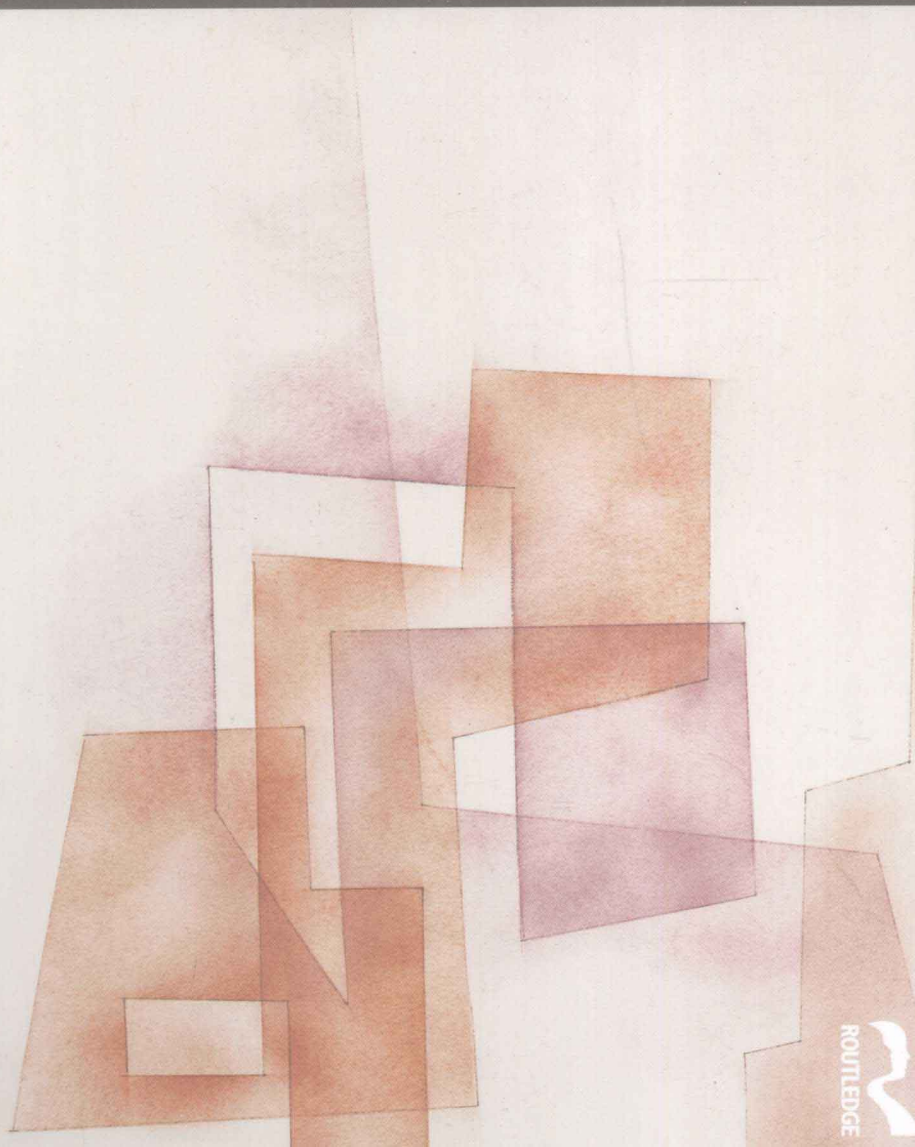


# Jurisdiction in Deleuze

The Expression and  
Representation of Law

Edward Mussawir

a GlassHouse book



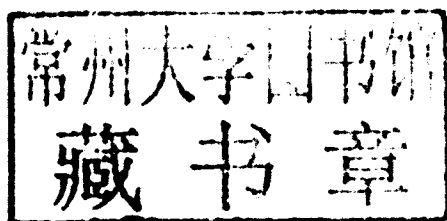
---

# Jurisdiction in Deleuze

---

The Expression and  
Representation of Law

Edward Mussawir



First published 2011

by Routledge

2 Park Square, Milton Park, Abingdon, Oxon, OX14 4RN

Simultaneously published in the USA and Canada

by Routledge

711 Third Avenue

New York, NY 10017

A GlassHouse book

*Routledge is an imprint of the Taylor & Francis Group, an informa business*

© 2011 Edward Mussawir

The right of Edward Mussawir to be identified as author of this work has been asserted by him in accordance with sections 77 and 78 of the Copyright, Designs and Patents Act 1988.

