Liverpool Law Rev (2017) 38:187–206
DOI 10.1007/s10991-017-9192-8

Temporality and Criminal Law Adjudication's Multiple Pasts

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Published online: 8 February 2017

Abstract This paper attempts to articulate a novel understanding of factual construction in criminal law adjudication through temporality. Arguing that adjudication is generally invested in the construction of pasts, the paper claims that different forms of judgment can (a) be distinguished by the theory of time upon which they are contingent (b) produce qualitatively different types of pasts in their factual construction of 'what happened'. A form of adjudication informed by Kantian temporality, which the paper characterises as the conventional 'abstract judgment', is problematic for the reasons that it produces certain types of pasts in which subjects of law are problematically constructed. A different, though infrequent from of 'concrete judgment', informed by Gadamerian–Bergsonian temporality, produces qualitatively different types of pasts in its construction of 'what happened', instead favourably producing legal subjects which are situated and constituted. The differences between these antipodal forms of judgment, understood through temporality, are important for both normative ascriptions of responsibility and to illustrate what is ignored factually in conventional forms of criminal legal adjudication.

Keywords Bergson · Gadamer · Kant · Adjudication · Time · Temporality · Subjectivity

Introduction

The case of *R v. Ahluwalia*[1] is familiar to many as presaging the reception of Battered Woman Syndrome as grounds for diminished responsibility in murder charges. One way that the facts of the case could have been *abstractly* described was

[1] [1993] 96 Cr. App. R. 31.

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of a woman who poured petrol onto her sleeping husband and set him alight. However, Lord Taylor CJ in the appeal opted for a more *concrete* account of what had happened. Indeed, it was important in this narrative to outline the history of being a victim of sustained domestic violence that had *constituted* the defendant, Kiranjit Ahluwalia, and her actions. The normative ascription of responsibility appeared to change upon the reception of a particular type of past into the narrative of what happened which partially absolved her. A creative reading of the judgment could have therefore, concluded that the necessary inclusion of this particular past (rather than an exclusive focus on the transgression) conditioned how adjudication understood the defendant and its overall ascription of responsibility. To put it crudely, the legal clock started not when she had poured petrol on her now deceased husband, but *earlier*. With this 'temporal stretching of the legal subject' (Boyle 1991, 522) came the emergence of a concreteness, bringing with it exculpatory elements that shifted the attributions of responsibility. The appellate ceased to be just 'a woman' or a 'rational actor' and became 'Kiranjit', imbued with a particular history and located in a particular environment. The judge appeared to have the option of seeing the history of violence as either naturally connected to and constitutive of her transgression, or as entirely separate and independent of it.

The ascription of responsibility was concomitant on the incorporation of a particular type of pastness (the 'history of violence') which was seen as necessarily connected to the murder in adjudication's factual construction. This paper claims that the inclusion (or exclusion) of that 'history of violence', as a particular type of fact (later referred to as 'past') is attributable to the *temporality* that informs the specific adjudicative approach taken in that case. Thus because *temporality* is at least partially responsible for how criminal legal adjudication constructs its pasts, this can impact upon responsibility attribution.

Outline

The paper will begin by first exploring the claim that factual construction in criminal law adjudication is, at least in part, contingent upon the theory of temporality which that particular adjudicative approach is predicated upon. This idea develops the work of Mark Kelman and Kevät Nousiainen, who pre-figure the relationship between time, factual construction and responsibility. The temporality which informs adjudication effects, the paper will argue, what *types of facts*, or specifically what *types of pasts*, are emergent in adjudication's determination of what happened. The paper will try to speculate and focus upon the latent temporalities in case reports by creatively interpreting different types of facts as indicative of those latent temporalities.

What drives this novel approach to adjudication's factual construction is that this theoretical re-framing can problematize and potentially change ascriptions of responsibility. What is also illuminating is that it may also reveal what types of pastness are typically elided in conventional forms of criminal law adjudication. Time it is later argued, also operates as an unproblematised site for the exercise of unrestrained judicial power. These points will form the basis of the second section.

