event which include the variegated pasts, specifically the conditions in which the killing took place but, within the defence of provocation, we won’t acknowledge them as destabilising the presumed reasonable persons’. Both limbs work to contain Ahluwalia; the first by adopting a narrow time frame for what constitutes sudden and temporary loss of self-control (with suggestions of broadening met with resistance operant within the spatial past) and the second, where there seemed to be suggestions for engaging the variegated past (factually demonstrated by the ‘history of violence’), this was subsumed by the reasonable man conceived of in the narrow time frame. Without the primacy of the Encounter to situate Ahluwalia within the history of violence and thus enriching the retrospective narrative, she only appears within a narrowly construed event and as such, the decision resembles tending toward adjudication as cognition. In addition, the judgment also lacks a stating of the Problem pertaining to this particular defence and so it cannot ‘guide’ the reconstruction of the legal rule of provocation (to allow for the boiling over period) and engage the history of violence qua the variegated pasts. In effect the case, on the basis of the provocation defence, is seen merely as a particularisation of the past rather than merely contained within the narrow time-frame of the legal event. One problem perhaps, is the requirement that the trait be permanent.

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716 I claim that when the variegated past is engaged, the reasonable man ceases to be as such and is instead situated in the variegated past rather than ‘above it’.

717 Ahluwalia (n 1) [141]

718 Incidentally, an extract in a popular criminal law text book which looks at BWS cases, says that ‘such cases must be considered in the light of the social background and in particular the problem of domestic violence.’ This appears to state both the Problem and engages the variegated past. See also Jonathan Herring, Criminal Law: Text, Cases, and Materials (OUP, 2014) 308.
rule, rather than in its concrete singularity (and thus embraces a Temporality of the Legal Rule ‘TOLR’ that is past-oriented). If this had tended toward adjudication as understanding, the slow burn approach, and the reasonable person would have been situated in the history of violence, for these would embrace the features of time that inform it as such.

Before moving onto the grounds of diminished responsibility, it is worth contrasting this with the provocation defence in Hill, a case that was granted leave to appeal upon reference by the Criminal Cases Review Commission. After an evening of drinking, the appellant left the pub with the victim and went back to the victim’s house. At some point, the appellant had strangled the victim to death. He claimed that he had fallen asleep and awoken to see the victim fiddling with his zip with the intention of sexual activity. The first grounds of the appeal were that there was fresh evidence that the appellant had suffered childhood sexual abuse which may have provided acquittal for murder on the grounds of provocation; the second ground was that scientific advancements could be used to demonstrate that the appellant was suffering from diminished responsibility. Both counts were rejected, the former on the basis that the appellant had ample opportunities to disclose the history of sexual abuse and the latter in that the evidence from MRI did not indicate impaired reason and thus diminished responsibility.

The fresh evidence of a history of sexual abuse against the defendant in which he was ‘assailed by a flashback to the similar conduct of the foster father’ is interesting. The courts cited independent evidence that corroborated this claim, which may have provided a condition to situate the particular sensitivity of the appellant to the provocation and thus the gravity of it. Had it been considered at the hearing of first instance, this may have altered both the retrospective narrative and potentially the consequent ascription of responsibility which the appellate court agreed with (though of course not in these specific terms). The appellant’s history of childhood sexual abuse, on the second limb of the provocation of reasonableness, engages the third form of variegated pastness, the sedimented past which the court referred to as an ‘oppressive history’. This considers the defendant as one who is constituted by his past (like Gadamer’s effective history). Recalling the judge in Ahluwalia, he similarly entertained the possibility of a ‘situated reasonable person’ but instead took the option to see the case as a particularity of the rule rather than in its radical singularity.

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719 See Chapter 2, section 2.21
720 [2008] EWCA Crim 2
721 Which may be admitted pursuant to s.23 Criminal Appeal Act 1968
722 Hill (n 720) [13]
723 ibid [21]
Provocation in the case of Ahluwalia is problematic for the reason that it seems to meaningfully ignore the history of domestic violence against the appellant women who had suffered innumerable. Provocation could have been interpreted as a senseless rule, in a manner that did consider the history of violence as meaningful (engaging the variegated past and enabling a ‘situated reasonable persons’) or the ‘slow-burn’ approach as appropriate (as seemed to be the case in Baillie) thus tending toward adjudication as understanding. In other words, though both limbs on their face appear to adopt narrow time frames, they could have been read to adopt broader ones and engage the sedimented past. Thus the ‘newly sensed-provocation’ rule would have created a caveat for ‘slow-burners’ who had a history of domestic abuse committed against them. The provocation defence therefore, as interpreted in this case, despite its openings for future litigation, makes out as if the appellant only appears within the confines of the event, and as if the history of violence had not even happened.

6.12 Sections 54 and 55 of the Coroners and Justice Act 2009- overcoming the limitations of provocation?

The general limitations of Ahluwalia pertain to the ‘crisis of representation’ that are concomitant with a spatial temporality and the political/indeterminate framing of her pasts. However, the more specific limitations are that we are aware of the history of domestic abuse that the appellant faced (Pure Event) yet the old law tactlessly ignored it- this is the principle limitation of a decision that tends toward adjudication as cognition and its use of the old provocation defence.

The law of provocation has since been replaced by the Loss of Self-Control defence that sought to, it appears, respond to the problems of the ‘cooling off period’ that previously negativated the defence in many domestic violence cases whilst also ameliorating ‘crimes of passion (predominately by male defendants) and maintaining the proscription on revenge killings. In addition, it sought to limit the range of provocative acts that were justifiable for killing.

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724 Baillie (n 20)
726 See also ‘Murder, Manslaughter, and Infanticide; proposals for reform of the law’ (2008) CP19/08 Ministry of Justice, 8
727 s.55(6)(c); though sexual infidelity is generally proscribed, for various reasons the courts have hesitated to read it literally as it often may provide the context in which the qualifying trigger makes sense under the provisions of ss. 55(3) and (4). See also R v Clinton [2012] EWCA Crim 2 [61]; Herring (n 692) 248-249
Under the latest legislative changes, s.54(1) stipulates that a person who kills or is party to a killing will instead be convicted of manslaughter where (a) loss of self-control exists, (b) that loss of self-control had a qualifying trigger and (c) a person of the defendant’s sex and age with a normal degree of tolerance and self-restraint and in the circumstances of the defendant might have reacted in the same way to them.\(^729\)

Part (a) Loss of self-control requires (perhaps surprisingly) that the defendant has the *mens rea* of at least grievous bodily harm. Therefore, it involves the combination of a defendant who knows what they are doing but with severely impaired powers that would otherwise stop themselves. The loss of self-control requirement need not be ‘sudden and temporary’\(^730\) as per *R v. Duffy*. Indeed, this was outlined by Lord Judge CJ when he said ‘provided there was a loss of control, it does not matter whether the loss was sudden or not. A reaction to circumstances of extreme gravity may be delayed’.\(^731\) Thus broader time frames appear to be enabled, albeit within the spatial past.

Part (b) qualifying trigger is detailed in s.55(3) and (4). It may occur where the defendant’s loss of self-control is attributable to his *fear of violence* from his victim against him or another identified person or where the qualifying trigger is a thing said or done (or both) which constitute circumstances of an extremely grave character and cause the defendant to have a justifiable sense of being seriously wronged (both decided objectively by the courts). The statute is not clear as to what constitutes circumstances of such a grave character though small day-to-day mishaps (or even the ending of a relationship)\(^732\) cannot be seen as satisfying such requirements.

Part (c) sets out the requirements for a normal degree of self-restraint and tolerance, to be decided by the jury and this limb aims to counter the problem of defendants who had low tolerance thresholds but could previously rely upon the old defence. For example, if a defendant was racist and had received news that their child was marrying a person of colour, it could not be said that they were seriously wronged under the new law nor would ‘normally tolerable people’ kill in such an instance. The reference to *self-restraint* is an expectation that people ought to demonstrate control in the face of insults, jibes or other provocations (save

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\(^{729}\) Section 54(5) says that if ‘sufficient evidence’ is adduced, the jury must assume that the defence has been successfully satisfied unless the prosecution proves otherwise beyond reasonable doubt.

\(^{730}\) The courts have sometimes referred to ‘cumulative provocation/impact’ as in the case of *R v. Dawes* which also can relate not just to the lapse of time but to the circumstances of the qualifying trigger in assessing whether a person of a normal degree of tolerance and self-restraint would have done what the defendant had

\(^{731}\) *R v. Dawes* [2013] EWCA Crim 322

\(^{732}\) Ibid
for these exceptions).\textsuperscript{733} It also focusses on the characteristics of the defendant’s age and sex as potentially mitigating. Thus these characteristics will change the expectation of self-restraint and tolerance, among men and women, adults and children. This however entertains the problem of categories discussed earlier.\textsuperscript{734} Section 54(3) also states that “the circumstances of D[defendant]” is a reference to all of D’s circumstances other than those whose only relevance to D’s conduct is that they bear on D’s general capacity for tolerance or self-restraint.’ Though this appears to be a strict test that focusses on behaviour, (1)(c) and (3) allow for a level of context. For example, determining whether a person of a normal degree of tolerance and self-restraint will respond to a qualifying trigger could be contingent on whether that qualifying trigger brought back painful memories of a troubling past as was entertained in the case in \textit{R v. Hill}.