Typeset in Times New Roman by Graphicraft Limited, Hong Kong

Printed and bound in Great Britain by CPI Antony Rowe, Chippenham, Wiltshire

All rights reserved. No part of this book may be reprinted or reproduced or utilized in any form or by any electronic, mechanical, or other means, now known or hereafter invented, including photocopying and recording, or in any information storage or retrieval system, without permission in writing from the publishers.

*British Library Cataloguing in Publication Data*

A catalogue record for this book is available from the British Library

*Library of Congress Cataloguing in Publication Data*

Mussawir, Edward.

Jurisdiction in Deleuze : the expression and representation of law / Edward Mussawir.

p. cm.

ISBN 978-0-415-58996-3 (hbk) — ISBN 978-0-203-82962-2 (ebk)

1. Deleuze, Gilles, 1925–1995. 2. Law—Philosophy. I. Title.

K230.D439M87 2011

340'.1—dc22

ISBN13: 978-0-415-58996-3 (hbk)

ISBN13: 978-0-203-82962-2 (ebk)

---

## Table of cases

---

<i>Attorney-General of the Commonwealth v Kevin and Jennifer and the Human Rights and Equal Opportunity Commission</i> [2003] FamCA 94	52
<i>Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd</i> (2001) 208 CLR 199	155
<i>B and B v Minister for Immigration and Ethnic Affairs</i> (2003) 30 Fam LR 181	53
<i>Behrens v Bertram Mills Circus Ltd</i> [1957] 2 QB 1	70
<i>Commonwealth, The v Grunseit</i> (1943) 67 CLR 58	156
<i>Corbett v Corbett (otherwise Ashley)</i> [1970] 2 All ER 33	55
<i>DPP v Thomas</i> (Ruling No 3: Reasons for Ruling) [2006] VSC 243 (7 April 2006)	157
<i>Hamps v Darby</i> [1948] 2 KB 311	69
<i>Higgins v William Inglis &amp; Son Pty Ltd</i> [1978] 1 NSWLR 649	70
<i>Minister for Immigration and Multicultural and Indigenous Affairs and B (No 3)</i> (2004) FLC ¶ 93–174	53
<i>Queen, The v Tang</i> [2008] HCA 39	36
<i>Re: Alex</i> [2009] FamCA 1292 (6 May 2009)	52
<i>Re Alex: Hormonal Treatment for Gender Identity Dysphoria</i> (2004) 31 Fam LR 503	52
<i>Re GWW and CMW</i> (1997) 21 Fam LR 612	52
<i>Re Kevin (Validity of Marriage of Transsexual)</i> (2001) 28 Fam LR 158	52
<i>Re Marion</i> (1992) 175 CLR 218	53
<i>Re P and P</i> (1995) FLC 92–615	52

---

<i>Re the welfare of A (a child)</i> (1993) 16 Fam LR 715	52
<i>R v Kirby; Ex parte Boilermakers' Society of Australia</i> (1956) 94 CLR 254	154
<i>R v Thomas (No 1)</i> [2006] VSCA 165 (18 August 2006)	157
<i>R v Thomas (No 3)</i> [2006] VSCA 300 (20 December 2006)	154
<i>R v Wei Tang</i> [2007] VSCA 134	36
<i>Reg v Gallears</i> 3 New Sess Cas 704	69
<i>Secretary, Department of Health and Community Services v JWB and SMB ('Re Marion')</i> (1992) 175 CLR 218	52
<i>Thomas v Mowbray</i> [2007] HCA 33 (2 August 2007)	154
<i>Thomas v The Queen</i> [2008] HCA Trans 258 (17 July 2008)	157
<i>Wellesley v Duke of Beaufort</i> (1827) 4 ER 1078	53
<i>ZP and PS</i> (1994) FLC 92–480	53