Thirdly, the paper will then outline three contrasting theories of time that will subsequently be used to explain different types of judgment. Importantly therefore, this section will explain why these theories of time ought to inform different adjudicative approaches. The penultimate section will then observe how these different temporally-contingent forms of judgment produce qualitatively different types of past in their factual construction of what happened. For convenience sake, the paper identifies two antipodal forms of judgment namely 'abstract' and 'concrete'. This section will illustrate how the different types of pastness emergent in abstract and concrete judgment correlate to the features of temporality which inform that particular type of judgment. The section finishes off by briefly commenting on the legal subjectivity present in these different forms of judgment and how this may affect responsibility attribution. Temporality will help categorise the different types of facts in adjudication, specifically those types of facts with partial exculpatory effect which are typically ignored in criminal law adjudication.

The paper then finishes off by contrasting 2 lawful excuse cases of criminal damage, one successful and one not, which can be distinguished by the divergent adjudicative approaches (predicated on different theories of time) adopted. It is claim that the latent temporalities of the cases can help to explain why one case successfully engaged the defence, whilst the other failed.

Temporality, Past Construction and Responsibility

Law and time have plenty to do with one another (French 2001; Greenhouse 1989, 1996; Melissaris 2005; Ali Khan 2009) and continue to arouse the interest of legal scholars (von Benda-Beckman 2014; Valverde 2015; Lefebvre 2008; Bjarup and Blevad 1994); not just because of the occasional explicit expressions of time in statutes or that 'statutory law is future oriented' (Wistrich 2012) and stare decisis venerates the past, but 'as a force that bites into law' (Mawani 2015, 255). The focus here however, is far more humble.

Adjudication is operative as a sort of historical inquiry that generally takes place *ex post.*[2] It may be likened to a type of retrospective epistemological endeavour where the judge's role is in 'determining what happened at some time in the past' (Bingham 2011, 3) or a 'project of retrieval' (Crowe and Youngwon Lee 2015, 2). Adjudication is also interesting as it is the process in which abstract laws encounter the concrete world and take on a retrospective narrative (MacCormick 1994) through their relation to facts. Though one may think that the laws proper movement is forward in time, (Fuller 1969, 53) in adjudication, laws become part of its backward reasoning. Thus it is reasonable to say that fact construction in adjudication can synonymously be described as *past construction*. It is argued now that past construction therefore is dependent on temporality. The interrelation

[2] Some forms of adjudication have an anticipatory orientation that appears to settle matters prior to the purported illegality having occurred such as administrative detention, inchoate or associational crimes etc. Further to this, injunctions, whether statute, equity or common law based, for example freezing of assets to stop the commission of a crime or non-molestation orders to prevent domestic violence, also occurin anticipation of an the alleged illegality.

between temporality and past construction has been partially anticipated by the work of Mark Kelman, Kevät Nousiainen and a creative reading of Alan Norrie.

Time and Past Construction

Kelman claims that judicial argument is composed of unconscious interpretive constructs (Kelman 1981; *see also* Cardozo 1921, 167–180) in adjudication's factual construction and the possible rules to handle them (Kelman 1997, 15–63). The first of these interpretive constructs include the use of *narrow or broad time frames* to determine factual relevancy where adjudication may incorporate facts about the defendant's personal history, incorporate facts about events preceding or post-dating the criminal incident, or just focus on an isolated criminal incident, 'as if all we can learn of value in assessing culpability can be seen with that narrower time focus' (Kelman 1981, 594). To illustrate (Norrie 2011, 141) consider the old American case of *State v Preslar*[3] where a woman, after having been beaten by her husband, left the family home with her child for her fathers. Some distance from the house, she decided to rest and continue the following morning but died of exposure. The court argued that she had exposed herself without necessity and was 'fully voluntary'. A broader time frame may have connected the woman's act to the ill-treatment from her husband, perceiving it as a constituted act of necessary self-preservation.

Another of the constructs, though related to the first, is the apportioning of *disjoined or unified accounts* which may look beyond an isolated incident if, for example, a defendant made a decision at an earlier moment to act criminally (Kelman 1981, 595). What Kelman appears to suggest is that there exists a coterminous relation between time (specifically 'time-frames'), adjudication's factual (or past) construction and criminal responsibility. Time-frames, according to Kelman's analysis, are jurisgenerative.

