A New Image of Law: Deleuze and Jurisprudence[1]

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> To act for liberty, to become revolutionary, yes, is to operate in jurisprudence.
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> — Gilles Deleuze, *L'Abécédaire*

1. Jurisprudence: Toward a New Image of Law

Gilles Deleuze has left us a series of tantalizing remarks on jurisprudence. Consistently in his writings, Deleuze abjures law *in toto* as abstract, moralizing, and limiting. By contrast, in an interview, Deleuze remarks that "rights aren't created by codes and pronouncements but by jurisprudence. Jurisprudence is the philosophy of law, and deals with singularities, it advances by working out from singularities."[2] In another discussion, this time with Antonio Negri, Deleuze expresses a critical distinction between law and jurisprudence: "what interests me isn't the law [*la loi*] or laws [*les lois*] (the former being an empty notion, the latter uncritical notions), nor even law or rights, but jurisprudence. It's jurisprudence ultimately, that creates law, and we mustn't go on leaving this to judges."[3] Jurisprudence is vaunted as capable of unblocking the movements that law arrests; it is recommended as an institution able to honor the singular situation in contradistinction to the limitations of the "rights of man" and other empty eternal values.[4] Jurisprudence operates as what

1. I thank Melanie White for her extensive help with this paper and its concepts, and Paola Marrati for her seminars on Deleuze and her careful reading of this paper.

2. Gilles Deleuze, *Negotiations, 1972-1990*, tr. by Martin Joughin (New York: Columbia University Press, 1995), p. 153.

3. *Ibid.*, p. 169, my emphasis. In addition to these two comments on jurisprudence, the 'G' entry of Deleuze's *L'Abécédaire* is noteworthy for its sustained and concrete consideration of law, justice, and institutional jurisprudence. Gilles Deleuze, *L'Abécédaire de Gilles Deleuze, avec Claire Parnet,* (Paris:DVD Editions Montparnasse, 2004).

4. Deleuze, *Negotiations*, *op. cit.*, p. 122.

we could call an institutionalized line-of-flight, a sanctioned yet deterritorializing power that "constantly threatens to bring what's been established back into question. . . . "[5] In brief, jurisprudence is a positive escape from the strictures of law.

Inspired by Deleuze's comments on the nature of jurisprudence, I evaluate the possibilities of a Deleuzian philosophy of law.[6] Despite his relentless critique of law, the purpose of this paper is to argue that Deleuze provides us with concepts capable of creating a positive philosophy of juridical law. This modifies both how we understand Deleuze's relationship to law, but more importantly how we come to understand law and jurisprudence. I proceed by three broad steps: 1. I begin by detailing Deleuze's critique of law, dividing it into four major themes: the critique of false repetition that converts singularities into particularities by rule of general law; the critique of distributive, equivocal difference distributed by judgments of good and common sense; the critique of moral law as state-centered; and the critique of human rights as abstract. While these critiques may appear distinct, together they constitute a concerted rejection of what I call the dogmatic image of law. Deleuze will then be seen to propose concepts expressly designed to replace law and institute true difference, repetition, and political action: true repetition will be seen as extra-legality *par excellence*; Deleuze will insist to have done with judgment; political philosophy will begin only with the ironic or humorous

5. *Ibid.*, p. 153.

6. As of yet, there has been no consistent and prolonged study of Deleuze in terms of a philosophy of law. Patton ably begins such a project in the last chapter in his *Deleuze and the Political* but more as a gesture and suggested direction than as a sustained undertaking. See Paul Patton, *Deleuze and the Political* (New York: Routledge, 2000). While insightful studies exist on the philosophy of law vis-à-vis deconstruction (see Drucilla Cornell, *The Philosophy of the Limit* (New York: Routledge, 1992)); Hegelian dialectics (see Jeanne L. Schroeder, *The Vestal and the Fasces* (Berkeley: University of California Press, 1998)); formal pragmatics (see Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, tr. by William Rehg (Cambridge: MIT Press, 1998)); and psychoanalysis (see Peter Fitzpatrick, *Modernism and the Grounds of Law* (Cambridge: Cambridge University Press, 2001)); Peter Goodrich, *Oedipus Lex: Psychoanalysis, History, Law* (Berkeley, CA: University of California Press, 1995); and Pierre Legendre, *Le désir politique de Dieu: étude sur les montages de l'état et du droit* (Paris: Fayard, 1988), no comparable study has been undertaken for Deleuzian philosophy (except for Gillian Rose's unsympathetic chapter in her *Dialectic of Nihilism: Post-Structuralism and Law* (Oxford: Basil Blackwell, 1984)). Such absence is surprising given that the themes Deleuze advanced over his entire oeuvre – complex repetition, production of sense, and creativity – are ideally suited to a renewed understanding of the philosophy of law, judgment, and jurisprudence.

subversion of law; and human rights are to be replaced with user-groups and specific interventions of jurisprudence. This allows us to *preliminarily* characterize Deleuze's philosophical and political enterprise as one of "*lex* versus *jus*."[7] Deleuze's comments on jurisprudence can thus be understood as a thoroughgoing critique and replacement of scientific, natural, moral, and juridical law.

2. Upon outlining the critique of law, I detail how the mechanics of Deleuzian jurisprudence function. As Deleuze's commentators have noted, rather than strict in opposition, law and jurisprudence must operate together, in that laws create the axioms that jurisprudence engages case by case.[8] The case, then, comes to signal the site of the engagement between law and jurisprudence. In what follows, I rely heavily on Henri Bergson – and Deleuze's commentaries on Bergson, with his injunction to renew and extend Bergsonian concepts to new sciences[9] — in order to construe the legal case as a material image and the legal archive of previous cases and decisions as virtually existent. From this perspective, jurisprudence is characterized as a positive actualization; it is the resonance between the singularity of the case and the virtuality of the legal archive. By analyzing jurisprudence we arrive at a new image of law and not simply the discreditation of all types of law.

3. By outlining the process of jurisprudence, I arrive at several specifications of the new image of law provoked but not executed by Deleuze. First, a notion of juridical law properly conceived is not axiomatic or abstract. Rather, the law lives only in the inventive actualizations of jurisprudence (*the life of law*). Second, a law makes sense and achieves a determination only through problems. A case is nothing but a problem of law and of its sense. Neither the case nor the law can determine itself without the constellation of the other (*the problem of law*). Third, if law exists only in its actualizations, a pure non-actual virtuality of law must be presupposed in the form of an ontologically existent, yet undetermined

7. Michael Hardt, *Gilles Deleuze, an Apprenticeship in Philosophy* (Minneapolis: University of Minnesota Press, 1993), p. 23.