---

## Table of statutes

---

Animal Care and Protection Act 2001 (Qld)	70
Animal Welfare Act 2002 (WA)	70
Animal Welfare Act 1999 (NT)	70
Animal Welfare Act 1993 (Tas)	70
Animal Welfare Act 1992 (ACT)	70
Animals Act 1977 (NSW)	70
Civil Liability (Animals) Act 1984 (ACT)	70
Criminal Code Act 1995 (Cth)	139
Criminal Code Amendment (Terrorism) Act 2003 (Cth)	154
Family Law Act 1975 (Cth)	38
Family Law Reform Act 1995 (Cth)	52
Prevention of Cruelty to Animals Act 1986 (Vic)	70
Prevention of Cruelty to Animals Act 1985 (SA)	70
Prevention of Cruelty to Animals Act 1979 (NSW)	70
Wrongs Act 1936 (SA)	70

### **International Conventions**

International Covenant on Civil and Political Rights	55
International Convention to Suppress the Slave Trade and Slavery	36

---

## Preface

---

Most authors, I imagine, must feel that their work is somewhat belated by the time it appears in print. The work is already a sign of old ideas, a catalogue of yesterday's imaginations, even when it presents something new each time to whoever reads it. In the case of this book, the sense of belatedness is accentuated by a few factors. The reception of the work of Gilles Deleuze has in recent years grown considerably within the scene of Anglo-American critical legal scholarship and jurisprudence. The present work now finds itself within a dialogue about Deleuze and jurisprudence which, at the time of its writing was far less central and consolidated as a major topic of analysis. Deleuze's philosophy of course has been previously influential in critical legal studies. His influence is found lurking in the footnotes, for instance, of works by writers like Yifat Hachamovitch and Peter Goodrich to whom Deleuze was one ally for thinking about the repetitive texture of a common law aesthetic and authority. But the notion of a specifically 'Deleuzian jurisprudence', on the other hand—something approaching a philosophy or theory of law based primarily upon Deleuze's work—is something quite different and a much more recent phenomenon. I have had the advantage of being able to follow the works of both Nathan Moore and Alexandre Lefebvre from an antipodean distance during my own period of study, both of whom had been concerned to give Deleuze an ambitiously systematic treatment in legal theory. I was able to share some of their optimism about the relevance of Deleuze to the study of jurisprudence, even if the ways of understanding that relevance were not exactly unified. Keeping one's distance from intellectual 'debate', on the other hand, may also have been not without its necessity and advantage. Moore's unsympathetic review of Lefebvre's *The Image of Law* in Volume 5 of *Law, Culture and the Humanities* is indicative of a much broader territorialism within an academic terrain heavily invested in securing and guarding the proper names of its key theorists and the right to interpret them.

With the present work then, one of the background concerns of mine had been as much as possible to avoid repeating the kind of critical gesture that

would turn the thought of an author one loves into another schema or another law for whichever field one wants to participate in: taking it upon oneself to institute, enforce and police the legitimate and illegitimate interpretations of the work and thereby truly ensuring that no one else may even begin to enjoy it for themselves. It is always stupid, for instance, to bother to tell someone that they have got the interpretation 'wrong' or 'off the mark', to point out the contradictions or, as Moore does to Lefebvre's reading of Deleuze, to simply note the supposed 'error which [he] has fallen into'.<sup>1</sup> Much better to say, '... and here's another thing while we're at it ...!', 'what's more ...!' or 'go-on—take it further!' with genuine amusement or fascination. This attitude might go for friends as well as enemies. Deleuze is fond of suggesting that interpretation (or misinterpretation) always has an impeccability and an unmistakable virtuosity in relation to the interpreter's manner of being. A particular interpretation is not so much true or false, well-founded or baseless; rather it always has as much value given the style of living, the modality of expression, the kind of interpretive *creature* it presupposes. There is thus a great *humour* and *generosity* to his philosophy, even if there is not necessarily an unqualified 'permissivism'. For instance, in offering this generous hand of legitimacy to all kinds of odd misinterpretation, it does not follow that 'just anything goes' *per se* for Deleuze. There are particular interpretations that would be decidedly illegitimate—satirical, dialectical, moralistic, rational-administrative, etc.—interpretations that do not survive within that perspective of humour and generosity that nevertheless marvels at the moralist, the pedant, the satyr, the administrator, the dialectician and affirms openheartedly all of their remarkable acrobatics, affects, capabilities.