Kevät Nousiainen similarly attempts to reconstruct temporality from the view of the subject of law, suggesting that adjudication involves a temporal challenge of being *ex post* though attempting to reconstruct the view of the action subject *ex ante* (Nousiainen 1994, 23). Thus *subjective time*, Nousiainen cites, is operative alongside a universally accepted conception of time, where *both* inform the law. She establishes a triad of 'reality construction, text, time' that offers a similar description to Kelman of how temporality conditions adjudication's past construction. She explains how adjudication utilises broad or narrow time frames for determining past construction. Broad time frames consider incidents as constitutive of a unified whole (like Battered Woman Syndrome in *Ahluwalia* which interestingly the author uses as an example), and the narrow time frames dissect narratives into singular events, disconnected from antecedent moments. Crucially law, according to Nousiainen, naturally produces a 'subject structure that keeps apart the subject in its active and passive formulations. This seems to implicate two time structures- a subjective, active and *ex-ante* time, as well as an objective, passive and *ex-post* time'(Nousiainen 1994, 26).

[3] (1885) 48 NC 417 18.

Both Kelman and Nousiainen argue then that 'time frames reality'. This is not an entirely revelatory claim as is apparent from a reading of Kant's *Critique of Pure Reason*. Briefly put, Kant stated that time (along with space) was an a priori feature of the intellect that allows us to make sense of data, to produce phenomena. This paper, like Kelman and Nousiainen, creatively extrapolates this axiom (that time frames reality) to posit that time similarly frames adjudication's construction of it's pastness (or facts).

One could claim however, that it is not actually temporality or 'time-frames' that are responsible for adjudication's construction of pastness. After all, laws (not 'time-frames' as Kelman and Nousiainen suggest) often explicitly state which facts they give meaning to; whether a law proscribes murder or prescribes the freedom of contract. It is, as Raz calls it, the classical image of the judge where 'he identifies the law, determines the facts, and applies the law to facts' (Raz 1979, 182). Of course this account is a caricature of adjudication, the *subsumptive fallacy* (Lefebvre 2008, 13). Indeed, 'rules are by definition general. They gather numerous known and unknown particulars under headings such as "vehicles," "punishment," "dogs"' (Schauer 1988, 534). For example, homicide can include different types of intent, different categories of victims, and very different factual situations, all of which are seen as particulars or instantiations of the general rule. One of the elements which allows for these *different* instantiations of the *same* rule, it is claimed, is temporality. To demonstrate this, the use of the old provocation defence in *R v. Ahluwalia* can be compared to *R v. Baillie (John Dickie)*.[4] In determining the first limb of the defence, 'sudden and temporary loss of self-control',[5] the courts construction of the past differed, using contrastingly narrow and broad *time frames* respectively. In the case of *Ahluwalia,* recalling that she had suffered horrendous domestic violence over several years, the courts were unwilling to entertain a lapse of time between the most recent bout of violence ('the provocation') and the killing of her husband. The appellant unsuccessfully tried to convince the courts of the 'the slow burn' approach as a justification for the lapse of time, which would have necessarily required a broad time frame in the construction of what happened. Lord Taylor CJ stated that 'the defence is concerned with the actions of an individual who is not, at the moment when he or she acts violently, master of his or her own mind'.[6] Yet contrastingly in the *Baillie* case, which involved a man who upon hearing that his son had been threatened by a drug dealer and then set off for the drug dealer's house, the courts adopted a broader time frame in its factual determination of what happened such that the lapse of time *did* amount to a sudden and temporary loss of self-control. This was not a simple 'law-fact' subsumption. Rather, this paper will later claim, whatever was the theory of time that allows for 'framing' and thus the separability of pastness, conditioned how that very past in these cases were constructed; one which was committed to narrow, proximate time frames, and one which readily adopted broader time frames.

[4] [1995] 2 Cr. App. R.

[5] *R v Duffy* [1949] 1 AER 932.

[6] R v. *Ahluwalia.*

The Merits of Reframing Factual Construction Under Temporality

Returning to the judgment of *Ahluwalia* but now equipped with Kelman and Nousiainen's triad and 'past construction' qua factual construction, the very ability to either weave together or cleave apart different elements of 'what happened' (whether the history of violence ought to be considered as part of a unified account of what happened together with the killing of her husband, or as something separate), is connected to the temporality which shapes the construction of pastness (the so-called 'Kantian axiom' discussed earlier). Temporality, it could be argued, was the difference between Ahluwalia's freedom or incarceration, between adjudication constructing her as a rational agent or a constituted Battered Woman. It was the difference between the injustice of imprisoning a women who had been a victim of sustained domestic violence and the justice of mitigating the responsibility of such a victim. This offers one such reason for this creative reframing.