8. Daniel W. Smith, "Deleuze and the Liberal Tradition: Normativity, Freedom, and Judgement," in *Economy and Society* 32, no. 2 (2003): 299-324, p. 313. Smith's article is a review of Patton's *Deleuze and the Political*, a work whose significant contribution lies in a preliminary outline of Deleuzian jurisprudence, specifically around questions of aboriginal title in Australia and the creation of a jurisprudential "smooth space" that overlaps and deterritorializes the traditions of common and indigenous legal codes onto one another. See Patton, *Deleuze and the Political*, *op. cit.*, pp. 122-131.

9. See Deleuze's "Afterword" to the English edition of *Bergsonism*, tr. by Hugh Tomlinson and Barbara Habberjam (New York: Zone Books, 1991), p. 115.

legal archive. The genesis of a judgment takes place not between actuals – present cases and known laws – but between the virtual and its actualization (*the past of the law*). Fourth, law so conceived is not in opposition to, but rather undergirds, jurisprudence (*jurisprudential presupposition of law*). Fifth, law is inherently and technically creative. Law manifests only in a particular reprise of the singularity of the case and the specification of the juridical archive (*the creativity of law*). Through these five points Deleuze formulates a coherent and positive concept of juridical law.

II. Critique of the Dogmatic Image of Law

I term the "dogmatic image of law" a collection of four interrelated characteristics – false repetition, distributive difference, state-centered, and abstract – that together form a figure that prevents the appearance of authentic difference and repetition. It is, therefore, not inconsiderable that *Difference and Repetition* opens with, and is organized by, a critique of law, and that this critique is systematically extended in *A Thousand Plateaus*. In what follows I present four critiques of the dogmatic image of law and its replacement by *extra-legal* terms that put true difference and true repetition to rights.

1. Singular → Particular (critique of false repetition).

A law is a set of constant relations, its most basic operation consists in determining a resemblance of the subjects it rules vis-à-vis terms it designates.[10] The formulation of a law requires the extraction of constants, or what amounts to the same thing, a determination of variables belonging to another law. Fundamental for Deleuze is that law compels singularities to change: they pass from being singularities to particulars. Instead of possessing their own singular differences in combination with other singularities, law transforms the singular into a particular exemplification of a general law in relation to other particulars that also exemplify laws. This conversion to particularity precludes true differential repetition of singularities: "As an empty form of difference, an invariable form of variation, a law compels its subjects to illustrate it only at the cost of their own change."[11]

This concept of law prevents consideration of the singular and its difference. It is dogmatic for two reasons. First, singularities are made to resemble one another as particulars subsumed by an identical law. Second,

10. Gilles Deleuze, *Difference and Repetition*, tr. by Paul Patton (New York: Columbia University Press, 1994), p. 2.

11. *Ibid.*, p. 2.

laws themselves stand in fixed relation to other laws, rendering change as calculable repetition. The singularity is arraigned by a law which changes it in kind; it discovers that its intimate legal subjectivity is in fact an expression of a law and its powerlessness is simply its objective legal form: "a subject of law experiences its own powerlessness to repeat and discovers that this powerlessness is already contained in the object, reflected in the permanent object wherein it sees itself condemned."[12] The legal form imprisons the singularity in constituting it as a regular legal particular; in so doing, law separates the singular from what it can do. Creative and strictly unforeseeable powers are substituted for the legal form of generality/particularity.

For these reasons, authentic repetition denounces the relationship of the law to its particular in favor of the differential repetition of the singular. *Repetition is extra-legality itself*, everywhere it puts law into question: "[Repetition] is against the law: against the similar form and the equivalent content of law. If repetition can be found, even in nature, it is in the name of a power which affirms itself against the law, which works underneath laws, perhaps superior to laws."[13] Moreover, as Deleuze will later argue in *Difference and Repetition*, genetic positive repetition of singularities gives rise to the legal order, an order which then obfuscates the true genesis of singularities by representing these as legal particularities. My point is not to comprehensively sketch authentic repetition for Deleuze, but simply note that it is conveyed in adamantly anti-legal formulations.

2. Distributive Difference (critique of judgment)

The critique of distributive difference in *Difference and Repetition* is a critique of Aristotelian specific and generic difference. The most perfect type of difference for Aristotle is "specific" difference, found between species sharing a genus. Within the genus, difference is univocal: the many different species are said in one and the same sense as their genus. Genera are able to bear differences while remaining substantially the same, "[they] remain the same in themselves while becoming other in the differences which divide them."[14] This is not the case with generic difference. Here, differences between genera are equivocal; their differences are too large to enter into relations of specific contrariety and cannot be gathered into a covering identity.[15]

12. *Ibid.*, p. 2.
13. *Ibid.*, p. 2, emphasis added.
14. *Ibid.*, p. 31.
15. *Ibid.*, p. 34.

For Deleuze, this schema of specific/generic is a timid conception that forfeits the true nature of difference. At once, true universality is lost in equivocity and true singularity vanishes in favor of resemblances between specific differences.[16] This concept of difference has significant consequences for *judgment.* Generic difference is equivocal and as such is not collective but distributive. A list of categories (broadest divisions) comes to represent being and establishes a "sedentary distribution, which divides or shares out that which is distributed in order to give 'each' their fixed share."[17] Here, judgment divides and proportions the concept into the terms of which it is affirmed; it distributes Being into categorical differences and proceeds to subsume specific differences under these categories. This activity preserves identity within judgment, it "allows the identity of the concept to subsist."[18] Categorical judgment allocates to each being a space in Being, it divides up a territory into particular domains ordered by divisions of generic and specific differences.

Judgment thus prevents any apparition of internal difference, or differences between things of the same kind (either between existents or within the existent itself). Judgment is a twofold operation based upon commonsense (the equivocal partition of the various categories and their coordination) and good sense (accurate empirical distribution into categories); these two values "constitute the measure [*la juste mesure*] or 'justice' as a value of judgment."[19] Underlying judgment is the presupposition of existing categories that can adequately portion difference; it is precisely this presupposition that assures that judgment "can neither apprehend what is new in an existent being, nor even sense the creation of a mode of existence."[20] If judgment apprehends a discrete "new" being, the schema will be redrawn with finer distinctions, but the form of judgment and distributive difference remains obviously intact. Echoing Artaud, Deleuze therefore recommends "to have done with judgment," to abandon distributive difference in favor of a nomadic nomos.[21] Such a smooth space occurs when differences distribute themselves (and not according to an ordering plan) into an open space that overturns the totality of judgment. Here, beings go to the limit and threshold of their

16. *Ibid.*, p. 38.
17. *Ibid.*, p. 303.
18. *Ibid.*, p. 33.
19. *Ibid.*, p. 33.
20. Gilles Deleuze, *Essays Critical and Clinical,* tr. by Daniel W. Smith and Michael A. Greco (Minneapolis: University of Minnesota, 1997), p. 134.
21. Deleuze, *Difference and Repetition, op. cit.*, p. 36.

power and in so doing transform and differentiate themselves. Laws of good sense and common sense are overturned in the rejection of judgment occasioned by the nomadic *nomos*.