This book is not the first to acknowledge the affinity that Deleuze's theory and practice of reading might have with the tradition of reading we call jurisprudence. But precisely how to characterize that affinity has not at all been clear-cut. Even during the course of my own study, the values I attributed to critical legal scholarship and jurisprudence evolved considerably. I began, for example, with an attraction to those who were engaged in criticism, in a 'radical' critique of law and in the broader reception of continental theory to legal studies and was left with a much different affinity: one reserved for those who just seemed to have an interest in local jurisprudence; those whose investment in the study of law was less than critical but just practical, vocational or personal. Jurisprudence is not necessarily suited to great theorists or grand thinkers who have a taste for speaking of the predicaments of 'humankind', of truth and justice, of 'the subject' and its relation to law, any more than it is suited to clever professional lawyers who have the knack when it comes to describing rights and interests and how to have them protected in law and public institutional discourse. Instead, it seemed to me that jurisprudence might be suited to a collection of individuals who find only the most tenuous justification for their own existence in 'law' and



who therefore have the most immediate and vital investment in its technical-theoretical description. 'If you don't admire something', says Deleuze, 'if you don't love it, you have no reason to write a word about it'.<sup>2</sup> Jurisprudence does not need to grapple with law in the abstract; it can afford to make it the subject of a more material and local encounter. And what becomes truly surprising is that, while the theory of law is really being produced everywhere, on every street corner so to speak, and with a practical necessity that belongs to these local situations, in the face of this fact, our major schools of law and legal thought have not yet become purely dumbstruck!

The subject for this book is, therefore, one that may still hold some currency inside legal institutions. Jurisdiction may be a relatively major term in the technical discourse of legal practice, but its centrality as a concept within jurisprudence is something that is still worthy of some elaboration and recovery. The hypothesis for this book was that Deleuze's philosophical method might do some of this recuperation. Even though jurisdiction is not an explicitly 'Deleuzian' concept, one can read aspects of Deleuze's style and method as a recovery of certain jurisdictional arts: a jurisdiction of persons or legal personae, for instance, which provides us with a set of methods capable of critiquing the still too abstract 'subject of rights' and the still too central place it occupies in legal and moral philosophy. Deleuze tells us that the 'subject of rights' is a meaningless concept for jurisprudence: what matters are the techniques in fashioning a 'legal person'. And indeed, when philosophy discovers (along with Nietzsche) how to pose the question 'Who?' rather than 'What is . . . ?' in relation to concepts—such that philosophy might be composed purely of certain 'conceptual personae'<sup>3</sup> rather than of transcendental ideas—it reveals its affinity with the discipline of jurisprudence which at times also learns to compose rights and their expression in terms of legal personae; as a relation of personal jurisdiction.

It is hoped that by reading certain 'jurisdictions' in Deleuze, legal scholarship might rediscover some of its disused theoretical languages for addressing law's technical contrivances and innovations, but also that a new perspective on Deleuze's philosophy as a form of jurisprudential thought might be made more accessible. This book owes quite a lot to those who introduced me to the possibilities of thinking about law through its jurisdictions. In this regard, I wish to thank two people especially at the University of Melbourne Law School. I have been lucky enough to follow the far deeper footsteps of Shaun McVeigh, whose insight into the jurisprudence and problematics of jurisdiction I continue to find outrageously masterful and intensely unique. From Shaun, this work borrows something of the idea of approaching law's performative or expressive registers as an explicit question of jurisdiction. Secondly, I owe an even greater gratitude to Peter Rush whose guidance throughout the length of this project and beyond it, allowed me to see life's practices as a continuing apprenticeship in jurisprudence. I

have Peter to thank as a teacher for first demonstrating to me that law could be studied and grappled with as an artistic, creative as well as a scientific vocation. His encouragement has at times been truly indispensable. For the time spent discussing this work, lending me those key texts in his literary archive, and for the countless drafts of the parts of this work which he has read through meticulously, generously and critically, I am enormously grateful.