There have been no analogous cases to \textit{Ahluwalia} that have tried to invoke the recent defence so one can only speculate, based on the application of its various limbs in other non-analogous cases, whether it may overcome the limitations of the old provocation defence when decided in a manner of adjudication as cognition. There seems to be a suggestion that the ‘boiling over’ principle has been accommodated into the law and was re-enforced by Lord Judge CJ in \textit{R v. Dawes}.\textsuperscript{735} Ahluwalia would certainly have been able to demonstrate that she was facing circumstances of a grave character, a justifiable sense of being seriously wronged and clearly she had a fear of serious violence from her husband. Therefore, establishing the presence of a qualifying trigger would not have been an issue. The difficulty arises in establishing whether she lost self-control as it seems, in the \textit{narrow time frame} presumed by s.54(1)(c), that she was acting calmly and deliberately. Would a person of her age, gender and circumstances \textit{but} with a normal degree of tolerance and self-restraint have acted as she did? In other words, does s.54(1)(c) contain the appellant in the same manner that Lord Taylor did in discussing the reasonable limb in the provocation defence (despite discussing the history of violence \textit{sans} the primacy of the Encounter)? Perhaps the \textit{R v. Hill} case, had the evidence been admitted, may have been enlightening in this respect. However, though speculating, it seems as though Kiranjit Ahluwalia’s defence under the new law would most likely have failed and for these reasons, it appears to succumb to the problematic limitations of ignoring the history of violence to situate the appellant, and normalising adjudication as cognition as a conventional form of judgment.

\textsuperscript{733} Note, the defence only requires that they show that a person of a normal degree of tolerance and self-restraint might have reacted in the manner they did and if they are uncertain, the defence should be admitted.\textsuperscript{734} See Chapter 4, section 4.1\textsuperscript{735} \textit{Dawes} (n 731)
6.13 Battered Woman Syndrome and Diminished Responsibility as tending toward Adjudication as Understanding

Lord Taylor CJ began his judgment by saying ‘on May 9, 1989, the appellant, after enduring many years of violence and humiliation from her husband’. Almost immediately, it appears to engage the variegated past, situating the defendant by identifying facts (pasts) which pre-exist the spatial past (ie the pouring and setting alight of the petrol over her husband as it was happening). Indeed, he refers to this variegated pastness by describing it as ‘enduring’ and thus the violence as a condition, rather than as a mere instant of time (such as a provocation). As a result of introspecting into the horizon of the history of violence of the appellant, the legal event in the retrospective narrative is enriched beyond the mens rea. These include being hit over the head with a telephone 8 years prior, then two years later in 1983, being pushed whilst pregnant and attempting suicide and again in 1986. This, as formulating BWS, pre-exists the transgression. Unlike in the failed provocation defence that tended toward adjudication as cognition, Ahluwalia’s appearance in the process of event construction is not delayed but pre-exists the pouring of petrol on her husband. This is an indication of the Encounter’s primacy and demonstrates openness to facts that are only revealed in the variegated pasts. The rule of diminished responsibility is senseless in that ‘what judges do, therefore, is provide a sense for the rule, which is to say that a judgment creates a rule insofar as it connects together the old form (tradition, the rule) and a new content (the reasons provided for the rule).’ Prior to the case, Diminished Responsibility did not recognise Battered Woman Syndrome (read in this thesis as an enduring past). Thus the new content of the rule is derived from engaging the variegated pasts. A creative reading of the case however, by engaging the variegated past (history of violence), pushed this defence into genesis, giving new sense to the senseless diminished responsibility rule (ie operating as a standard rather than a rigid rule). Indeed, such a decision would require therefore a Temporality of the Legal Rule (‘TOLR’) which is future-oriented.

Adjudication as Understanding therefore explains how different temporalities produced a different retrospective narrative (unlike the contained and narrowly construed event in provocation) and resulted in diminishing responsibility by incorporating Battered Woman

736 This is not to suggest that a literal reading be adopted as a methodological approach.
737 Ahluwalia (n 1) [135]
738 Lefebvre (n 17) 102
739 See Chapter 2, section 2.21
Syndrome into it. How diminished responsibility constructs the retrospective narrative is through the Gadamerian dialogic (or the Bergsonian dynamic process) between the reading of the legal rule (the now repealed s.2 (1) Homicide Act 1957) and the variegated pastness of Ahluwalia. Contextualising purely within the immediate spatial past was clearly inadequate (as the provocation defence illustrated) and so it required the judge to examine a qualitatively different pastness that revealed the Battered Woman Syndrome as a pre-existing condition. From this, an inference can be made as to the primacy of the Encounter, in which the variegated past, as that which is exterior to the spatial past, was meaningfully incorporated into the retrospective narrative (contrary to the second limb of the provocation defence).

Of interest is James Boyle’s comment regarding the battered woman syndrome:

‘Think of the battered spouse defence. You have a woman who is in a marriage which is extremely abusive, she has been beaten for five years, she has been repeatedly threatened, her husband has shot her in the leg on one occasion. Finally, when he’s asleep, she grabs up a knife and stabs him. The standard notion of legal self-defence, given our stripped-down subject, sees no self-defence here. How can there be? The husband is asleep. There is no immediate threat in the brief time horizon of our genderless, contracting subject. But the battered spouse’s defence lengthens the time horizon of the subject and makes the subject exist through time. The lawyers and scholars who created this defence argued that the time-horizon for self-defence in this case was five years not five-minutes. Now what is that but a broadening, a temporal stretching, if you will, of the legal subject? Yet at the same time that they are using the traditional genre of legal arguments about the subject and self-defence, these advocates are also calling that genre into question- the apparently fixed world of free will and its limited exceptions around which criminal law is constructed’. 740

Though Boyle seems to be referring to a spatially broadened legal event (five years not five minutes), it could also be read as enriching the retrospective narrative by situating the rule within the context of the natural person’s variegated past. The time-horizon of which he mentions is related, not to the event, but that of the person and is analogous to the horizon espoused by Gadamer that necessarily situates the natural persons. ‘Temporal stretching’ can be taken to mean therefore the engagement of the variegated pasts and the resultant ‘enriched’ retrospective narrative.

740 Boyle (n 2), 522
The examination of the natural persons variegated past reveals that which mitigates her responsibility and its meaningful incorporation into the retrospective narrative. This overcomes the shortcomings of the provocation defence used in the way emblematic of adjudication as cognition that ignores this history of violence (accepting that provocation could have been interpreted in a manner of adjudication as understanding). Indeed, it also settles the problem of a legal event being constructed ab aeterno. Mere stretching of the spatial past goes against the intuitive tendencies of legal systems general antipathy toward constructions that belittle proximity. Instead, diminished responsibility in this case introduces an altogether qualitatively different pastness that enriches the retrospective narrative, without the legal event beginning ab aeterno.

6.2 R v. Hill & Hall and R v. Saibene: Civil Disobedience as ‘responding to the Variegated Past’

Civil Disobedience was first thought to be coined as a term by Henry David Thoreau in his seminal essay, *Resistance to Civil Government*, and has since been meticulously examined within the domains of political philosophy and law. More concretely however, it provided the modus operandi for social movements that have defined eras, from Mohandas Gandhi, Martin Luther King Jr to Rosa Parks. What all three had in common in exercising civil disobedience was its ‘addressor’, a response to an enduring (legal or social) injustice that pre-existed their civil disobedience but continued to persist; whether that was British (neo-)colonialism, or slavery and its legacy of systematic racism against African Americans.

Like most concepts however, with some positing descriptive accounts of civil disobedience and others outlining normative claims, it lacks semantic consensus. Many liberal philosophers for example reference civil disobedience by the absence of violence. Some additionally state that an acceptance of the consequences is an essential aspect of civil disobedience that articulates an overall fidelity to the law. On the question of violence, Howard Zinn stated that the requirement of its absence would be to ignore a pathologically violent system which will always produce ‘choice of means’ which themselves will be inescapably violent, in the transition to a more egalitarian world. Importantly, common to all streams of thought is its

distinguishability from other forms of criminal activity and coercive political action by virtue of its moral defensibility.

Ironically in a case that perhaps substantially limited the viability of civil disobedience, Lord Hoffman stated that:

‘Civil disobedience on conscientious grounds has a long and honourable history in this country. People who break the law to affirm their belief in the injustice of a law or government action are sometimes vindicated by history in this country. The suffragettes are an example which comes immediately to mind. It is the mark of a civilised community that it can accommodate protests and demonstrations of this kind’.743

Defendants vary as to whether they will plead guilty or not guilty.744 For those who fall into the former, the defences that have usually been used include lawful excuse, prevention of crime as per s.3 of the Criminal Law Act 1967, defence of other people, necessity or duress, and Article 10 of the ECHR. Interestingly, aggravated trespass under the Criminal Justice and Public Order Act 1994 is also used as an indirect exercise of civil disobedience by forcing the courts to scrutinise the activities operant within a space to determine whether their operations are ‘lawful activities’.745 If a business for example is suspected of engaging in a criminal offence, only when that is ‘integral to the core activity’, may it be considered unlawful for the purposes of CJPOA 1994.746 Civil disobedience therefore forces courts to look beyond a specific transgression to particular conditions that have summoned such behaviour. It is for such reasons that they stimulate the interest of this chapter.

This section’s focus is much narrower, centring primarily upon ‘lawful excuse civil disobedience’. This has successfully been used in a few cases to mitigate alleged criminal responsibility pursuant to s.5(2) of the Criminal Damage Act 1971. The famous ‘Kingsnorth 6’ case,747 in which 6 Greenpeace activists were able to occupy a smokestack of a power station and paint the words ‘Gordon’ on the side, argued that they were trying to prevent damage to property caused by CO₂ emissions produced by the power plant. It was the first time that such an argument had been used as part of a lawful excuse defence and, with the help of expert
witnesses that testified to the environmental damage that the power plant had already caused, the 6 were exonerated. Lawful excuse was also successfully used in the Northern Irish case of *R v. McCann and others*\(^\text{748}\) where a group or protestors entered an arms company in Derry, causing tens of thousands of pounds worth of damage. The protestors sought to rely on lawful excuse saying that the action was executed to defend property belonging to people in southern Lebanon which was being destroyed by Israeli war jets that had parts supplied to it by the arms company.

For the purposes of the analysis however, the principal focus will be the 2011 Crown Court case *R v. Saibene and others*.\(^\text{749}\) This will be juxtaposed with an identical case heard some 20 years prior, *R v. Hill* and *R v. Hall*\(^\text{750}\) (hereafter *Hill and Hall*) which unlike *Saibene*, unsuccessfully invoked lawful excuse. It is claimed that the different outcomes may be explained by the different forms of adjudicative styles used (cognition or understanding) and, more fundamentally, the latent temporalities underpinning these forms of judgment.