3. Moral Law (critique of state form)

In *Difference and Repetition*, moral law functions analogously to the laws of nature, it converts singularities into particulars. Moral law is enacted in a 'test' of repetition, a test of the types of habits and behaviors that can in principle be repeated without contradiction in contrast to the demonic repetition and boredom of aesthetic existence.[22] With moral law we remain in the sphere of generality, wherein singular actions and desires are converted – tested – into repeatable particularities of a general moral law.[23] Such an operation is a recovery of commonsense (distribution of different actions according to a set moral schema) on the plane of practical reason.

In *A Thousand Plateaus*, the analysis of this moral test is deepened into an anticipation of state law and form. Moral law is a strange subreption wherein submission to law gains self-mastery and possession: "The more you obey as subject, the more you will be master, for you will only be obeying pure reason, in other words, yourself."[24] This is but a step away from a republic of self-legislating subjects, bound together by reason and contract, where ". . .realized reason is identified with the rightful state [*l'Etat de droit*], just as the State is the becoming of reason."[25] A putative State of Nature signifies aesthetic despair, and participation in a self-legislated pact is tantamount to a union of liberty and reason. The state is merely the form of pure and practical reason, a political actualization of the faculties and union of commonsense and good sense.[26]

Not only does moral law sanction and support the general state form of contractual political association (as commonsense), but it also underpins the juridical law of the state (good sense). "Crime," for example, is abused good sense: it is a violence deemed illegal for it consists in taking possession of "something to which one has 'no right.'"[27] Crime is a corruption of the harmony of faculties insofar as one misbehaves (fails the

22. *Ibid.*, p. 4. Delize has the Kierkegaard of Ethics I or II in mind here.
23. *Ibid.*, pp. 4-5.
24. Gilles Deleuze and Félix Guattari, *A Thousand Plateaus, Capitalism and Schizophrenia*, tr. by Brian Massumi (Minneapolis: University of Minnesota Press, 1987), p. 376.
25. *Ibid.*, pp. 375-6, translation modified
26. *Ibid.*, p. 375.
27. *Ibid.*, p. 448.

test of moral repetition, crime is nongeneralizable) and makes claims outside its province. Conversely, moral law (and its doubly articulated good and common sense) establishes lawful violence, capturing while "constituting a right to capture."[28] Rightful capture sanctions the use of violence according to an implemented harmony of the faculties (of state affairs and peace) that constitutes its domain by terming "criminal" that which does not follow its orderings. Such a legal operation forcefully "particularizes" aberrant singularities.

Moral law serves to stifle becomings: its test converts singularities into particularities; it anticipates the contractual state of universal self-legislation; and it establishes domains of right and criminality. If society (and *a forteriori* political society) is defined by its lines of flight, then moral law is pure impediment.[29] That is why moral law is not a term of political discourse for Deleuze. In fact, it is the deterritorialization of (moral) law that makes political philosophy possible. In "Coldness and Cruelty" Deleuze analyzes how law is overturned by processes of irony and humor. For example, Plato's ironic political principle is that law is itself a secondary power dependent upon a principle of the Good; equally, obedience to the law is "best," and best is the mere humorous image of the Good: "this conception, which is seemingly so conventional, nevertheless conceals elements of irony and humor *which made political philosophy possible*, for it allows the free play of thought at the upper and lower limits of the scale of the law."[30] This examination goes on to Sade (who ironized law as secondary to institutional model of anarchy) and to Masoch (who humorized law with masochistic pleasure and disorder produced by minutely adhering to its interdictions). My point is not to relate in detail this complex analysis but again to note that law is disregarded (or rather, deterritorialized) in favor of extra-legal terms; as such, humor and irony subtend the possibility for social and political thought and true apprehension of movements and desires.

4. Human Rights (Critique of Abstraction)

Documents of human rights are abstract in their expression by providing general provisions protecting life, liberty, speech, property, etc. A constitution, or any catalogue of human rights, bundle together floating

28. *Ibid.*, p. 448.
29. *Ibid.*, p. 171.
30. Gilles Deleuze, "Coldness and Cruelty," in *Masochism* (New York: Zone, 1989), p. 81, my emphasis.

propositions void of sense. Adapting Deleuze's argument from *The Logic of Sense,* we can say that propositions are void of sense unless they are referred to a concrete situation – a problem – that generates their sense and provision.[31] It is incorrect to say that rights simply require a denotation in a specific situation that will inform the right if it is true or false (i.e., achieved denotation if the right is honored, or infelicitous denotation if the right is violated). Rights need much more: they require concrete situations not simply for denotation but also to take on sense. Abstract values such as liberty or property demand a concrete situation – what kind of liberty is guaranteed, what effects of speech can limit its use, which sorts of property are to be protected? Formal insistence on rights is empty for the reason that without the particular case and concrete situation, rights tell us nothing and are unable to execute justice.

As Alain Badiou has remarked, human rights fail to concern individuals directly (as concrete multiplicity) but rather refer to a general human subject, such that whatever "evil befalls him is universally identifiable."[32] In this respect, Deleuze concurs with Badiou, claiming that rights are axiomatic and general, they coexist in a space of multiple axioms such as the protection of property, right to war, etc. These axioms exist together in a competitive milieu; one may override the other, and abstractly postulate "human rights say nothing about the immanent modes of existence of people provided with rights."[33] Until they enter into concrete assemblages and determination, rights remain a mere technical element in broader social machines of diverse axioms with varying value: "The principle behind all technology is to demonstrate that a technical element remains abstract, entirely undetermined, as long as one does not relate it to an assemblage [*agencement*] it presupposes."[34] Rights in no sense guarantee that life will be protected; they are part and parcel with other axioms of liberal capitalism, and, as such, some rights (property, for example) may be upheld against other rights (life, for example).

For these reasons Deleuze recommends jurisprudence to address specific user groups that negotiate how to live with a problem. Instead of a

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31. Gilles Deleuze, *The Logic of Sense,* tr. by Mark Lesser (New York: Columbia University Press, 1990), pp. 12-22 and 121-23.

32. Alain Badiou, *Ethics: An Essay on the Understanding of Evil,* tr. by Peter Hallward (London: Verso, 2001), p. 9, and Alain Badiou, *D'un désastre obscur: droit, état, politique* (Paris: Editions de L'Aube, 1991).