I also want to acknowledge and thank Peter Goodrich and Keith Ansell-Pearson who examined and offered insightful criticism of my work. This book attempts to incorporate the perspectives that they each brought in different ways to my reading of Deleuze and jurisdiction. In relation to the jurisprudential treatments of jurisdiction in particular, Peter has provided me with much inspiration and food for thought over a number of years. I am grateful too for the many others who commented upon, encouraged and challenged my thinking at conferences and workshops over the course of this project and influenced its development; they are too many to be named here. I also want to acknowledge my appreciation of those who additionally have had a long-standing commitment toward fostering a collegial critical legal community in Australia.

Lastly, I would like to also thank the many colleagues and friends and family who have made the study of jurisprudence in Melbourne something more necessary, more humorous and more collective. Yoriko Otomo, Connal Parsley, Cressida Limon and Jothie Rajah for sharing their creative energies with me, their intellectual trepidations and for making the life of law and its theory less lonely and more multiplicitous. Luis Eslava who manages (much to my admiration) to share an endless and genuine good-humour in the study of law, as well as Olivia Barr, James Parker and also Bec Goodbourn who I similarly admire for bringing a cheerfulness of interpretation to more than just Deleuze. Juliet Rogers for her consistently incisive engagements with my work amongst many others at the Melbourne Law School over a long period. And Marc Trabsky not least for helping many of the ideas in this book to be either born, altered, assaulted or just sacrificed. Finally, and of course most of all to Marika with whom law might afford not to be just a conversation but a long experimentation, a fellow-traveling, a navigation:

We're in the same boat: a sort of lifeboat, bombs falling on every side, the lifeboat drifts toward subterranean rivers of ice, or toward rivers of fire, the Orenoco, the Amazon, everyone is pulling an oar, and we're not even supposed to like one another, we fight, we eat each other. Everyone pulling an oar is sharing, sharing something, beyond any law, any contract, any institution. Drifting, a drifting movement of 'deteritorialization': I say all this in a vague, confused way . . .<sup>4</sup>

## Notes

- 1 Nathan Moore, 'Book Review: *The Image of Law: Deleuze, Bergson, Spinoza*' (2009) *5 Law, Culture and the Humanities* 462, at 463.
- 2 Gilles Deleuze, 'Gilles Deleuze Talks Philosophy' in David Lapoujade (ed.), *Desert Islands and Other Texts 1953–1974*, Trans. Michael Taormina (New York, NY: Semiotext(e), 2004), pp. 143–145, at 144.
- 3 See Gilles Deleuze and Felix Guattari, *What is Philosophy?*, Trans. Hugh Tomlinson and Graham Burchill (London: Verso, 1994).
- 4 Gilles Deleuze, 'Nomadic Thought' in David Lapoujade (ed.), *Desert Islands and Other Texts 1953–1974*, Trans. Michael Taormina (New York, NY: Semiotext(e), 2004), pp. 252–261, at 255.

---

# Acknowledgements

---

Versions of two of the chapters in this book are published elsewhere as articles. Chapter 7 incorporates ‘The Activity of Judgment: Deleuze, Jurisdiction and the Procedural Genre of Jurisprudence’ in *Law, Culture and the Humanities*, 10.1177/1743872110379697 and Chapter 8 ‘Jurisdiction of Control: Judgment and Procedural Forms in *Thomas v Mowbray*’ (2010) 19(2) *Griffith Law Review*. I would like to thank Sage Publications and Griffith University for kindly granting the permission to reprint this material 307–329.