Another reason for this novel approach to criminal law adjudication flows from the indeterminacy of 'time-framing.' If past construction is not merely subsumptive but is rather contingent upon the time frames which are adopted, then there is an argument that this is a 'relatively unrestrained process' (as *Ahluwalia* and *Baillie* illustrate). Interestingly, Kelman describes this as the *arational choice* (Kelman 1981, 594) claiming that criminal law tends to adopt narrow time frames.[7] Indeed, to quote Lindsay Farmer's reading of Kelman, this 'has particular political implications, buttressing a particular view of free will, since it leads us to ignore earlier decisions or actions that could have an impact on our understanding of how free or determined a particular act actually was…shaped by political considerations and served certain social and class interests' (Farmer 2010, 340). Indeed, the paradigmatic Kantian rational legal subject (Naffine 2009, 64–65) loses its special character when a broader view of events is taken (Norrie 2011, 137–141). Thus temporality, specifically time-frames, are a newly under-problematised site for latent temporalities in the operation of politico-judicial choice that form the difference of subjectivity construction in law.

Further to this, if temporality is responsible for past construction and 'time-frame indeterminacy' does exist, one may reasonably ask why certain *types of pastness* are not incorporated in conventional forms of criminal law adjudication's past construction? Conventional forms of Adjudication includes certain types of past but it is 'a very particular past that is constructed by 'who done it' inquiries, judicial and otherwise' (Valverde 2015, 12). Indeed, can and does criminal law adjudication intend to capture *everything* in its past construction (Naffine 2009, 3)? Clearly there is discrimination (or 'framing out' of pastness) justified or not; a defendant summoned before a judge for killing his wife would hardly bring up remote causes such as his father's alcoholism. What about however, a young black teenager in Tottenham who assaults a police officer; is it only the transgression which is

[7] Lindsay Farmer quotes Scott Veitch saying that 'legal conceptions of responsibility are organized according to conceptions of proximity and foresight, which refer to particular roles and duties, and according to a narrow conception of foreseeable consequences.' See also Farmer, Lindsay. 2010. 'Time and Space in Criminal Law' 13, 2 New Criminal Law Review: An International and Interdisciplinary Journal 333.

relevant in adjudication's past construction or ought one to consider the pastness of discrimination that has characterised the relations between the police and the group to whom that individual belongs? Or imagine a frustrated, disenfranchised young Muslim man that commits heinous acts abroad; does adjudication ignore the harassment of him by the intelligence services (Cage 2015)? What are the qualitative variations between these different types of a past? This can, in part, be answered by describing different theories of temporality with features of those times corresponding to different types of fact that may emerge in adjudication, such as provocation (as 'a fleeting moment') contrasted against systemic harassment or police harassment (as an 'enduring condition of living').

Time

Adjudication, specifically how it determines points of fact, is contingent on the theory of time that informs a particular judicial approach and can be distinguished from other forms of adjudication on this bases, it is argued. This section outlines the theories of time that will subsequently be used to explain the distinctions between different judicial approaches in past construction. It is argued that the conventional form of adjudication in criminal law (later referred to as *abstract judgment*) is characterised by Kantian temporality and a more radical form of judgment (later, *concrete judgment*) is grounded on a hybrid of Bergsonian and Gadamerian temporality. These different temporalities produce qualitatively different types of past in criminal law adjudication which produces different types of subjects of law and can overall effect responsibility ascription.