33. Gilles Deleuze and Félix Guattari, *What Is Philosophy?* tr. by Hugh Tomlinson and Graham Burchell (New York: Columbia University Press, 1994), p. 107.

34. Deleuze and Guattari, *A Thousand Plateaus, op. cit.,* pp. 397-398.

general and transcendent rights-bearing subject, we have life and the problems of life that proceed only case-by-case, something for jurisprudence to unravel and honor.[35] Jurisprudence addresses the situation to make it livable, it resists coding it with transcendent evaluations of abuse. Justice and Rights do not exist. Only jurisprudence exists and it alone is capable of creating law [*droit*].[36]

We now see Deleuze's four significant critiques of law: law converts singularities into particularities that fatally compromise repetition; distributive judgment imposes an ordering schema of generic and specific differences; moral law models itself on common and good sense, anticipating the advent of the state; and human rights are abstract, unable to clarify or render justice to concrete situations. Equally, Deleuze creates concepts declaredly alien to law and legal order – extra-legal repetition; *a nomadic nomos* to rid thought of judgment; humor and irony to collapse law; and jurisprudence and user groups to replace rights – thus positioning his philosophy as a massive enterprise against law.

III. Two Encounters

Notwithstanding this dogmatic image of law, a new image of law, a non-dogmatic one, can be discerned within Deleuze's corpus. It is his particular reading of Bergson, especially his attention to the relation between the virtual and actual that makes this possible. The implications are profound, for it addresses the conditions of real experience. For example, whereas the dogmatic image of law assumes that human rights are the *condition* able to identify and attend *all possible breaches of right*, a new image of law, by contrast, takes a Bergsonian inspiration and inquires not into the conditions of all possible legal experience, but addresses "the conditions of *real* experience."[37] A new image of law must reach the individual manifestation of law, the genesis of law, its sense and its application. If for Deleuze the first principle of philosophy is that universals "explain nothing and must themselves be explained," a new image of law must share this departure and must, with precision, analyze how law functions, what its conditions of emergence are, and how it may fashion a concept that guards against the legal obfuscations Deleuze relentlessly criticized.[38]

35. Deleuze, *L'Abécédaire*, *op. cit.*,G.
36. *Ibid.*, G.
37. Gilles Deleuze, "Bergson's Conception of Difference," in *Desert Islands, and Other Texts, 1953-1974*, ed. by David Lapoujade, pp. 32-51 (Los Angeles: Semiotext(e), 2004), p. 36.
38. Deleuze and Guattari, *What is Philosophy?*, *op. cit.*, p. 9.

I suggest that the first condition for a new image of law is to base its emergence upon the notion of an *encounter*. If jurisprudence is to proceed case by case and heed singular demands, it must necessarily find its support and inspiration in the specificity of *a* problem or *an* encounter before it. What is said of thought in *Difference and Repetition* holds *mutatis mutandis* for law and jurisprudence: "There is only involuntary thought, aroused but constrained within thought, and all the more absolutely necessary for being born, illegitimately, of fortuitousness in the world. . . . Do not count upon thought to ensure the relative necessity of what it thinks. Rather, count upon the contingency of an encounter with that which forces thought to raise up and educate the absolute necessity of an act of thought or a passion to think."[39]

The profound mistake of the dogmatic image of law – of human rights advocates, of plain statutory applications, for example – is that it reduces law to a set of propositional theses that "treat" the case, designate wrong, and perform expeditious applications of original law to correct the situation.[40] Lost is the sense of the case (problem or encounter) as a properly genetic element *of the law*. The creation of law from the most intimate encounter with a case is not reducible to these propositional theses. A Deleuzian image of law would begin by claiming that law in-itself (the pure texts of statutes, of constitutions, and previous judgments) exists in a torpor and is aroused only by an encounter – a case – whose contingency raises the law to its necessary exercise and effective power.

We might divide encounters into two kinds. The first is termed an "easy case." Such ease poisons the dogmatic image of law. In this encounter, the law (statute, right, or previous decision) is considered sufficiently clear or sufficiently thick and regular to make moot the genetic problem: i.e., the letter of the law is applied and judgment rendered. Following Bergson, we call the designation of an "easy case" an instantiation

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39. Deleuze, *Difference and Repetition, op cit.*, p. 139.

40. For two adherents of this position, see Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Princeton: Princeton University Press, 1997) ("What I look for in the Constitution is precisely what I look for in a statute: the original meaning of the text" (38)), and Michael McConnel, "Textualism and Democratic Legitimacy: Textualism and the Dead Hand of the Past," in *George Washington Law Review* 66 (1998): 1127. Textualism holds that the legal text is the primary source of legal interpretation – over history, doctrine, political values, etc. Originalism holds that a particular moment in history (the originary moment of the law in question) ought to be dispositive in interpretative questions. In "textualism" (Scalia) and "originalism" (McConnel) the law is ready-made, preformed, and preexistent to itself. Its sole action is to pass into reality by adequately treating the case before it. I thank Tom Donahue for his help here.

of legal *habit memory*. In such memory, a "ready-made response [a habit] renders the question [or the problem] unnecessary [*inutile*]."[41] Here, the case is condemned to have applied to it a ready-made solution in the form of a set precedent or a perspicacious reading of a statute. Law steamrolls the case, the latter serves as mere instantiation or application. The law overcodes, "it supplants the real intuition [i.e., the case] of which the office is then merely… to call up the recollection [*le souvenir*], to give it a body, to render it active and thereby actual."[42] In this view, law still requires an encounter but simply to motivate its manifestation, to reassert its rule in the particular case. In the case, law gains a specific unit (a particularity) for its general potential; the law compromises its universality to render a verdict in a particular case but in so doing, instantiates its force and rule. The easy case bears only the shadow of its genetic nature, reduced to a transcendental opportunity for the law to gain its relevance and existence.[43] This merely "habitual" application forfeits the problematic genesis of law from a case in order to instate law over a case; law becomes its own bare or brute repetition. Such a case is truly non-problematic: its ease (habitual resolvability) expresses the emergence, application, and instatement of the dogmatic image of law.

The second type of encounter is the "problematic case," which raises the encounter to its appropriately transcendental function. The easy case additively sharpens and instantiates ready-made, preexistent laws and legal decisions. Such an understanding of the law, cases, and problems misses everything essential to legal judgment and to law itself. To understand how law functions, we must grasp the nature of the problem as it appears in a case/encounter. When Bergson or Deleuze claims that we must not be a slave to problems, this has nothing to do with a careful selection of empirical problems to occupy our attention (like a court of judicial review that chooses the cases it hears); rather, we must understand the genetic nature of the problem and avoid lapsing into a dogmatic image with its false separation of sense and statement, problem and solution, law and case.[44]

Before we proceed, we may identify a certain number of principles

41. Henri Bergson, *Matter and Memory*, tr. by N.M. Paul and W.S. Palmer (New York: Zone Books, 1988), p 45.

42. *Ibid.*, p 66.