6.21 *R v. Hill and Hall:*

The case of *Hill & Hall* involved two appellants who were charged under s.3 of the Criminal Damage Act 1971,\(^\text{751}\) after having been found with a hacksaw and admitting to its intended use to saw through part of a fence of the US Naval Facility at Brawdy. They justified their attempt under s.5 lawful excuse.\(^\text{752}\) In order to satisfy the statutory defence that the damage

\[\begin{align*}
\text{(a)} & \text{ if at the time of the act or acts alleged to constitute the offence he believed that the person or persons whom he believed to be entitled to consent to the destruction of or damage to the property in question had so consented, or would have so consented to it if he or they had known of the destruction or damage and its circumstances; or} \\
\text{(b)} & \text{ if he destroyed or damaged or threatened to destroy or damage the property in question or, in the case of a charge of an offence under section 3 above, intended to use or cause or permit the use of something to destroy or damage it, in order to protect property belonging to himself or another or a right or interest in property which was or which he believed to be vested in himself or another, and at the time of the act or acts alleged to constitute the offence he believed—} \\
\text{(i)} & \text{that the property, right or interest was in immediate need of protection; and} \\
\text{(ii)} & \text{that the means of protection adopted or proposed to be adopted were or would be reasonable having regard to all the circumstances.}
\end{align*}\]
amounts to protection, the courts have to establish what the defendants’ honestly held belief was (it is immaterial whether this is a justified belief), that the property was in immediate need of protection, and that the means adopted were reasonable having regard to all circumstances. The wording of the legislation appeared to suggest that this was an entirely subjective test:

‘If he destroyed or damaged or threatened to destroy or damage the property in question or, in the case of a charge of an offence under section 3 above, intended to use or cause or permit the use of something to destroy or damage it, in order to protect property belonging to himself or another or a right or interest in property which was or which he believed to be vested in himself or another… …and at the time of the act or acts alleged to constitute the offence he believed—(i) that the property, right or interest was in immediate need of protection; and (ii) that the means of protection adopted or proposed to be adopted were or would be reasonable having regard to all the circumstances’.

The cases were factually identical and so the appellate judge dealt exclusively with the evidence provided by Ms Valerie Hill. Her reasoning for the damage against the naval base was that the attempt was an effort to force the UK to abandon its nuclear weapons programs and prevent the destruction to their property and their neighbours. The trial judge directed the jury to convict on the grounds firstly, that there was lack of a causative relationship between the act and the alleged protection such that the act could not objectively be seen as a protective act; and secondly that she could not be said to have believed that the property was in need of immediate protection. An application to appeal against the judgment was brought on the basis that these were both entirely subjective tests, and was thus a question of fact that should have been left to the jury such that the judge was wrong to direct the jury to convict.

In the appeal, Lord Lane CJ paraphrased what constituted Ms Valerie Hill’s description of the threats and thus her belief that she was protecting property belonging to another:

‘This particular base was to monitor the movements of Soviet submarines, that in the event of hostilities breaking out between the United States and the Soviets, or the Soviets and ourselves [UK], the base would be subject of a nuclear strike with

(3)For the purposes of this section it is immaterial whether a belief is justified or not if it is honestly held.’

753 This is one of two ways to establish lawful excuse, with the other being consent.
754 [emphasis added]
devastation in the area...the Soviets might select the site at Brawdy as a target for a sudden nuclear strike...that if enough people took a hacksaw blade and did as she intended to do, namely cut a strand of the perimeter wire, the Americans might come to the conclusion that it was no longer possible to maintain the safety and integrity of their base’.755

Accepting that this was her belief, the judge sought to rely upon the test of ‘whether the defendants’ actions on the facts believed by them could constitute protection, was a matter of law’ (rather than what appeared to be subjective). This test followed R v. Hunt where the appellant set fire to a guest room in an old people’s home so as to summon the attention of others to a defective fire alarm system. The trial jury and the Court of Appeal in Hunt both ruled it was for the judge to decide whether the facts, as believed by the defendant, constituted protection of property.

Holding up the ‘objective test’, Lord Lane CJ quoted and affirmed what the trial judge in Hill and Hall had said, citing that ‘the causative relationship between the acts which she intended to perform and the alleged protection was so tenuous, so nebulous, that the acts could not be said to be done to protect viewed objectively’.756 On the immediacy element, the judge’s reading of the defendants’ established belief was similarly critical. At the trial stage, when probed about the immediacy of the threat, Ms Valerie Hill replied:

‘I see the international situation as being constantly changing and sometimes far more threatening than others, and when we play with nuclear weapons, when we play the nuclear game, there is always the possibility at any time...that somebody will press the button and a bomb will fall...perhaps I can make an analogy...my husband is an epileptic; he suffers from epilepsy. This does not mean every minute of every day I go round thinking Ian is going to have a fit, but it is something that is kept in mind at all times as a possibility, and I would say this is an analogy really as to how I feel about Brawdy. I don’t expect a nuclear bomb to fall today, or tomorrow, but there is always that possibility that it is going to happen’. 757

755 Hill/Hall (n 750) [76]
756 ibid [77] The appellate court agreed with the decision in the case of Ashford & Smith (unreported) which followed the court in Hunt (1978) in which the appellant set fire to a guest room in an old people’s home to draw attention to the defective fire alarm system; that the first limb of s.5(2)(b) of the defendants belief was a subjective test and that the second limb (despite contestations from the advocate) of determining the causal relation and immediacy of the speculative act was an objective test.
757 ibid
Based upon what the defendants had outlined as their objectives, it could not be said (controversially) as a matter of law, that their actions amounted to protection of property belonging to another on the bases that the proposed action was too remote from the defendants’ eventual aim\(^\text{758}\) (ie that it was too remote into future, requiring the adoption of a ‘broader time-frame’ and was thus indeterminate) and it also lacked immediacy\(^\text{759}\) (ie in effect reifying a narrow time frame). The application was refused.

6.22 The dominant in dominant-spatial temporality and speculative futures

*Hill and Hall* stipulated therefore, contrary to what one may understand as the natural meanings of the statutory defence, that the role of the court was to firstly, determine the belief that the defendant was protecting property belonging to another and secondly, to then interpret that belief objectively as to whether it constituted protection of property. How can this be understood as problematic (i.e. ignoring salient features from the Pure Event) within the context of temporality?

The controversial move by the court to objectively interpret the defendants’ belief, and thus for it to determine whether that constituted protection of property belonging to another, demonstrates the dominance of adjudicative temporality but also importantly the problematic speculations of the defendant’s belief. In establishing the causal relation between the purportedly criminal act and the threat and thus its immediacy, the beliefs of the risks that were attributed to Ms Hill were entirely speculative and thus indeterminate.\(^\text{760}\) By speculative, it is meant that the responses that Ms Hill gave to the trial judge were hypothetical, future-oriented and therefore would find considerable difficulty being woven into the retrospective narrative’s pasts. Nothing in her evidence (or indeed in the judgment) attempts to engage the variegated past, such as evidence of previous incidences that would suggest the likelihood of an attack (much like in anticipatory self-defence claims) or other pre-existing factors which may be responsible for her intent to commit criminal damage; instead the arguments were anchored primarily in an indeterminate future. Of course, threats are predicated upon indeterminate futures, but their likelihood can be contextualised by engaging the variegated past. To use the reference to anticipatory self-defence; if a particular state is a habitual violator of international law, and commits persistent aggressions against a people that it occupies, those that are occupied may have a strong case to anticipate a future threat and engage in

\(^{758}\) ibid
\(^{759}\) ibid
\(^{760}\) Interestingly, in the unreported case of ‘The Kingsnorth 6’ which successfully invoked the lawful excuse defence, expert advice testified that there was an immediate need to protect property endangered by rising sea levels, rather than a speculative future threat; see also Richard Harvey, ‘Climate change in the courtroom’ (2010) 54, Socialist Lawyer, 20-25
anticipatory self-defence based on that historical record. Returning to *Hill and Hall*, what is even more abstract about the threat is not just that it is predicated upon a speculative future within no anchoring in any type of past, but that at the time of the judgment, it was still yet to actualise, thus making the causal link infinitely more tenuous. This is unlike in a negligence case where foreseeability is determined retrospectively after a harm has actually occurred. Another example of this, where a particular type of ‘past helped to interpret the future’, was demonstrated in the case of *Bolton v. Stone* where the courts had to decide if the defendant was negligent for conduct that was not reasonably foreseeable; hitting a cricket ball out of the ground which struck the plaintiff. Admittedly, unlike in *Hill and Hall*, this referred to a breach that was future *ex ante* but had manifested *ex post*. In determining the foreseeability of a risk, rather than focussing on the relation between the breach of a duty of care and the harm, the determination of foreseeability was premised upon evidential history. Lord Normand stated that ‘the evidence about the infrequency of hits out of the ground is directed to the period since 1910, and is sufficient basis for a judgment on the degree of risk and on the duty resting on the defendants’.

A reasoning that is rooted not in pastness but exclusively in *speculative futures* therefore renders our representation of the natural persons problematic and would have been much less convincing to the judge and jury when it came to ascribing responsibility. Ms Hill only appears from the instant of the intended action and the difficulty of the defence lies in the absence of situating the appellants within their constitutive pasts and subsequently introspecting into those pasts. In other words, it lacks a constituting horizon in which to situate the defendants and in which to understand their intended criminal damage; the entirety of the discussion within the judgment, including the beliefs of the appellants is projected toward the future rather than rooted in a past.

Unlike in *Ahluwalia* where there was some indication of the Pure Event (as a barometer for ‘what was missed out’), here it is less obvious, thus making it more difficult to produce any normative assessment of the inadequacies of the judgment’s retrospective narrative. Therefore, one can only speculate. However, generally speaking, that the variegated past (which seeks to overcome some of the problems inherent within the spatial past) was altogether elided in the current case is itself problematic, for the judges would be none the

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761 [1951] A.C. 850
762 ibid [862]
763 ibid [863]
764 ibid [864]
765 I am not making the claim that the past is easily determinate, but that it is more determinate than the future.
wiser as to what an enriched retrospective narrative that engaged the variegated past may have revealed (and whether it would have subsequently effected apportioning responsibility).