---

# Contents

---

<i>Table of cases</i>	vii
<i>Table of statutes</i>	ix
<i>Preface</i>	x
<i>Acknowledgements</i>	xv
1 Deleuze and jurisdiction: expressionism in jurisprudence	1
<b>PART I</b>	
<b>Masks and personal jurisdiction</b>	<b>19</b>
2 Personal jurisdiction: the 'method of dramatization' in the 'law of persons'	21
3 Minority and personal jurisdiction: judging sex in <i>Re Alex</i>	38
4 Persons of animal law	56
<b>PART II</b>	
<b>Rights and subject-matter jurisdiction</b>	<b>73</b>
5 Deleuze, the 'law of things' and subject-matter jurisdiction	75
6 To put to flight: the right of possession	93

**PART III**

**Actions and procedure 113**

- 7 The activity of judgment: 'law of actions' and the procedural genre of jurisprudence 115

- 8 The jurisdiction of control: judgment and procedural forms in *Thomas v Mowbray* 138

- 9 The locality of law: jurisdiction in Deleuze 159

*Bibliography* 162

*Index* 171

# Deleuze and jurisdiction: expressionism in jurisprudence

---

Modern legal theory is beginning to reconnect with the language and conceptuality of 'jurisdiction'. Gilles Deleuze's philosophy of expression also enjoys a renewed relevance in legal theory and offers a unique perspective on the thematics of jurisdiction. This chapter traces the development of both the thematic of jurisdiction as well as the reception of the work of Deleuze in contemporary jurisprudence. It proposes that Deleuze's method may be read as recovering certain technical genres of jurisprudence relating to persons, rights and actions.

It is a difficult thing to try to navigate the law without an idea of jurisdiction. This it seems is one piece of knowledge over which lawyers in particular may have no special claim. It is true that jurisdiction on the one hand concerns very technical matters of law. For this reason, it is assumed to be a problem confined to the discourse of the legal profession who are thought to negotiate the problem of how laws work in practice, when and where they should apply, over whom and with what authority. The techniques of law in this sense might be equivalent to the techniques of cooking, mechanics or music: the imperative is to 'know your craft'. Yet on the other hand, to be concerned about problems of jurisdiction, one does not necessarily need to have any special knowledge of the law: to be able to represent the law to oneself or to others. It may, in fact, be more advantageous *not* to know the law all that well; to really know it a little less perfectly than most and therefore to make of one's description of it more of an expression than a representation.

This book discovers an unlikely ally for thinking about the concept of jurisdiction: Gilles Deleuze. It may seem curious at first glance to invoke the work of Deleuze for a study of jurisdiction. Deleuze has had a broad influence in philosophical, artistic, cinematic, linguistic and cultural theory; but his work (and in particular that conducted with Felix Guattari) has often appeared too unruly to have anything but an oblique and random presence in jurisprudential writing. While recent studies have attempted in some measure to redress this lack of systematic treatment of Deleuze's thought in

jurisprudence, they have not necessarily employed the thematic of jurisdiction in doing so.<sup>1</sup> The reason for this is not difficult to imagine: jurisdiction is not explicitly a 'Deleuzian' concept; indeed, it is a concept linked in a conventional way to an institutionality from which theorists interested in Deleuze have typically distanced themselves in a critical sense. There is a sobriety to the legal conceptuality of jurisdiction that seems to cut against the grain of most of the Deleuzian interjections in legal theory; interjections which have typically attempted only to extrapolate certain of his concepts 'invented' within other fields, in an attempt to radicalize our critical relation to law. Yet it may be precisely this sobriety and this non-figurative technicality that gives jurisdiction an ideal candidacy as a concept describing Deleuze's encounter with jurisprudence. Speaking about 'style' in literature, Deleuze notes that, 'The secret of great literature is to move toward increasing sobriety . . .' through which 'the ease of figuration falls away'.<sup>2</sup> Legal writing too has this kind of literary effect. And if the form of literature that we call law has not so much a figurative as a technical and instrumental value, then the increasingly sober questions of jurisdiction may be, for legal scholars, something worth re-examining.