43. On the logic of legal reference vis-à-vis specificity and generality, see Paul de Man, *Allegories of Reading, Figural Language in Rousseau, Nietzsche, Rilke, and Proust* (New Haven: Yale University Press, 1979), pp. 267-273; and Georgio Agamben, *Homo Sacer: soverign Power and Bare Life,* tr. by Daniel Heller-Roazen (Stanford: Stanford University Press, 1998), p. 21

that emerge once the problematic status of the case and of the law is respected and analyzed. 1. The case does not encounter a preformed law or discerned precedent that suffices to treat it. 2. The encounter between law and case serves to connect the singular points of the case to the singular points of the law. 3. The connection of the points of the case and of law is what we call jurisprudence, the practice of legal judgment. 4. Judgment is not limited to the announcement of a verdict: it is the construction of a legal plane, one in which the case — its facts, its salient aspects — is determined in relationship to laws, and conversely, where laws are adjudicated, related, and transformed through the distinct points of the case. 5. Legal judgments (and therefore law) are connected to problems without which they would have no meaning. 6. Neglecting or repressing the status of the "problem" leads to illusions of law typical of the first encounter. Moreover, if law is depicted as general and preceding its problems, it is appropriately criticized according to Deleuze's outlined four critiques. 7. By respecting the nature of this process, jurisprudence will be creative. Creativity is not an epithet applied to irregular judgment but is necessary to its everyday operation.

IV. Law and Judgment, sub specie durationis

Together these principles constitute the beginnings of a new image of law. With these in mind, I will construct a legal scene with the purpose of outlining the processes of jurisprudence and the fabrication of a new image of law from key Deleuzian concepts. What follow is, of course, grounded in Deleuze, but it is also centrally indebted to Bergson, especially to the insights and organization of *Matter and Memory*. In *What is Philosophy?* Deleuze and Guattari honor Bergson as the first author since Spinoza to have rigorously, and without compromise to transcendence, constructed a plane of immanence adequate to reality and to thought.[45] Specifically, they point to the first chapter of *Matter and Memory* and its depiction of images and movement.

In this chapter, Bergson establishes a theory of perception and of movement. He imagines a world of pure matter, without perception, a world of *present* images and not *represented* images.[46] For Bergson, perception is subtractive: we apprehend pragmatically and perceive only the

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44. Henri Bergson, *The Creative Mind, An Introduction to Metaphysics*, tr. by Mabelle L. Andison (New York: Citadel Press, 1974), p. 50; Deleuze, *Difference and Repetition*, *op cit.*, p. 158.

45. Deleuze and Guattari, *What is Philosophy?*, *op cit*., p. 49.

46. Bergson, *Matter and Memory*, *op cit*., p. 36.

aspects of the object that interest us.[47] Unrepresented, therefore, an image presents *all its sides at once.* This image is without the narrowing function of perception: it is absolutely present in all of its qualities, aspects, and movements, both to itself and to other images. Each "point" of an image is available and acts upon each "point" of the universe. These fully present images "present each to the others all their sides at once [*toutes leurs face à la fois*]: which means that they act and react mutually by all their elements [*parties élémentaires*], and that none of them perceives or is perceived consciously."[48] Bergson's actively spatial language – sides, points, parts – depicts the pure image of matter. As time/duration is not yet included at this stage of the theory, we can claim that the image is fully and totally actual, it reserves none of itself either in subtractive perception, nor does it gain in virtual duration. This is a field in which everything is given (but not to a subject) in infinite reciprocity.

The legal case can be understood as an image in this strict sense, and preliminarily can be defined as a pure actual image insofar as it underlies and exceeds its representations. This helps us to see that the most basic operation of any judge or lawyer is to select points and qualities of a legal case and coordinate these into an argument or a judgment. Insofar as we exclude temporality and memory from the case (and at this point we do), the perception of a case and the process of presenting an argument is limiting and subtractive. *Only certain crucial points* are advanced and construed into legal argument, but underlying these points is the *case-in-itself*, unperceived, or giving to perception the part that interests the perceiving parties. The case-in-itself (the pure actual case) has an infinity of points and sides that go neglected, facts irrelevant to the interest at hand that exceed its particular legal construction. This case, then, will have infinite sides and points. Its actual present sides are infinite, there for possible selection, and yet the infinity of sides is sustained only insofar as these are unperceived. While a natural object is more readily conceivable as a pure actual image than a legal case (for the latter's very definition *as* legal case reins it into perception and limitation), we hold that as an image the legal case exists more fully, with absolutely more sides, than a represented case. At this point of the investigation, the legal case as actual image is a discrete numerical multiplicity with infinite actual sides that bear no virtuality or perception. *The unperceived case is a fully present actuality*.

Having outlined the pure actuality of spatially present matter, I now

47. *Ibid.*, p. 21.
48. *Ibid.*, pp. 36-37.

sketch the pure virtuality of temporal memory. We shall see that the combination of these two – matter and memory – will provide the ground for a new image of law. For Bergson, the concept of the *pure past* emerges from three paradoxes of time. Deleuze analyzes these paradoxes with precise economy in *Difference and Repetition.* First of all, the past cannot be reconstituted by passing presents, by past presents. For the present to pass – for there to be a continuity of time rather than a series of juxtaposed and infinitely decomposable present instances – the present must be "past 'at the same time' as it is present."[49] This is the first paradox of time: the past as contemporaneous with the present that it was. This leads to a corollary paradox: coexistence. It is not a discrete past that coexists with the present; rather, *all of the past* is contemporaneous with the present (a present which is now also past given the first paradox). Finally, the third paradox is that of preexistence. Given that the past is "contemporaneous with the 'present it was,'" we treat a past which was never present, it was not formed 'after,' it is already there.[50] These three paradoxes lead to profound conclusions on the nature of time: There is therefore a "past in general" that is not the particular past of a particular present but that is like an ontological element, a past that is eternal and for all time, the condition of the "passage" of every particular present. It is the past in general that makes possible all past in general. . . . *It is a case of an immemorial or ontological memory.*[51]

What Deleuze calls the "actualized present [*présent actuel*]" is a duration, localized and actual, that does not cease to pass and become.[52] The present cannot be said to "be," it "is not" in an ontological sense: its nature is to become and to pass. The pure past, by contrast, is impassive and inactive, it IS and is identical with Being itself.[53] Again and again, Deleuze stresses that the pure past is not psychological but is the ontological ground of an actualized present.[54] The pure past therefore, insofar as it is not drawn upon by the present and actualized, is the element in which the present establishes itself *qua present* but is itself non-actual. Ontologically existent, the pure past differs in kind from the actualized image of matter.