In *Hill and Hall*, a variegated past which suggested the likelihood of the threat, such as previous and similar incidences of Soviet attacks on American naval bases, *may* have strengthened the relation between the exclusively speculative threats in the appellates’ submissions, and the intended action, not on causative grounds, but situating it within the condition of the threat from a constitutive horizon. Otherwise Ms Valerie Hill is existent only from the point of approaching the naval base and dissipates into a speculative future. Nothing of the variegated past is engaged, whether relating to enduring features of the defendant or conditions for understanding her intended action. Along with an exclusive focus on a not-yet manifested speculative threat, notions of responsibility cannot be seriously challenged.

It is not only the speculative futures which render the defence indeterminate and therefore unsuccessful, but also that the judge clearly determines the passage of events in the adjudication’s retrospective narrative with the ‘objective’ reading of the defendant’s speculative state of mind. The legal clock, as it were, only started when Ms Hill took a hacksaw and approached the naval facility at Bawdy. Thus the dominant element of spatial temporality (which is what the primacy of the Encounter attempts to resist) rears its head. The absence of the variegated pasts also means an absence of the primacy of the Encounter, which would otherwise challenge the dominance of spatial temporality.

Lawful excuse in the incumbent example, unlike a defence of provocation, does not pertain to a point in time that precedes the intentional element (thus causally related). Rather it is rooted in a sometimes non-actualised and thus radically indeterminate future. This is not to say that laws should not prescribe certain conduct that seeks to prevent future wrongdoing (though that can be wrought with problems) but rather an interpretation of a defence focussed exclusively on the future, may lead to certain difficulties if not supplemented by a retrospective narrative to determine its likelihood (as in the ‘Kinsgnorth 6’ case). For the purposes of this project (that attempts to move toward a concrete temporality of adjudication), it is woefully abstract in that the natural persons *qua* legal subject appears only from the commencement of the event and diffuses into an imprecise future. Determining the speculative threat, whether manifest or not, needs to be rooted in a certain form of pastness which *Hill and Hall* simply did

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766 The difference between the spatial past and the variegated past is not analogous to objective and subjective. The Spatial past allows for arbitrariness in delineating legal events as has been outlined elsewhere and the variegated pasts posits that the natural persons are both constituted and constituting and thus adjudicative analysis should encapsulate this (rather than the idea of radical subjectivity)

767 Farmer (n 73) 343
not do. As such, the defence is interpreted in an abstract manner that tends toward adjudication as cognition with no attempt to situate either the natural persons or the conduct and it is for these reasons, it is claimed, that the jury remained unconvinced.

The following case however, could be said to overcome this limitation by rooting the relation between the act and its causal relation to an immediate threat, in the variegated past.

6.23 R v. Saibene and Others

Though a Crown Court ruling, R v. Saibene and others did not falter in the controversy it provoked, not least from the Office for Judicial Complaints, with accusations of judicial bias from the presiding judge, His Honour Bathurst-Norman J, in what was seen as a fiercely political judgment. However, commentary has been scant, limited primarily to the academic blogosphere.

The defendants in the case, all from Bristol, were Ornella Saibene, Elijah Smith, Robert Nicholls, Tom Woodhead and Harvey Tadman. After having exhausted all democratic means, on the 17th January 2009 they broke into the premises of an American defence company, EDO MBM (hereafter EDO), located in Moulscoombe, Brighton. Engaging in what they referred to as a ‘citizens’ decommissioning’, the defendant’s threw filing cabinets and computers out of the factory windows causing damage in the region of £180,000. The purported criminal damage was seen as a last resort in response to the 2008-2009 war in the Gaza Strip, Operation: Cast Lead and EDO was targeted as it provided component parts for Israeli F-16 jets that were crucial in that military operation. All seven defendants were charged with conspiracy to commit criminal damage and thus invoked the defences of lawful excuse and necessity. To draw the comparisons with the Hill and Hall case, the focus will only be upon the lawful excuse defence. The defendants were successful and the claim is that this

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768 The case was unreported and so the analysis is based on the judge’s full-summing up ‘Judge Bathurst-Norman: the full summing up’ (The Jewish Chronicle, 15 July 2010) <http://www.thejc.com/35771/judge-bathurst-norman-full-summing> accessed 9th January 2015. After having contacted the Lewes Crown court, a full transcript was estimated at around £40,000. The full summing up judgement however, adequately outlines the law and facts.


770 Christopher Cismont and Simon Levin were also among the defendants but did not enter the premises. Instead, they acted as watch posts.

771 This was described by local Green MP, Caroline Lucas as a form of ‘non-violent direct action’. See also Saibene (n 768) 3
can be explained with the judge’s appeal to the variegated past, illustrative of tending toward adjudication as understanding, which convinced the jury to acquit.

In adjudication as understanding, the construction of the retrospective narrative is a ‘dynamic-dialogic’ process that is enriched by appeals to the variegated past. It is claimed that with an enriched retrospective narrative, this may alter normative ascriptions of responsibility. Adjudication as understanding requires the primacy of the Encounter to stimulate this dynamic process. The legal rules, in this case that of criminal damage and the defence of lawful excuse, are considered as senseless or malleable and, guided by the Problem, may be tailored to produce a unique solution to a unique case.

6.24 Situating criminal damage in the Variegated Past

The similarities to the Hill and Hall case are notable. Both included acts (and intended acts) of civil disobedience, purported to protect property belonging to another; specifically in this case to stifle the Israel Defence Forces’ ability to damage property in the Gaza Strip. With the former case however, as that which tended toward adjudication as cognition, the construction of the legal event was simply a variation of the spatial past with no engagement of the variegated past, anchored exclusively in an indeterminate future. As such, there was nothing that could enrich the retrospective narrative to incorporate conditions for understanding (or enduring features of the natural persons) the criminal damage that may have persuaded the judge and jury in their normative assessment of the intended act.

The initial construction of the retrospective narrative, specifically the legal event in R v. Saibene and Others could be said to be similarly constructed along the lines of Hill and Hall. The first reconstruction however (or enrichment of the retrospective narrative through the dynamic process of judgment), based on the evidence, demonstrates that there was prior agreement carried out in accordance with the intentions of the group which resulted in the commission of the offence that constitutes the conspiracy requirement. In this dynamic process of retrospective narrative construction therefore, the first change would be the adoption of a broader time frame to construct the legal event beyond that in Hill and Hall. However, the broadening of the legal event is still only operant within the spatial past, premised upon causal relations. How the case emerges as significantly different from the previous case is that it engages the variegated past.
To re-iterate, for lawful excuse to be successfully invoked, the defendants must have an honestly held belief that the property in Gaza was in immediate need of protection (immaterial as to whether it is justified) and that the defendants’ action were reasonable in protection of that property. How were these rules given sense and how were they distinguished from the similar facts in *Hill and Hall*? Firstly, the cases can be distinguished on the basis of the primacy of the Encounter and the stating of the Problem. Recall that ‘an Encounter shocks the law and initiates the uncovering of a problem that will establish the facts of the situation’. What is ‘shocked’ is the spatial past (and thus causal relations) and thus the construction of the retrospective narrative. What ‘shocks’ is the variegated past that looks at conditions for understanding the damage caused at the arms factory. However, in order to engage the variegated past requires a particular stating of the Problem. Remember that the Problem explains differentiation within the law and fundamentally provides the parameters to establish the facts of a case, or more fundamentally, the *types of pastness* that are promulgated. In other words, it guides the legal rule of lawful excuse in its pragmatic application. Because of the singularity of the case, afforded through the primacy of the Encounter, the Problem is similarly unique.

The very engagement of the variegated past from the Encounter is contingent on a creative reading of the case and a radical stating of the Problem by the judge. If for example, His Honour Bathurst-Norman J were to have stated the Problem merely as recognising domestic proprietorial rights, then it could be argued that he would have not needed to have directed the jury toward the variegated past that he ended up going into in his summing up. This case would have therefore been a mere particularisation of the legal rule (thus a ‘TOLR’ that is past-oriented). However, the judge instead radically framed the Problem as one based upon international crime prevention (and thus protection of property). Indeed the judge stated that ‘in this case, the purpose of the defendants in damaging MBM’s property has to be to prevent the destruction by the Israeli Air Force of property in Gaza’. Grander claims citing threats to political virtues were also expressed; ‘democracy would not exist unless there were reporters and members of the public who were prepared to stand up for what they believed to be right, and sometimes, as in the case of the suffragettes, even to go to prison for their beliefs’. The summing up also went further on to state that all other non-direct action means had been exhausted. In effect, the Problem was about how to reconcile proprietorial rights with the welfare of others and the prevention of war crimes. Had this been constructed using a narrow time frame (and thus within the spatial past), in which the defendants appear only within the confines of said legal event, it would simply not have been able to solve the Problem.

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772 Lefebvre (n 17) 237
773 ibid 216
774 See Chapter 2, section 2.21
775 *Saibene* (n 768) 3
776 ibid 5
777 ibid 9
stated. In other words, if the only facts (past) used related to the commission of the offence, it would naturally have ignored any reference to the conditions revealed in the variegated past. What it necessarily required to solve the unique Problem as stated, was engaging the variegated past. By contrast, if the Problem were stated simply as protecting commercial property (or ensuring national security, a competitive market in the sales of arms) the facts contained within the narrow spatial past would have sufficed.