Bergson's Durée

Interestingly, in Nousiainen's paper, when describing the two time structures operant in adjudication, she predicates them on both Bergson's and Kant's theories of time. Bergsonian philosophy in law has witnessed a healthy resurgence of late (Crowe and Youngwon Lee 2015; Mawani 2015; Lefebvre 2008). One of his most enduring contributions was his theory of time or *durée,* also expressed as 'experiential or lived time'. On its definition, Bergson wrote:

> 'Pure duration is the form which the succession of our conscious states assumes when our ego lets itself live, when it refrains from separating its present state from its former states…nor need it forget its former states: it is enough that, in recalling these states, it does not set them alongside its actual state as one point alongside another, but forms both the past and the present states into one another'. (Bergson 2012, 100)

Time as durée is a time that endures and where the whole *past is constitutive.* To conceptualise of time in this way is to think of it as the intercalation of an accumulating past into an ephemeral and dynamic present.[8] Past and present cannot

[8] Thus becoming is reality, being is mere appearance.

be delineated *stricto* sensu; to understand it as the addition of successive states is to fall into the trap of spatiality. Durée thus may be likened to a whole, rather than composed of distinct parts, and is thus antithetical to 'clock-time' or *chronologising reality* (the process of distinguishing, selecting, and placing adjacent to one another, states into a sequence that are causally related). Most significant to durée therefore, is the notion of *interpenetration.*

Bergson describes durée therefore as *qualitative* because of the uniqueness of the present experience; the past, as the accretion of former presents, consequently pigments the experience of the dynamic present. Thus no two 'presents' can be said to be the same and their difference is *qualitative* rather than quantitative (Guerlac 2006, 106–172). Unlike 'clock-time' which is divisible into uniform and separate units, Bergsonian durée is a time of motion, with an interpenetrative, accumulating and constitutive whole past and ephemeral present. It is analogous to experience and is resistant to any form of analysis which necessarily neutralises its interpenetrativeness.

Gadamer's Effective History

The features of Gadamer's temporality are taken from a creative reading of his post-Romantic hermeneutics. Gadamer rejected objective, neutral or value-free readings of legal texts (Warnke 1987, 3), instead focussing his theory on explaining what the *conditions* were for intersubjective meaning or *verständigung*. These can be understood in three ways; that interpretation is 'ontological, dialectical and critical' (Eskridge 1990, 614). Of interest is its ontological dimension.

That interpretation is *ontological* derives from Gadamer's assertion that the truth is largely independent of any method and that we are in fact interpretive beings. He adopts Martin Heidegger's historicity of our 'being-in-the-world as the forestructure of Dasein':

> We are thrown into a world whose contexts moulds us and limits our imagination and, hence, our options. Our very being is a process of interpreting our past, which is projected onto us and to which we respond…not in what way being can be understood but in what way understanding is being….interpretation is the common ground of interaction between text and interpreter, by which each establishes its being…interpreter and text are indissolubly linked as a matter of being (Eskridge 1990, 617-618).

To put it crudely, interpretation is not something one 'does', but rather something one 'is'. Unlike the *tabula rasa* of the Cartesian spectator, what shapes one's understanding of a text is one's *horizon* which is 'the range of vision that includes everything that can be seen from a particular vantage point'(Gadamer 2004, 301). This relates to what Gadamer calls the *history of effect* (Gadamer 2004, 301) in that our existence is inherently contextual such that we project this onto meaning the traditions of the world in which we are 'thrown into'.

Understanding for Gadamer is contingent on a temporality in which, like durée, the present is constantly being renegotiated by an over-hanging horizon (or past). Indeed, 'time is the productive possibility of custom and tradition aiding

understanding by illuminating what presents itself' (Regan 2012 300). An extrapolation of Gadamer therefore acknowledges the effective history as the *constitutive horizon* of the legal subject in adjudication.