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49. Deleuze, *Difference and Repetition, op cit.,* p. 81.
50. *Ibid.,* p. 82.
51. Deleuze, *Bergsonism, op. cit.,* pp. 56-7, my emphasis.
52. Deleuze, *Difference and Repetition, op. cit.,* p. 80, translation modified.
53. Bergson, *Matter and Memory, op cit.*; p. 150; Deleuze, *Bergsonism, op. cit.,* p. 54.
54. Keith Ansell-Pearson, *Philosophy and the Adventure of the Virtual: Bergson and the Time of Life* (London: Routledge, 2002), p. 15.

How can the contemporaneity of the entire past with our actual present contribute to the new image of law? Consider Kant's "What is Enlightenment?". Here, Kant argues that we all lead double lives. On the one hand, we conduct "public" lives wherein we speak our minds with the fullest possible exercise of reason; on the other hand, we fill "private" (what we would call "professional") lives in that we serve institutional roles, adopting its personae.[55] Turning back to Bergson, let us take the example of a judge. As a human ("public") being, a judge obviously moves in Being-Memory, a virtual existence of the past that permits actualizations of lived presents. But in his capacity as a Judge, he occupies an *institutional Being-memory*, the being-past of the law. Although Bergson did not develop this specific insight, it is possible to claim that not only do living beings presuppose pure memory for their present action, but institutions presuppose it for their operation.

Judicial law, as an institution, is ideally suited to develop this homology. *The judge, as judge*, exists *within* an enormous history, an institutional past, which we call *archive memory*. This archive is virtual, and as such it is the general past in which the totality of past decisions (precedents) and statutory law available for judgment is to be found. It is no distortion to say that the "pure past," institutionally considered, offers a way to theorize the pure archive that enables actual presents to come into relief. In brief, the judge is in the legal archive as the medium of the past in general and presupposes its virtual coexistence, an ontological existence that enables the institutional action of judgment.

Let us make this very concrete. In order to judge, a judge must draw upon an institutional archive: the prudential aspect of judgment demands that a judgment exercise not mere individual fancy but rather must be institutionally based. In order for a legitimate judgment to present itself (either as a *recalled* judgment, or a *created* judgment) it must find root in legal memory. The very manifestation of a present judgment demands a coexisting/preexisting memory-archive; it demands that the *entire and absolute* legal archive virtually coexist as a medium in which discrete past decisions are present and in which the present judgment may actualize itself. This archive is not a mere collection of individual decisions and discrete laws; it is the *general element of the past* these recollections [*souvenirs*] presuppose. It is the medium in which they are preserved for our use in present judgment; it is this pre-existence of the past in general

55. Immanuel Kant, ."What Is Enlightenment?" in *Practical Philosophy*, ed. and tr. by Mary Gregor (Cambridge: Cambridge University Press, 1996).

(what we call the *archive* of law) that recollections and therefore present judgments presuppose.[56] With this, Bergson's theory of the pure past and of pure memory takes on an institutional life: the judicial archive is fully, yet virtually, present to a judge who must judge an actually present legal case. The archive is the institutional Being-of-the-Past.

We can now run two threads of the new image of law in parallel. First, we have the purely positive actual image of the case that underlies the perceived case. Such a case bears an infinite number of sides and points that we sample in limited fashion to give the legal case as it is *represented*. Second, we have the virtual archive, the general element of the past and the totality of the institutional memory of law. The archive is the element in which pure non-actuals exist in relation and continuity. At this stage of the inquiry, we have two full positivities, one actual and one virtual. We now see the organizing problematic of the new image of law: how do the actual image of the case and the virtual archive of the law engage one another? The solution is jurisprudence.

In pure perception, the represented image is a reflection of the interesting, of the possible actions exerted by the body upon the image. Pure perception without memory adds nothing creative to the image.[57] But, Bergson adds, *pure perception is a heuristic fiction:* memory is always added to the image, memory always accompanies perception.[58] Undoubtedly, the pragmatic aspect of perception is maintained — we perceive that which is of present use, according to our particular disposition to action[59] — but this pragmatic theory of perception is enhanced by memory: "subjectivity, then, takes on a new sense, which is no longer motor or material, but temporal and spiritual: that which 'is added' to matter . . . recollection images, not movement images."[60]

In the construction of a legal case and of legal judgment the case is indeed diminished in terms of its relevant factors, or rather, the interesting "sides" it presents. But equally, the case is "enhanced" or created by a

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56. Gilles Deleuze, *Cinema 2: The Time-Image*, tr. by Hugh Tomlinson and Robert Galeta (Minneapolis: University of Minnesota, 1989), p. 98. See also *Difference and Repetition*, *op cit.*, p. 80: "the past in general is the element in which each former present is focused upon in particular and as a particular."

57. Bergson, *Matter and Memory, op. cit*., p 37.

58. *Ibid*, p 232.

59. Bergson argues that "present consciousness admits *legally* only those recollections that provide assistance to action." Bergson, *Matter and Memory, op. cit.*, p. 177, my emphasis.

60. Deleuze, *Cinema 2*, *op. cit.*, p. 47.

selection undertaken through the legal archive. The selection and construction of a case creates the latter's distinctive points by leaping into the legal archive and selecting relevant recollections required to construct a legal claim. This process is the constitution of a problematic field. Only with this process does a "case" emerge *qua* legal case, as a problem: "The problem of thought is tied not to essence but to the evaluation of what is important and what is not, to the distribution of singular and regular, distinctive distinctive [*remarquables*] and ordinary points, which takes places entirely within. . . the description of a multiplicity, in relation to the ideal events which constitute the conditions of a 'problem.'"[61]

The remarkable and distinct points of the case neither preexist the law nor can their definition be discerned without it; the essence of a legal case is the fabrication of a multiplicity from significant resonances between case and archive. It is this genetic relationship between the case and the archive that can be called equally "legal argument" or "jurisprudence" proper.

We must closely examine how these resonances are created, resonances which are the essence of a legal problem. In distinction to Spinoza's formulation of intuitive knowledge as *sub species aeternitatis*, Bergson insists we must "become accustomed [*habitons-nous*] to see all things *sub specie durationis*," under the aspect of duration.[62] What does this injunction require? A leap, *sui generis:* "By which we detach ourselves from the present in order to replace ourselves in the past in general, and then in a certain region of the past – a work of adjustment [*de tâtonnement*], analogous to the focusing of a camera. But our recollection still remains virtual; we simply prepare ourselves to receive it by adopting the appropriate attitude [*nous nous disposons simplement ainsi à le recevoir en adoptant l'attitude appropriée*]. Little by little it comes into view like a condensing cloud; from the virtual it passes into an actual state. . . ."[63]

Insofar as it operates within a tradition of common law, jurisprudence institutionalizes this attitude: particular recollections (e.g. a precedent) are sought only by virtue of this leap and disposition. For Bergson, the function of memory is to select recollections in order to treat present images; for jurisprudence, the function of the legal archive is to select precedents and guidelines from the past administration of law in order to treat the present case it hears.