The concept of jurisdiction implies a certain relation between expression and representation in jurisprudence.<sup>3</sup> On the one hand, theories of legal power in modern jurisprudence have tended to focus upon the metaphysical problematic of sovereignty and its relation to the origin, foundation and purpose of State authority. Questions of jurisdiction on the other hand, which continue to order the local, technical and technological languages of law, the modalities of legal speech, institution and the aesthetics of judgment, have remained relatively unaddressed by modern theoretical discourse. Thus, while the major critical philosophies of law can be characterized by surveying a distinctly 'representational' aesthetic of legal authority, the matter of the 'expression' of this authority has increasingly become abandoned to a narrow juridico-institutional technicism. The consequences of this are not necessarily easy to translate. It is difficult, for instance, to note precisely what is at stake when legal institutions find it useful to continue to frame as an arrangement of 'jurisdiction', relations of power that theorists have typically been concerned to present in more totalizing or universalizing terms. Conversely, it is also hard to account for what might be at stake when the traditionally technological and jurisprudential knowledge of jurisdiction is removed from its theoretical treatment and gets left to the technical-administrative domain of law. Deleuze's work nevertheless provides, through a commitment to a certain 'expressionism' in philosophy, a way of also addressing the 'expressive' jurisdictional practice of jurisprudence.

Deleuze never felt the need to write a book explicitly on jurisprudence despite the fact that he left us with some brief clues on why it might have been crucially important to his outlook in philosophy.<sup>4</sup> Deleuze, of course, was not a lawyer and so could not claim to have had a technical, professional or vocational knowledge of law but this same non-expertise in relation to



other disciplines such as cinema, art and music did not prevent him from tracing his own fantastic philosophical modifications and encounters within those fields. Out of all the various arts and disciplines that interest Deleuze, nevertheless, it is possible that jurisprudence might have been capable of competing with philosophy as the subject of a kind of 'life-work'. 'If I hadn't done philosophy', he reminds us in an interview with Claire Parnet, 'I would have done law . . . I would have done jurisprudence. Because that's life'.<sup>5</sup> In one way, all of Deleuze's work may be read as a jurisprudence: a creative negotiation of the technical field of law that is co-extensive with life. As legal scholars we might take some pleasure in imagining then that 'jurisdiction' might have played a key conceptual role in it, not just because it seems to reveal certain affinities with Deleuze's theoretical apparatus in general (including the idea of 'expression' in philosophy), but also at a more practical level because it refuses to transcendentalize our analysis of law or judgment through terms that are foreign or superior to its own idiom. When Deleuze writes books on cinema, on the work of a certain author or painter or on a particular academic area of study, etc. all of the concepts he employs in these studies are drawn from the field or the medium in which he becomes embedded. He does not apply semiotic, linguistic or psycho-analytic theory to cinematic study for example; he draws from cinema the theoretical concepts adequate to the practical and creative dimensions of that medium, so that the work becomes a kind of toolkit for film-makers, etc. rather than film-critics.

What jurisdiction gives us then is a way of working within law's medium. It gives us a method for analyzing power in a language that maintains a descriptive relation to matters of 'legality'. As legal scholars, we cannot ignore the fact that what we are (or are meant to be) engaging with are questions of law. And yet we usually become acutely aware as critical theorists that the technical languages of law are limiting to the creative scope of our intellectual analyses. Jurisdiction may act as a kind of challenge in this respect: it challenges us from one perspective to invent certain ways of 'making do' without a law, without higher values (values superior to one's jurisdiction) and yet from a different perspective this might also challenge us to develop a way of being with law, a style of existing with law and with its languages, technologies and practices. The only way in which one can make do without law, Deleuze suggests, is through a 'jurisprudence'—a practical creativity that belongs to cases and local situations—and yet jurisprudence does not work outside of laws in some sphere abstracted from the custom of legal principle. It requires all of these laws, legal principles, judgments, etc. to constitute the desert of its immanent mode of navigation.

## Theories of jurisdiction

The development of a theory and an analytical language of jurisdiction can be said to have become more essential in recent years to the techniques of