Remembering once again that the construction of the retrospective narrative is a dynamic process, the second reconstruction becomes enriched, not through further broadening, but as the variegated past is engaged. The manner in which the lawful excuse defence in Saibene constructs the legal event is radically different from the aforementioned case for the simple reason that it bears weight, not exclusively on causal relations and thus the spatial past, but in situating the civil disobedience within its conditions, and thus invoking the variegated past. The judge spends ample amount in his summing up engaging the sedimented past. In an effort to encourage the jury to 'look at the evidence coldly and dispassionately', he states:

'I am going to start with the background relating to Israel and Palestine and to the evidence which points to the war crimes being committed by Israel in Gaza…[UNSC]resolutions condemning Israel on no less than forty occasions…the barrier, and the judgment of the International Court holding it illegal and to stop building settlements in the West Bank are simply ignored...so with that broad picture in mind let me concentrate on Gaza…It is surrounded by a fence. That fence is patrolled by Israeli tanks, planes fly overhead…Israel decides what goes in and out…[they] impose a land, air and sea blockade…the Dahiyah doctrine, namely that Israel would apply disproportionate force and cause great damage and destruction to any village…Israel’s attack on Gaza involved the use of disproportionate force…in three minutes 40 seconds, 250 Gazans were killed on the first day…the Al-Quds hospital was bombed. Hospitals, ambulance depots, mosques, United Nations compound, industrial and agricultural sites, the sewage and the electricity power plants were all targeted and damaged or destroyed'.

This simply cannot limit itself to the spatial past for the reason that these conditions pre-existed the case whilst it was happening. In other words, they are not merely past by virtue of adjudication’s positioning ex post. Instead, they are analogous to the third form of the

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778 ibid 5-12
variegated past which is the sedimented past that provide conditions for understanding in an effort to enrich the perception of the retrospective narrative.

The requirements of lawful excuse for the protection of property, requires that the defendants believe that the property was in need of immediate protection and that the force was reasonable; assuming that the variegated past had not been engaged (or, like Hill and Hall, the attempted justification had been exclusively predicated upon speculative futures), there would be nothing to substantiate that property in the Gaza Strip was in need of protection. Similarly, in determining whether it was reasonable; this would have only been considered within the confines of the narrow time framed-legal event which would have only included the preceding agreements that constituted conspiracy and the destruction of the arms factory. Immediacy and reasonableness take on new sense when situated within the context of the variegated past. To smash up an arms factory and cause £180,000 worth of damage for the sake of it (which would be the case had the variegated past not been engaged) or centred exclusively on a vague threat, would seem unreasonable; but within the context of the war in Gaza, the purported criminal act is understood differently. In constructing this enriched retrospective narrative, it is not enough to direct the jury to the conspiracy. The context of the war in Gaza is a necessary component of that retrospective narrative. An enriched retrospective narrative (ie that incorporates the variegated pasts) revealed to the jury that which changed their ascription of responsibility. Indeed, even immediacy takes on a radically different meaning when situated with the variegated past. It is not understood in the narrow spatial sense but as a response to a pre-existing threat (effective history). It also reifies the causal relation between the damage and the harm it sought to prevent, because it is anchored in a determinable past (rather than an exclusively speculative, non-actualised future as in Hill and Hall). The judge acknowledged this horizon and thought it necessary, in an effort to solve the Problem stated, to direct the jury accordingly. Thus adjudication as understanding is linked to a Temporality of the Legal Rule (‘TOLR’) that is future oriented and in which rules operate more as standards of ‘senseless rules’.

*Saibene* therefore is a decision that tends toward adjudication as understanding, capturing the central features of durée of an interpenetrative past and present, an accumulating past, a time that is qualitative and ontological. It disrupts ‘chronologising the past’ (the process of distinguishing, selecting, and placing adjacent to one another, states into a sequence that are presumed to be causally related) and instead tries to gather, to use Bathurst-Norman’s J words, a ‘broad picture’ of what happened. The further enrichment of the retrospective narrative pushes the judge and jury to observe whether their notion of legal responsibility changes. It is for these reasons, it is claimed, that the defence was successful and at the heart of this lays temporality.
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<td><strong>Rule</strong></td>
<td>Defence of Lawful Excuse</td>
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<td><strong>Problem</strong></td>
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<td>Could be read as reconciling proprietor rights with the welfare of others and the prevention of war crimes (and thus the protection of property of others)</td>
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<td><strong>Primacy of Encounter</strong></td>
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<td><strong>Pasts</strong></td>
<td>Spatial Past</td>
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<td><strong>Outcome</strong></td>
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<td>Tending toward Adjudication as Cognition</td>
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6.25 To-ing and Fro-ing: The Nature of Introspection

In the Ahluwalia case, the introspection revealed a history of violence (being hit over the head with a telephone 8 years prior, then two years later in 1983, being pushed whilst pregnant and attempting suicide and again in 1986) and in Saibene, this incorporated the military occupation as a condition (settlements, the blockade of the Gaza Strip etc) that situated the civil disobedience and gave new sense or new factual content to immediacy and reasonableness of the lawful excuse defence. Part of adjudication as understanding (or the verstehen approach) is not ‘to halt the projection of the judge’s view’ in interpreting the transgression, but within the context of temporality, to suggest that the variegated pasts reveals how that action comes to fruition. Thus it is not a type of verstehen approach that acknowledges a strict subject-object divide and attempts to delve into the later, but an understanding approach which is instead initiated with introspections of the variegated pasts.
I've explained that the reading of the legal text against the variegated past to produce the retrospective narrative is a dialogic (to use the Gadamerian term) or dynamic (to use the Bergsonian wording) process—recall Nousiainen's *triad of time, text and reality*. This means that a more meaningful engagement with the variegated pasts, where new information emerges that presents the difference of the case, will enrich the retrospective narrative. The nature of this introspection varies and part of the reason why the thesis is titled *toward*, aims to reflect the hesitancy in universalising a set ‘method of introspection’ into these different types of past. Part of this hesitancy is also expressed in trying to articulate a method of ‘selecting between conditions’.\(^{779}\) The relation between the condition and the litigants is often varied. For example, the ‘Kingsnorth 6’ case and *Saibene* can be contrasted with *Ahluwalia* because of the relations between the litigant and the conditions. In the former, there seems to be an active acknowledgement and confrontation with this horizon, whereas in *Ahluwalia*, the relation to the condition is much more passive. This distinction is important as to indicate the propensity of judges to potentially include such types of facts into the retrospective narrative. As was said before, civil disobedience forces the court to look beyond a specific transgression to particular conditions that have summoned such behaviour. One is compelled to suggest that such judicial inclinations are not as readily illustrated in cases that resemble *Ahluwalia*.

The Encounter, which acknowledges the uniqueness of the case by virtue of its variegated pasts, is about *meaningful incorporation* of conditions into the retrospective narrative. What adjudication as understanding demands therefore is that conditions which are *not* included be explained. As Norrie says, just because iniquitous conditions are normalised, is it for those reasons that they are ignored (or ‘framed-out’) in adjudication? Adjudication as Understanding resoundingly answers this in the negative.

\(^{779}\) See Chapter 5, section 5.42
I have tried to argue that without problematizing temporality, we may misunderstand, in part, how adjudication constructs its determination of ‘what happened’ (the retrospective narrative). I will restate the four research questions outlined at the beginning, before providing a summary of my argument as a response to them. The first question was to develop the claim that time is connected to adjudication’s reality construction (extending the Kantian axiom, situated in Heidegger’s critique of Kant’s *Critique of Pure Reason*). Second of the four questions provided that temporality is prior to subjectivity and that the paradigmatic abstract, deracinated and ‘rational’ subject of law is actually contingent on a particular theory of time, thus reframing discussions of legal subjectivity construction through temporality. Thirdly, was the task of observing how time, as that which is unproblematised, is an otherwise concealed exercise of power that is able to include or exclude, frame in or out, factors which may be constitutive of transgressions. Finally, I set out to articulate how an alternative theory of time may produce a concrete and thus transformative form of judgment.

I reject the subsumption thesis on the basis that it cannot account for the inherent creativity of adjudication, made possible through the generality of laws, that laws can operate as rules or standards and that, to quote Lord Bingham once more, ‘in deciding facts, the judge knows no authority, no historical enquiry and (save on expert issues) no process of ratiocination will help him. He is dependant, for better or worse, on his own judgment’. Thus facticity in adjudication can be explained, in part, by the temporality upon which it is based.

I demonstrate that the conventional form of judgment, *adjudication as cognition*, is predicated on *dominant-spatial temporality*. I refer to factual construction (or past construction) as the *retrospective narrative* for the reason that adjudication is generally *ex post factum*. The features of dominance (in that it determines how the legal event and subject of law is created) and spatiality (imbues features of uniformity, divisibility, juxtaposition and simultaneity), mean that adjudication as cognition, allows the past to be *chronologized* such that it provides the judge with the ability to distinguish, select, and place adjacent to one another, states into a sequence that are presumed to be causally related. Though this allows judges to demarcate
when events begin and end (preventing the absurd possibility of legal events beginning *ab aeterno*) and thus when rights, obligations, powers and liabilities are initiated, it also carries with it a myriad of problems. Firstly, is that of *time-frame indeterminacy* in that spatial temporality allows for the use of broad or narrow time frames of what is included in the retrospective narrative with little judicial restraint. It is what Kelman calls the *arational choice*. Further, I claim that the subject of law, in a case that is decided in the manner of adjudication as cognition, ‘traps’ the natural person in a *spatial past-legal event* which extinguishes their difference (thus producing the paradigmatic abstract, deracinated, ‘rational’ subject of law). This difference presents the uniqueness of the subject of law which is only emergent when *conditions* (contingent on a contrasting theory of time) are incorporated into the retrospective narrative. Thus, even in adjudication as cognition, where a legal event undergoes broadening, which is the switch from a narrow time frame to a broader time frame (say as in contributory negligence cases), it still contains the subject of law- for they are *born, killed and reborn at each moment*. Thus we can rearticulate the legal subject as the containment of the natural persons in the spatial past. All these features of the spatial past share features of spatial temporality and the necessary exclusion of conditions inhibits a proper normative assessment of responsibility in the case.

Given the limitations of adjudication as cognition, I then explain a form of judgment with transformative potential which is contingent on a contrasting theory of time, *adjudication as understanding*. Adjudication as understanding’s retrospective narrative additionally incorporates qualitatively different facts (conditions) from adjudication as cognition (causes) due to, as I have argued, the theory of time which it is predicated upon. Thus the features of Gadamerian *effective history* and Bergsonian *durée* produce facts which are enduring, accumulating and constitutive. Examples of such facts may include ‘poor social environment, racial discrimination, police harassment.’ 