Jurisprudential memory proceeds by trial and error. The leap into

61. Deleuze, *Difference and Repetition, op. cit.*, p 189.
62. Bergson, *The Creative Mind, op. cit.*, pp 128-9.
63. Bergson, *Matter and Memory, op. cit.*, p. 134, my emphasis, trans. modified.

the pure past is not the discernment of *actual* recollections but the commencement of a search. For Bergson, this search seeks an appropriate tension. Such is the meaning of the famous cone of time: the past coexists whole and absolute with our present in various simultaneously repeated degrees of contraction and expansion. I suggest that the legal archive (the legal past in general) infinitely repeats itself in varying degrees of contraction and expansion; the various planes of the pure past are "so many repetition of the whole" of the legal archive.[64] The more recollections are removed from the present point of action the more they preserve their singularity and distinctness; contrarily, the closer we locate a plane to the active present, the more the recollections resemble one another and the more they are immediately serviceable to present need. The judicial leap into the legal archive jumps into the plane of tension most adequate to the demands for judgment of the actual case. "Depending on the *case*, "Deleuze writes" I do not leap into the same region of the past; I do not place myself on the same level; I do not appeal to the same essential characteristics."[65] If the selected plane partakes of a contracted nature, the recollections within that plane will have a general nature and will easily, even habitually, connect with the current case. The more expanded the plane, the more the precedents will have their distinct quality, and will be related to problems specific to themselves; these recollections will be more subtly individuated, yet less immediately applicable to the case at hand.

What is difficult in understanding selection is that the pure past exists in each level in undivided continuity (though in different tensions) and as such strictly forbids discrete points or specific recollections. How then does the plane divide and yield the recollections with which to treat the present? The judicial selection of recollections (or precedents) is accomplished through translation and rotation: "Memory, laden with the whole of the past, responds to the appeal of the present state by two simultaneous movements, one of translation, by which it moves in its entirety to meet experience, thus contracting more or less, though without dividing, with a view to action; and the other of rotation upon itself, by which it turns toward the situation of the moment, presenting to it its most useful side [*la face la plus utile*]."[66]

The specific recollections that fracture a plane of memory are the function of "rotation," where a plane presents its most useful *side,* a side

64. *Ibid.,* p. 168.
65. Deleuze, *Bergsonism*, p. 62, *op. cit.*, my emphasis.
66. Bergson, *Matter and Memory*, *op. cit.*, p 168, my emphasis, trans. modified.

divided and spatialized. These rotations are called up by the needs of the present for a *specific* recollection, *and yet* the leap is said to select an *undivided* plane of useful tension. The leap chooses a level of undivided tension and not a specific, partitioned recollection. Thus the search initiated by the present need organizes virtual memory into the specific undivided tension the former requires. This is the work of "translation," the degree of virtual tension that contracts or expands a plane of undivided recollections into useful tension. Translation (undivided tension) and rotation (divided actualizations) are strictly simultaneous and necessary to one another. The present presupposes at once an undivided plane (which provides a recollection with appropriate tension) *and* a fractured plane (in which present need looks for and finds the discrete recollections embodying the tension of the whole). Bergson's complex simultaneity is such that we pick useful memories (rotation) that *divide* the virtual tension, yet it is this *undivided* tension (translation) that offers a suitably contracted discrete recollection.

We can see how the judicial leap expresses the simultaneity of translation and rotation. On the one hand, a judge might decide a case according to general principles, upheld through any number of cases without differentiating their specificity (for example, automatic *stare decisis* and the application of a principle or axiom from a leading case, e.g., "first in time, first in right" for contracts). Here, the virtual whole of the legal archive would be tensely contracted (translation) such that a general principle might be actualized from it (rotation). On the other hand, a judge might move deeper in the cone of time, selecting a plane of time that provides greater specificity to select precedents and to connect these to the case at hand. In either example, the specific recollections available for selection vary according to the degree at which the legal archive is contracted: every translation and rotation of the virtual archive is a local integration of the archive in accord with the case judged. It is this process that actualizes a jurisprudential *topos*. As Bergson puts it, with the variation of tension each plane organizes itself around renewed "dominant memories" and "outstanding points" unique to a particular tension, points able to emerge only from that tension.[67] Contraction expresses the movement by which a recollection is actualized, "at the same time as the level that belongs to it."[68] *Jurisprudence* is the process that determines the specific

67. Bergson, *Matter and Memory, op. cit.,* p. 171; see also Deleuze, *Bergsonism, op. cit.*, p. 100.

68. Deleuze, *Bergsonism, op. cit.,* p. 64.

tension of the entire legal archive requisite to adequately judge a present case by connecting the case to the actualized tension of a precedent. This is what it means for jurisprudence to operate in its own time and archive.

V. The Creativity of Law

Using Deleuze and Bergson we have proposed a philosophy of jurisprudence based upon the repetition of the planes of the legal archive at varying degrees of tension, an operation that generates the suitable recollection-images by which a legal case (a problem of law) is constructed. However, this process does not yet include the most significant feature of jurisprudence – creativity – with which I conclude the essay.

We may begin by asking what happens when recognition fails, when recollection-images are insufficient or poorly equipped to treat an encounter? Such failure occurs when habit-memory, our cloak of usual recollections, proves inadequate and we must prolong a search of memory, testing various levels and tensions to discern an adequate image. As Deleuze observes, neither attentive recognition nor habits provide us with a true concept of memory; rather their disturbance or interruption reveals a genuinely creative capacity.[69] Using Kantian language, we could say that when the determinative judgment of memory fails and recollection forfeits its subsuming faculty we are left with no choice but to leap into the archive: "*If the retained or remembered* [*rémemorée*] image will not cover all the details of the perceived image, an appeal is made to the deeper and more distant regions of memory, until other details that are already known come to project themselves upon those details that remain unperceived [*sur ceux qu'on ignore*]. . . our memory chooses, one after the other, various analogous images which it launches in the direction of the new perception. . ."[70]

Earlier, we distinguished between two sorts of encounters in a legal case: a so-called "easy" case treated by habit memory, and a problematic case treated as a genetic legal problem. An easy case is cleanly accounted for by the selection of a recollection image close to the base of the cone of time, a dispositive judicial habit that renders any probe into the pure archive, or experimentations with tension, unnecessary. By contrast, *a problematic case* is not an expression of especially complex litigation; rather, it *is a judicial disposition that abides the singularity of the case* vis-à-vis the law with which it must connect. The problem of the problematic case is to discover in a legal perception what is not yet legally perceived: it is a ques-

69. Deleuze, *Cinema 2*, *op. cit.,* p. 54.
70. Bergson, *Matter and Memory*, *op. cit.*, pp. 101-2, translation modified.

tion of connecting the case in question to previously unperceived points of the archive in order to illuminate previously unperceived points of the case. Memory and the actual sides of the case shuttle to-and-fro, constituting in their reciprocal amplification the fabric of the problematic case. Failed recognition initiates the genesis of a legal problem, a case untreatable by canons and habitual construction. A disposition favorable to the legal problem leads us to reinvestigate the archive, to discover recollections that when combined with the case generate a true image of law (case + archival law). Respect for the singularity of the case is not a transcendent call to justice and to the infinite otherness; singularity is interruption of habit-memory, and a foray into the immanence of Being-memory of the law.