Kant's Spatial Temporality

Before explaining what is meant by Kantian temporality, it is important firstly to support the claim that Kantian time would inform conventional forms of adjudication (later, abstract judgment). Kant's contribution to law cannot be underestimated. Indeed, 'in the field of law many or even most theoretical discussions have their origins- consciously or unconsciously- in Kant' (Tontti 2004, 116). *Critique of Pure Reason* deals with Kant's understanding of the knowledge of the natural sciences which bore the fruits for contemporary legal positivist thinkers attempting to establish scientific rigour to law, and from *Critique of Practical Reason* (and the adjoining *Rechtslehre*) came a secondary interest in cultivating a theory of legal science. Alexandre Lefebvre uncontroversially (McGee 2009, 481) situated three key theories of modern legal thought and adjudication within the Kantian tradition as variations of subsumptive theories of judgment (Lefebvre 2008, 5–49). For Hart, Lefebvre says his theory of adjudication is analogous to Kant's transcendental schematics where the a priori concepts are likened to Hart's legal rules, the *sense data* correspond to the pre-legal facts and the phenomena correlates to the constructions of the legal case. Dworkin's neo-Kantian timbre, manifested as reflective teleological judgment, is a creative application that adopts Kant's notion of an 'organism as a reflective principle according to which the arrangement of organs must be assumed as purposively organized if the organism is to be apprehended as such' (McGee 2009, 482). This is comparable to Dworkin's theory of law as integrity, operative as a standard against which judgments must be decided against. Finally, Habermas invokes Kant's moral and political philosophy in which a rule's legitimacy is contingent on its durability from its initial inception to its application. A 'successful application' is one that maintains this durability but presumes the cases etymology as if it had already been within the rule; what Lefebvre calls 'retrospective temporality of application discourses' (Lefebvre 2008, 42–49).

Kant also heralded a key moment in Western thinking regarding time and space (Valverde 2015, 32) in his *Critique of Pure Reason;* 'time is not an empirical concept that is somehow drawn from experience…time is the a priori formal condition of all appearances in general' (Kant 1998, 162–163). Considering time not as something that could itself be considered the object of introspection (such as categories in Kant's cognitive faculty) but which was the very condition for perception, was an important juncture. Further to authoring this critical turning point in time, Kant also established the most pervasive understanding of the legal subject in modern legal systems, as a self-causing rational agent that is able to transcend the contingencies of its experiential existence. Ngaire Naffine, responsible for one of the most thorough examinations of the legal subject in common law systems, said that 'perhaps more than any other philosopher, Kant has shaped legal thinking about the nature and legal significance of human intelligence' (Naffine 2009, 64).

Finally, Henri Bergson's critique of Kantian time as spatialized, was to rebut the Kantian-inspired *spatial presuppositions of western thought* (Guerlac 2006, 65). As the progenitor of 'Western thinking', to extrapolate his theory of time as claiming it informs conventional forms of judgment is a reasonable ascription.

So how is Kantian temporality spatial? On Kant's own terms, there was nothing to suggest that time is spatial (indeed he expressly separates the two). Read through Bergson however, to describe Kant's theory of time as spatial is to suggest that it imbues qualities of space. Spatiality is 'what enables us to distinguish a number of identical and simultaneous sensations from one another; it is thus a principle of differentiation other than that of qualitative differentiation, and consequently it is a reality with no quality' (Bergson 2012, 95). It is a 'medium which inserts intervals between them and sets off their outlines' (Bergson 2012, 98). Kant's subsumption of durée with concepts introduces qualities of space into it.

Objects in space are implicitly juxtaposed, uniform, discrete and simultaneous. The process of counting for example, cannot proceed without the imposition of uniformity and simultaneity. If I were to count black panthers, I'd have to assume their sameness and ignore that x was male, y female, z was in fact a cub and so on. This is entirely antithetical to the qualitative difference and interpenetrativeness of durée. The very act of cognition (such as counting) in the Kantian transcendental apparatus, represents durée with concepts to create phenomena through 'language, logic, mathematics, and other symbols or means' (Guerlac 2006, 62). Indeed, Bergson's most searing criticism of representing time is levelled towards language as it 'alienates us from direct experience' (Guerlac 2006, 69). Any representation which necessarily involves cognition, will *always* introduce space into time. To put it succinctly, 'time is lived, but the second we speak of it, it is killed with representation. Indeed, its ephemerality resists analytic intervention' (Mawani 2015, 256). Unlike durée and the effective history then, spatial time's past is separable.

To summarise, spatial temporality can be understood as 'reflected upon durational time', mediated and represented to subsequently introduce properties of divisibility, simultaneity and uniformity. Contrastingly, durée is a resistant-to-division, experiential time of motion, with an interpenetrative, accumulating and constitutive past and ephemeral present. Similarly Gadamerian temporality, like durée, is where the present is constantly being renegotiated by the entirety of an over-hanging horizon (or past).