Causes, like spatial temporality, are fleeting and derive their past-ness by virtue of adjudication’s positioning *ex post*. Conditions on the other hand, precede the legal event when it was happening and are enduring, like durée and pervasive like the effective history. Adjudication as understanding demands that conditions are incorporated into the retrospective narrative to see whether they may mitigate responsibility (this refers specifically to criminal law cases) and if they are not, judges are required to explain why such conditions are ignored. This produces radically different events and subjects of law, where the former incorporates conditions of living and the latter is constituted by these conditions, rather than exclusively constituting them. In other words, conditions such as the ‘poor social environment, racial discrimination, police harassment’ are not independent of law’s cognition of the subject, but contribute to its understanding of legal subjectivity. From a critical perspective, it allows one to see how judges may actually

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781 Norrie (n 11) 137-140
perpetuate certain social iniquities by excluding them in the retrospective narrative. Thus a legal decision that tends toward either adjudication as cognition (abstract) or understanding (concrete) is distinguished by temporality.

The rest of the concluding remarks will start by making some very brief comments regarding some of the unique problems such a novel understanding of adjudication and time presents and how to respond to these. This will begin by looking at how temporality is operative in discussions of theories of adjudication. It will also broach one of the key anxieties of adjudication as understanding; that of its potential nihilism and dissolution of responsibility. I will then end this section by looking at the workability of such a form of adjudication within the constitutional milieu.

The final sections will go on to discuss some of the themes from the thesis that may be advanced. These include the problem of the temporal trap which is revealed in the problematisation of temporality in adjudication, and the larger discussion of time’s marginalisation in Modernity.

‘Temporality as Metaphysical’ or ‘Temporality as an Analytical Lens’

Throughout the thesis, I made use of the expression ‘extending the Kantian axiom’ meaning that, where Kant states that temporality shapes perception, I claim that adjudication’s temporality similarly shapes its construction of the retrospective narrative. The extrapolation of this is indeed bolstered by Heidegger’s articulations. This appears to make a metaphysical claim about the very ontology of adjudication. A fair question to ask, and one that I have mentioned previously and responded to, can be shaped as follows. Take the use of relatively unrestrained narrow-broad time frames, what Kelman describes as the arational choice. Has this something to do with the fundamental nature of judicial reasoning or is this merely a normative assessment of relative responsibility? There is a seemingly practical necessity in thinking spatially and in that sense, my claims could be seen as metaphysical. However, if one rejects metaphysical speculation, or that time contributes little in how judges make decisions, or that these are unconscious elements in legal decision making, then at

782 See Chapter 1, section 1.33
783 See Chapter 4, section 4.33
784 Kelman (n 10) 594
the very least, temporality can still serve as a novel analytical lens through which to observe factual construction in adjudication. This is particularly clear in the way I have attempted to distinguish between qualitatively different types of facts (or pastness). The qualitative difference between causes and conditions can be illustrated with recourse to the features of different theories of temporality. Thus it may not be a metaphysical claim I am making (which I could be accused of by distinguishing different forms of adjudication based upon the theories of time underpinning them) but rather that temporality provides a useful analytical framework in which to observe the particular process of factual construction and the distinctions between typologies of fact. We can see that certain (and these tend to be the more prevalent) forms of judgment characteristically ignore conditions and focus on causes. Such a distinction, I think, would be difficult to decipher without recourse to temporality.

Responsibility and Nihilism in Adjudication as Understanding

The scope of this thesis has been to primarily look at the effect of problematizing time with respect to the criminal law. Have I argued however, for the aggravation or even extinction of a theory of criminal responsibility?  

In the introductory chapter, I made a few remarks about the nature of the contributions that the thesis will endeavour to make, using the expression that ‘philosophy is as useful in its enterprise of demystification as it is in reconstruction’. Part of these remarks stem from the anxiety of relying purely on a thesis of reconstruction and whether, following a problematisation of temporality in adjudication, an alternative form of judgment (adjudication as understanding) is even workable. However, the other reason for focussing on ‘demystification’ as well as ‘reconstruction’ is to identify and confront the limits of law. Is there a sacred boundary that necessarily prevents adjudication and law’s descent into nihilism, a blurring of subject and environment, or a cul-de-sac in which adjudication is necessarily prevented in its ability to be concrete (and thus limit its transformative potential)? If justice is understood as the experience of the other (natural persons) as the other, is law and adjudication necessarily limited in its pursuit of concreteness and thus justice? The utility of

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785 See Chapter 5, section 5.42
786 See below, ‘The workability of Adjudication as Understanding: a few remarks on Constitutionality’
787 Karin Van Marle provides an overview of Derrida and Drucia Cornell’s development of his deconstruction. See also Van Marle (n 57) 250-255
788 By ‘other’, I mean the subject of law as a subject which is situated, its radical difference made possible with the incorporation of the variegated past. See also Van Marle (n 57) 251
this limit or boundary of law which adjudication as understanding seems to push (and arguably destroy) can be understood in two ways.

The first relates to adjudication as understanding potentially dissolving legal responsibility. If adjudication as understanding seeks to incorporate conditions into the retrospective narrative, the problem is that conditions may have exculpatory force. A necessary limit which adjudication as cognition introduces therefore, is preventing the collapse of a theory of responsibility by allowing legal events to be demarcated at certain points and by excluding potentially exculpatory conditions. The second relates to adjudication as understanding’s reception into practical reasoning. Will it ever be reasonable to use colonialism, the fetishizing of private property or ‘poor social environment, racial discrimination, police harassment’ as a (partial) defence? There is something counter-intuitive about such seemingly remote pasts that are at odds with our strong causally proximate tendencies.

How do we respond to this? This is where the demystification element comes in. Adjudication as understanding is interesting from a conceptual point of view, for it reveals what is left out (and thus normalised) in adjudication, why, and thus highlights iniquities within conventional forms of judgment. With adjudication as cognition as the conventional form of judgment, law and adjudication therefore operate at the behest of inherent limits, with concreteness and justice always in advance of it. However, I would still argue that judges ought to be committed, by default, to adjudication as understanding. Remember, it does not call for the incorporation of all mitigating facts. It simply requires that they are either incorporated, with (partial) exculpatory effect, or that their exclusion is explained - what I’ve called meaningful acknowledgement.

The workability of Adjudication as Understanding: a few remarks on Constitutionality

A practical question would be to ask how workable Adjudication as Understanding would be within a particular constitutional milieu. As a form of judgment that seeks to accommodate the variegated past, that considers all cases in their singularity, rules as ‘senseless’, that requires radically restating the problem which needs solving, and, at its heart, is a creative

789 Norrie (n 11) 137-140
790 Though the work has not expressly located itself within any particular jurisdiction, the cases in the analysis are taken from UK criminal law
form of pragmatic judgment, what limitations may a jurisdiction’s constitutional apparatus have on admitting such an approach? A short illustration may contrast the constitutional complexions of the US, where the Supreme Court are guardians of a superior codified constitution and the UK, with a Supreme Court that honours the constitutional supremacy of Parliament. The former is conducive, though not necessarily committed to, a pragmatism that some may say is not overtly recognised by the UK courts. To quote Lord Devlin when discussing Professor Cox’s book *English and American Judges as Lawmakers*, ‘the sloth of the British judges is contrasted with the zest of the American’. The danger for staunch formalists of course is to equate pragmatism with creativity and to ignore the ways in which a decision which is purportedly formalist in its countenance, may actually be creative at its root.

The UK courts acknowledge that statutory language can be indeterminate (particularly with discretionary powers) and it is accepted by Parliament that the process of settling these uncertainties are within the remit of the judicial function. Statutory interpretation therefore lies at the heart of the Rule of Law and Parliament’s sovereignty. Though the courts’ role as interpreters equating to law-makers is a debate around which volumes of legal debate revolves, the UK still preserves the doctrine of the separation of powers as a fundamental axiom of British constitutionalism. The most emphatic pronouncement of this of course is that of Lord Diplock in the case of *Duport Steel v. Sirs* which can be summed up as saying that the ‘Parliament makes laws, the judiciary interpret them’ and any changes in the law are reserved strictly for the supreme legislature. In an effort to sustain this constitutional axiom, courts will interpret the statutes either literally, according to the golden rule, or in an effort to remove some mischief or defect in a previous legal rule. Despite the range of interpretive operations, ‘all three traditional strategies draw a clear distinction between the legislative and juridical rule, and emphasise the subordinacy of the latter to the former’. Alternative statutory techniques such as Lord Denning’s importation of the continental purposive

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791 For the purposes of the example, this makes blanket presumptions as to the rampant formalism in UK courts for the purposes of making the point
793 (Clarendon Press, 1969)
794 Devlin (n 47) 1
795 Fredrick Schauer, when discussing the infamous *Lochner v. New York* U.S. 45, said that the exercise of formalism in the case was to ‘disguise a choice in the language of definitional inexorability’ which ‘obscures that choice and thus obstructs that choice’. See also Schauer (n 18) 511-517
796 Of course the range of indeterminacy varies from (and within the ranks of) the formalists to critical legal scholars.
798 [1982] 1 WLR 142 [157]
799 Though the literal rule has been critiqued on many occasions, it was famously problematized in *R v. Burstow*[1998] AC 147 in which the judges debated as to whether psychiatric harm, not recognised at the time the act was passed, constituted ‘bodily harm’ under s. 20 and s.47 of the Offenses Against the Persons Act 1861. Lord Steyn said that statutes were ‘always speaking’ and that medical understandings from the 1980s ought to be adopted in the ‘literal meaning’ of bodily harm rather than those from 1861
approach have been met with fierce resistance for its alleged legislative role; indeed, Lord Simmonds, a noted formalist, described it as ‘a naked usurpation of the legislative function under the thin guise of interpretation…if a gap is closed, the remedy lies in amending the Act’. Such a judicial quarrel ironically raises a definitional conflict over the very meaning of interpretation and legislation. Of course stare decisis seeks to reinforce the separation of powers and promote the principle of legal certainty. The theme that connects all of these institutional features of the UK legal system is that of an ideal of strict separation between the branches. This can also be supported with compelling majoritarian and democratic legitimacy arguments which are embedded within the constitutional culture.