A case, we have seen, presents an infinity of actual sides that, when placed in the virtual archive, connect with recollection images to generate a properly *legal* case.[71] A case does not merely actualize one plane of the legal archive, but constructs itself by combining a variety of legal recollections, taken from different planes with varying tensions. This process is not unlike the construction of a concept in Deleuze and Guattari's "What is Philosophy?" There, the concept surveys [*survol*] its components at an infinite speed, and it is this which creates the consistency of the concept.[72] Equally, a legal case is a singular survey of myriad recollection images drawn from the legal archive in coherent jurisprudential construction. A case determined through jurisprudence contracts a number of external moments (external to one another in the archive) into a single internal moment, the case itself. We now see how jurisprudence is creative of the case.

To conclude I argue a stronger point: in addition to creating the case, jurisprudence creates law and presupposes a new image of law that accommodates and structurally requires creativity. In this sense, I want to employ Deleuze like Phillipe Soulez uses Bergson: to insist that creativity is itself a political principle.[73] Let us again consider the attentive perception-image: "An act of attention implies such a solidarity between the mind [*l'esprit*] and its object, it is a circuit so well closed that we cannot pass to states of higher concentration without creating, whole and entire

71. In this sense, we might say that the legal case is homologous to the crystal-image of *Cinema 2* in that each case *qua* case bears within it the smallest internal circuit between its actuality and a legal archive as virtual past. Deleuze, *Cinema 2*, *op cit.*, pp. 78-83.

72. Deleuze and Guattari, *What is Philosophy?*, *op cit.*, pp. 15-34.

73. Phillipe Soulez, *Bergson Politique* (Paris: Presses Universitaires de Paris, 1989), p. 280.

[*de toutes pieces*], so many new circuits which envelop the first and have nothing in common between them but the perceived object."[74]

We have just witnessed this process: attentive perception is not the combination of distinct objects on the same plane of memory; rather, it is the same object traveling through and cohering together different planes. The journey of memory is rhizomatic, provoking the re-wirings of planes by virtue of the object attentively treated. Successive planes join and cancel their independence in this real and psychic reality.[75] As Deleuze affirms, "reciprocity of determination does not signify a regression . . . but a veritable progression in which the reciprocal terms must be secured step by step, and the relations themselves established between them."[76] In this sense, recollection and the attentive operations of archival translation and rotation simultaneously give difference and introduce difference into the present: each recollection constitutes something new.

The creativity of the new image of law can be strictly defined in three respects. First, the case issues novelty in that it combines and coheres various planes of law: the case actualizes a positive constellation of translated legal planes bearing both the whole of the archive and multiple rotated precedents selected from diverse levels of tension.

Second, a jurisprudence of the pure archive is incapable of brute repetition. Bergson once remarked that biology as a science suffers because it is not adequate to the thought of no repetition at all.[77] Such an observation applies equally to law: because precedents are chosen according to the distinct points of the case, and because the points of the case decisively adjudicate the tension at which the precedent is sought, there is strictly no question of a precedent "subsuming" or "covering" the case. A dogmatic image of law based on distributive difference and a judgment that portions the case under existing criteria is both anathema and incompatible with the creative jurisprudence we have been describing.

Third, it is often repeated by Bergson and Deleuze that while the virtuality of the past possesses a reality, it requires a state of affairs to give it body and existence. It is true that the case provides such an actuality. Remarkable about the case is that it becomes a legal problem only in connection with an archive; equally, pure law (the archive) gains a reality only

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74. Bergson, *Matter and Memory, op. cit.,* p. 104.
75. Deleuze, *Cinema 2, op. cit.,* p. 46.
76. Deleuze, *Difference and Repetition, op. cit.,* p. 210.
77. Henri Bergson, *Mélanges* (Paris: Presses Universitaires de France, 1972), p. 1149.

when it is actualized in a case. Law receives a sense in the case: it alters its signification according to the points with which it is connected. Any significant legal case and legal judgment adopts the archive to the present sides of a case, and in so doing creates a *new legal problem and a creative judgment.*[78] The case as we have seen always bears a halo of virtuality, which enables its construction as a case; at the same time and by virtue of the same process the laws of the archive achieve sense only in their differentiation by a legal case and in their adaptation to a new legal problem.

The legal archive therefore gains a life through its decisions, it achieves reality in the selection and adaptations of jurisprudence. By consequence, jurisprudence requires law that is differentially repeated in the pure levels of the archive and that gives recollections appropriate tension and application. Additionally, jurisprudence requires a law that undergoes differential actualization, the process by which law actualizes itself only in transformation, by adopting the needs and problematicity of the case at hand. Inspired by Deleuzian concepts, jurisprudence gives us an adequate and new image of law appropriate to its operation. The philosophy of Gilles Deleuze provides us not only with a thorough fourfold critique of the dogmatic image of law, it also provides concepts by which we can envisage a new image of law that adheres to the singularity of the case, one that proceeds by the injunction of problems, that upholds virtual reality, and that centrally requires creativity for its operation. For it to function (and this is not only an ethical claim but also an ontological one), law requires the characteristics of differential repetition and differential actualization; in other words, the institution of jurisprudence demands the creative exercise of law in order for it to produce legal arguments, legal problems, and legal judgments.

78. To take an arbitrary, if controversial, example: in *Roe v. Wade* (1973) the constitutional right of privacy from previous decisions such as *Griswold v. Connecticut* (1965) was applied to the issue of abortion. We can see that a recollection of the legal archive was adapted to a new legal problem, thereby transforming the former. With the argument of *Roe,* privacy laws were creatively adapted to include substantive women's rights. *Griswold* was not simply recalled but formed on an suitable level of tension within the legal archive in order to be selected and differentially actualized into a new case and problem.