The apparent problems with adjudication as understanding’s reception therefore is to potentially undermine these very limitations, as it would afford judges the kinds of power which are perhaps more overtly expressed and acknowledged in the US or jurisdictions with a constitutionally supreme apex court. Adjudication as understanding for example is invested into the idea of each case brought before it as singularly different from any other, a point seemingly at odds with the partial analogic underpinnings of the doctrine of precedent. The inherent creativity that stems from this appears to confront the formalist traditions of some UK commentators of the judiciary as adjudication as understanding would warrant a radical form of pragmatism.

Are British judges however, in fact pragmatist? Richard Posner, when discussing the prevalence of pragmatism beyond the US says that:

‘The case for such adjudication is weaker in a parliamentary democracy than in a U.S.-style checks-and-balances federalist democracy…if the courts identify a gap in existing law, they can be reasonably confident that it will be quickly filled by Parliament…thus English judges can afford to be stodgier, more rule-bound, less pragmatic than our judges’.  

This is perhaps a caricature of the UK’s courts, as its common law system is not only conducive to pragmatism but lawyers ‘positively glory in this preference’. As Patrick Atiyah

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801 Magor and St Mellons RDC v. Newport Corpn [1949] 2KB 481
802 Magor and St Mellons RDC v. Newport Corpn [1951] 2 All ER 839
803 The problem with a variety of statutory interpretive approaches was demonstrated in Liversidge v. Anderson [1942] AC 206, HL
804 Posner (n 443) 18-19
805 Atiyah (n 208) 3
states in the *Hamlyn Lectures*, English lawyers defer much more to experience than logic, remedies to rights, precedent over principle and adorn its practitioners and judges above its professors of law.\footnote{ibid} Lord Bingham suggested that the formalism attributed to British judges has all been but abandoned out of theoretical and practical necessity.\footnote{Bingham (n 26) 29} The question of whether pragmatism equates to judicial creativity, which is perhaps what adjudication as understanding may demand, is another matter altogether.\footnote{Indeed, Lord Devlin tries to establish the difference between judicial creativity (or dynamism) as judicial operations ahead of the consensus; and judicial activism, which he defended as operating within the consensus (or Zeitgeist) and thus was immune from attack on democratic grounds. Lord Devlin, 'Judges and Lawmakers' (1976) 39, 1 Modern Law Review, 8-9} Though this particular obstacle will not be developed any further, it is important to bear in mind as to the workability of adjudication as understanding within the UK jurisdiction. Indeed, the UK courts have from time to time demonstrated overt rebellion, giving credence to rule of law rather than will of Parliament as demonstrated by the 'ouster clause' cases that sought to eliminate the common law power of review.\footnote{Lord Denning in *R v. Medical Appeal Tribunal, ex parte Gilmore* [1957] 1 QB 574, CA interpreted a provision of a statute that provided all decisions of a special medical tribunal dealing with appeals for national insurances claims, as not eliminating the common law review; and indeed the more openly rebellious in *Anisminic Ltd v. Foreign Compensation Commission* [1969] 2 AC 147, HL where the courts reviewed decisions of a commission administering compensation to companies despite the Foreign Compensations Act 1950 stating that determinations of a commission 'shall not be called into question in any court of law'. Here the rule of Law prevails over the will of Parliament and appears to suggest some judicial creativity in reading legal rules.} Perhaps adjudication as understanding would demand however, a greater constitutional departure.

Also worth briefly mentioning is the constitutional limitations that derive from non-justiciable prerogative powers. Constitutional limitations may creatively be understood as obstacles to the incorporation of the variegated past and the subsequent construction of a radically situated subject. What if a law or convention prohibited the justiciability of facts which were of a sedimanted nature that may situate the natural persons in adjudication? If, for example, a group of protestors attacked military basis in an effort to prevent a war, and such preparations for war would provide the conditions of a natural persons’ conduct so as to comprise the sedimanted past in adjudication’s retrospective narrative, would that be permitted within the UK courts? Something not too dissimilar could be said to have happened in the case of *R v. Jones (Margaret)*\footnote{[2006]UKHL 16} where a group of protestors who conspired to commit criminal damage and aggravated trespass sought to rely on the defence of crime prevention. The question was whether the ‘crime of aggression’ constituted being a crime within the meaning of the s. 3 Criminal Law Act 1967\footnote{Section 3- Use of force in making arrest, etc.} or offence for the purposes of s.68(2) Criminal Justice and Public

\footnote{\(A\) person may use such force as is reasonable in the circumstances in the prevention of crime, or in effecting or assisting in the lawful arrest of offenders or suspected offenders or of persons unlawfully at large.

\(2\) Subsection (1) above shall replace the rules of the common law on the question when force used for a purpose mentioned in the subsection is justified by that purpose.}
The question was *not* whether a crime of aggression had been committed by the British government, but whether it was part of UK law. Without developing the extensive arguments put forward by Lord Bingham and Lord Hoffman, they ruled that the crime of aggression was neither a crime nor offence and upheld the appeals. A key point of their judgment was that though the crime of aggression may be considered a part of Customary International Law (CIL), such CIL cannot presumed to be automatically incorporated into municipal law (maintaining the UK’s dualist tradition). In addition, because of its absence in domestic law, the courts were not willing to create a new offence,\(^\text{813}\) instead reaffirming Parliament’s exclusive legislative competence. Most crucially however, the courts were also reluctant to introduce a crime that had States as its main offenders, which would force them to review the exercise of non-justiciable prerogative powers, such as the conduct of foreign affairs and the deployment of armed services.\(^\text{814}\) This constitutional limitation, to not consider the crime of aggression as part of domestic law, is arguably a limitation on situating the natural persons.

The thesis can thus end in one of two ways: articulating a process of adjudication with a workable conception of time in order to produce solutions that are viable and situated within a certain constitutional tradition, or at least with these arrangements in mind; or a ‘shock doctrine’ approach that razes to the ground the constitutional restraints in an effort to produce a particular theoretical insight for the purposes of academic merit. Interestingly, the former approach may usefully highlight how specific constitutional restraints prevent such a radical conception of time in adjudication and thus its ability to situate the natural persons (as in *R v. Jones (Margaret)*). The first approach, which considers the constitutional arrangements that may stifle a radically contextualist adjudication as understanding, is particularly interesting for the fact that it highlights a limitation on the kind of temporality that can be inhered in adjudication. This *institutional limitation* can be contrasted with the *conceptual limitation* which

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\(^{812}\) Section 68 - Offence of aggravated trespass.

(1) A person commits the offence of aggravated trespass if he trespasses on land \([F1\text{in the open air}]\) and, in relation to any lawful activity which persons are engaging in or are about to engage in on that or adjoining land \([F2\text{in the open air}]\), does there anything which is intended by him to have the effect—

(a) of intimidating those persons or any of them so as to deter them or any of them from engaging in that activity,

(b) of obstructing that activity, or

(c) of disrupting that activity.

\([F3(1A)]\) The reference in subsection (1) above to trespassing includes, in Scotland, the exercise of access rights (within the meaning of the Land Reform (Scotland) Act 2003 (asp 2)) up to the point when they cease to be exercisable by virtue of the commission of the offence under that subsection.

(2) Activity on any occasion on the part of a person or persons on land is “lawful” for the purposes of this section if he or they may engage in the activity on the land on that occasion without committing an offence or trespassing on the land.


\(^{814}\) *Chandler v. DPP* [1964] AC 763, 791, 796; *Council of Civil Service Unions v. Minister for the Civil Service* [1985] AC 374, 398
recognises that adjudication may necessarily have to create certain points of beginning and end in its construction of the natural persons to avoid a descent into nihilism which dissolves any concept of responsibility.

The Relation to Concrete Judgment and its Transformative Potential

To recall to William Lucy's paper *Abstraction and Equality* once again, concrete judgment may be described as ‘tempered not just with mercy but also by knowledge: not only of the conduct in question and its context, but knowledge of our character…and in all our particularity…we are not strangers but intimates, with a history’. What adjudication as understanding attempts to do is to move toward providing that context and knowledge of the character with the introduction of its variegated past, predicated upon Gadamerian Hermeneutics and Bergsonian time. Temporality enables concreteness but it does so by recognising its limits of law.

Socially constructed contexts necessarily precede any given individual (the *being-in-the-world*) and one is unavoidably situated in already existing social practices and conditions that form the grounds and horizons of our world. Adjudication therefore ought to explore those grounds and horizons especially as they may change the normative assessment of legal responsibility. Adjudication as Understanding is a form of concrete judgment because it asks these very questions. By engaging the variegated past that is immediate, exists in its entirety, and in which the natural persons is embedded, the judge's job becomes not just one of weaving a tapestry of causal relations, but to enrich that very tapestry with conditions. This is where the transformative potential lies. It begins with the exploration of larger cultural constructs in which natural persons are situated and looks at how those constructions are normalised. The transformative attitude of adjudication as understanding is the dialogic/circuitry process of invoking different elements of the variegated past to enrich the legal event. Rather than ignoring conditions by excluding them from the retrospective narrative, adjudication as understanding includes and challenges them. Do the horizons of young black men explain certain conduct toward the police as Lord Scarman alluded to? Indeed, what can be said about the very process of disassociating these two pasts in the manner which spatial temporality allows?

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815 Lucy (n 38) 22
816 Winter (n 281) 1452
By disrupting the abstract, chronological time of adjudication as cognition's dominant spatial temporality, adjudication as understanding attempts to attain ‘synchronicity’. If event and legal subject construction is concomitant on notions of temporality, adjudication ought to capture (if it is geared toward concreteness rather than analytical convenience) as far as is possible, the temporality over whom it adjudicates. Thus concrete or sympathetic judgment is achieved through ‘matching times’. Therefore beyond its meek objectives of capturing reality and the self, adjudication as understanding describes a forceful effort to destabilize presumed foundations, to both articulate a reality of becoming (where being is mere appearance) and replace notions of abstract subjectivity with concreteness.

Given that adjudication is effectively the selection from a multiplicity of different types of pasts, the claim is that time attempts to bridge the gap between modernity’s crisis of representation and post-modernity’s spectre of nihilism; or false objectivity and radical indeterminism. If time is not simply a chronology that is useful for mere legal analysis, but strives toward capturing reality as close as is possible, the realities that it constructs cannot simply be prefixed by causal relations where X causes Y and thus Y is temporally antecedent to X. It must also encapsulate the conditions of social reality that are qualitatively different from the past of spatiality. Indeed it is with a discussion of the conditions of reality in adjudication where the transformative potential lies. An unsympathetic, abstract approach to Saibene would simply have constructed a causal chronology. With no interest in the knowledge of the defendants, there can be no introspection into the horizons that situated and constituted them. With no conditions for understanding, in an effort to enrich the retrospective narrative, there is no context and just the mere presumption of the natural persons as de-situated, contained, willed and autonomous. The variegated past, spatial, enduring and sedimented, attempts to capture the situatedness of the natural persons as much as is possible. Again, the claim here is not that upon opening up the horizons of natural persons in legal analysis, one should always mitigate responsibility, but to see what is missed (demystify) and force judges to confront these iniquitous conditions that have been normalised (reconstruction). If there are limitations on this, constitutional or otherwise, for the critic, this makes equally a significant contribution to our understanding of adjudication. For there to be a concept of responsibility, requires ignoring certain conditions and shutting down discussion about certain types of pastness.

How may we describe the consciousness of adjudication as understanding? To go back to Bergson’s description of the different types of consciousness; he distinguishes between the

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817 Winter (n 281) 1449
immediate and the reflective which situate durée and spatial time respectively. Because of various limitations (that durée is resistant to any form of representation), one could not ‘go back’ to the immediate consciousness but had to move forward to understanding  in an effort to capture central elements of durational time. We may equate understanding with slowness as it naturally ‘takes time’ to introspect into these variegated pasts and for the dialogic-circuitry movement (between the legal rule and the variegated past) of adjudication in this form to operate. We may call this the attentive consciousness that acknowledges the multiplicity of pastness, and takes time to make judgment:

<table>
<thead>
<tr>
<th>Intuitionism (IC)</th>
<th>Cognition (RC)</th>
<th>Understanding</th>
</tr>
</thead>
<tbody>
<tr>
<td>Immediate Consciousness</td>
<td>Reflective Consciousness</td>
<td>Attentive Consciousness</td>
</tr>
</tbody>
</table>

The slowness of understanding is characterised well by Karin Van Marle:

‘With a material recollection goes a greater openness towards the particular and that this is necessarily associated with slowness - it takes more time to reflect on and be attentive to material circumstances than to merely follow or apply a rule, or consider and issues in a linear chronological, abstract and mostly predictable manner’.  

“An attitude of slowness and attentiveness when approaching life and when interpreting and negotiating the past, present and future is open to the various traces that occur and reoccur…in following an approach of slowness to law and legal interpretation, an openness for traces and for other ways of remembering, imagining and justifying could come to the fore”.  

With adjudication as understanding as default and a predilection toward concreteness instead of a predisposition toward analytical convenience, one may be able to re-imagine a particular future with a reading of these ‘radical’ variegated pasts. With this contribution, we may

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818 See Chapter 5, section 5.1
819 Van Marle (n 57) 247
820 ibid 255
understand the differences and problems between contrasting theories of adjudication through the novel lens of temporality, and open up avenues to create new forms of judgment.

The 'Temporal Trap' of Adjudication as Cognition

Now, moving onto some future developments of the thesis. Adjudication as cognition is the principal form of decision making (which is likened to abstract judgment) and is characterised by dominant-spatial temporality. The drawbacks by now are well rehearsed (lends to arbitrariness and, linked to that, indeterminacy which may further be considered as an expression of power, a general inability to represent reality in any of its complexity, including the natural persons in their situatedness). Adjudication as cognition can be seen to have one essential role which is to shut down any dispute over the inclusion of certain types of pastness.

Simply, it ‘stabilizes a dynamic and ephemeral reality’ by selecting certain pasts (themselves difficult to determine) and saves judges from confronting the challenges of determining ‘deeper pasts’ or conditions. Pasts which are causally proximate are themselves contentious, so the discussion on incorporating the variegated past would add innumerable difficulties to what is and what is not included in the retrospective narrative.

This essential role also ‘solves the problem’ already mentioned, which adjudication as understanding would potentially produce, of mitigating, aggravating or even altogether dissolving responsibility (potentially for heinous crimes or civil infringements) purely because of some obscure constitutive past which may have potentially exculpatory force. To illustrate this point, recall the earlier discussion pertaining to the changes of the provocation defence. There could be a situation which may mean exonerating a father who had killed his daughter who was set to marry a person of colour because of some vague past in which he had internalised racist sentiments. From this, two important and interrelated points can be made. Firstly, once adjudication is opened up toward other types of pastness (conditions) through an alternative temporality, it will necessarily have to select amongst these. Thus adjudication as cognition would appear to collapse into adjudication as cognition, though selection in adjudication as cognition is between narrow or broad time frames and not different conditions. Secondly, to determine which conditions ought to be selected would, admittedly, require a normative criterion independent of Bergsonian-Gadamerian temporality. Part of the process of selection amongst the conditions can in part be answered by the posing of the Problem.

\(^{821}\) Posner (n 202) 573
\(^{822}\) See Chapter 6, section 6.12

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The Problem is the genesis of how the case ought to be decided and thus what pasts ought to be included. The question then becomes however, what is the normative criteria of how the Problem is posed. This presents a site for future development of the proposals made in the thesis. At this point, ‘meaningful acknowledgement’ in Adjudication as Understanding, which provides the judge with two choices to either include the variegated pasts into the retrospective narrative or to provide reasons for this non-incorporation, is a partial solution.

Whilst there is certainly certainty and analytical rigour in adjudication as cognition, it may also be seen as either instigating or perpetuating great social iniquity. As that which selects pasts, with no invested interest in ‘capturing reality’ (through the incorporation of conditions), adjudication as cognition could be considered ‘law as snapshot’. Conditions, as contingent upon a non-spatial temporality, become normalised through this snapshot and adjudication as cognition’s non-selection or framing out of them; something which Norrie questions. Do we agree with adjudication acquiescing in the conditions of documented police brutality and institutional racism constituting realities of (predominately) young, black men from Tottenham? Is it right that we normalise, by ignoring, the systemic harassment of wayward ‘religious’ terrorists in adjudication’s retrospective narrative? Indeed, as we saw earlier, it is through a creative reading of the failed provocation defence in Ahluwalia, which ignores the sustained domestic violence against her, that this problem emerges.

As a system that invites our normative commitments, it also seems reasonable to explore how adjudication constructs our pasts and binds our futures. Thus I want to describe a problem with adjudication as cognition’s abrupt ignorance of conditions as forming part of what I would refer to as the temporal trap. Simply, this means that, first, futures (conduct) may be understood as partially restricted. Whether laws facilitate our autonomy or if they operate as a form of social control is beyond the scope of this project, but it contests the varying degrees of control and/or freedom of legal norms. Indeed, within the context of temporality, Elizabeth Freeman has coined the term ‘chrononormativity’ as ‘the use of time to organise individual human bodies toward maximum productivity’. Taking from this debate, if we understand futures as partially restricted, then the second element of the temporal trap of adjudication as cognition describes how our pasts are spatialised, thus introducing the various limitations and demerits that the spatial past bring into judgment (indeterminacy, analytical convenience over concreteness, a desituated legal subject that ignores conditions). Adjudication as cognition (as the conventional form of judgment) thus produces a new problem of the temporal trap where futures are partially restrained and pasts, because they are spatialized, can be selected

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823 See Chapter 5, section 5.3
through the relatively unrestrained process of judgment. Thus we may understand the crisis of representation, modernity's orientation toward 'analysis and clarity' through temporality.

**Modernity, Law and marginalising Temporality**

The marginalisation of time has been discussed earlier in the review of the literature, with its panacea coming in the form of the 'temporal turn in law'. However, the relegation of temporality in law may also be attributed to the general banishment of time in the intellectual pursuits of Enlightenment Modernity. If we connect the advent of modern reason with judicial reason, then the failures to consider temporality singularly will naturally bleed into our understandings of law and adjudication. Lindsay Farmer, quoting Barbara Adam, cites that it is 'as a consequence of modernity that time and space are seen as objective and external to human experience, and as such have come to be taken for granted'. Such an intellectual tradition therefore, gives rise to a culture in which considerations of temporality, either as a metaphorical concept or an analytical framework, are passive or presumed. I think that this passivity can to some degree explain the production of the paradigmatic abstract, deracinated, 'rational' subject of 'Western-Modern' legal systems; ahistoric, de-situated, a manifestation of modernity. According to Henri Bergson, the presumption of, what may be referred to as, the temporality of modernity is 'spatial'. This was echoed by Manuel Castells whom is worth repeating; 'in the modern world in particular, time is conceived of in spatial terms: it is continuous and measurable, divided into spaces that can be filled, it can be vacant or unoccupied, and it is taken to imply limits or deadlines'. 'Modern Time' therefore is conducive to the production of the abstract subject of law. The culture in Modernity of presumed spatial time, in which difference may be extinguished or transcended affirms such a form of subjectivity, attached to which we can ascribe rights, duties and responsibilities. Modernity has thus side-lined temporality and its problematisation to our peril. This thesis therefore lays the groundwork for revising (or awakening the general silence of) law's view of temporality and how it may allow us to reshape questions of facticity and subjectivity in adjudication.

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825 See also Chapter 1
827 Adam (n 4) 104-126
828 Farmer (n 73) 341
829 Thornhill (n 826) 24
830 Castells (n 552) 441
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