Typologies of Pasts in Criminal Law

The claims at the beginning of the paper were that different types of judgment can be distinguished from one another based upon the theory of time which informs it. Further, the paper also declared that whatever theory of time latent in the type of judgment, produced particular types of facts, or more accurately, pasts and subjects of law which could affect overall ascriptions of responsibility. We can divide judgment into two forms; *concrete* and *abstract*. Concrete adjudication is sympathetic and 'tempered not just with mercy but also by knowledge: not only of the conduct in question and its context, but knowledge of our character…in all

our particularity…we are not strangers but intimates, with a history' (Lucy 2009, 22). Ahluwalia on the BWS limb could be described as concrete judgment. Contrastingly, abstract judgment 'judges us (1) not in all our particularity but as identical abstract beings; (2) by reference to general and objective standards equally applicable to all such beings; (3) the application of these standards being mitigated only by a limited range of exculpatory claims' (Lucy 2009, 23). Ahluwalia on the failed provocation could be described as abstract judgment. The contrasting theories of time will explain these ontological differences and the types of past they produce.

Pastness and Their Relation to Time

The aim of this section seeks to explain what *types of pastness* (facts) Gadamer, Bergson and Kant's theories of time produce in adjudication's factual construction. In abstract judgment, past construction is characterised by the *spatial past* that share features of Kantian time. Concrete adjudication however, is epitomized by qualitatively different types of pastness that is collectively described as *variegated*. The variegated past is a tripartite of different pasts, including *the spatial*, but also *the enduring* and *the sedimented past,* with the latter two sharing features of Bergson's durée and Gadamer's effective history. A case which has been decided in a manner of concrete judgment therefore can be identified by reference to the types of facts it considers relevant in the rendering of what happened.

The *Spatial Past* are facts which are initiated and ceased by 'fleeting moments' or 'instants', for example *mens rea* and *actus reus* elements- what we may typically refer to as causes. In the spatial past, the difference between these instants are measureable in units of time that are uniform and separable (hours, days, years). In other words, they have all the features one would expect of space (divisible, uniform, juxtaposed, simultaneous etc.). The spatial past can thus vary by *degree* of calculable units of clock/calendrical time that may undergo broadening along its 'spatial axis' for example, in a case involving a qualifying trigger in a Loss of Self Control defence- this is what Kelman and Nousiainen refer to as narrow and broad time frames.

Other features of the spatial past can be illustrated by contrasting it with other *types of pasts* such as *pre-existing conditions* (such as insanity, battered woman syndrome) or *societal conditions* (such as social or economic duress). Collectively *Conditions of Living*, which will be taken up when considering the *variegated past*, cannot be considered *past* in the same way as the spatial past. This is because when the spatial past was happen*ing* (i.e. *mens rea*), these conditions of living listed above *were* and continue to *be.* In other words, conditions preceded the spatial past when the spatial past was present. In that sense, conditions are not fleeting like the spatial past, but *enduring* (like durée); and though they are a type of pastness, unlike the spatial past, this is *not* by virtue of adjudication's positioning *ex post*- thus importantly, another feature of the spatial past is that it derives its pastness purely by virtue of adjudication's positioning *ex post.*

Legal subjectivity can innovatively be interpreted as a *temporal* construct of the natural persons. When a case is *abstractly* decided, the spatial past *contains* the natural persons and allows for it to be separated from other pasts (all features of

space- divisibility, separability etc.), producing the reasonable person standard whose conduct is verified only within the confines of said legal event. In effect, the natural person only *appears* within the time-frame of the spatial past (i.e. when *Ahluwalia* began to pour petrol on her husband) and is what Kelman understands by the narrow framing that is conducive to the 'free-will' paradigm. Outside of these triggers, the natural persons does not legally exist and is not able to engage their legal rights as 'right regimes are therefore often conceived and implemented through temporal mechanisms that rely, at least, on a 'before' and an 'after.' (Grabham 2010, 108). Outside of these indexes, they cease to be a rational *legal* subject. *The legal subject therefore can be redefined as the containment of the natural persons within the strictures of the spatial past. It is as if they are born, killed and reborn at each moment* with no enduring past (i.e. conditions of living). In the fullest embrace of abstract adjudication therefore the *delayed appearance* of the natural person means that determining responsibility will consider the action only within the confines of the spatial past (ignoring *conditions of living* such as societal constraints, historical transgressions or pre-existing physiological or mental conditions).

The *Enduring Past*, not surprisingly, are facts characterised by enduring qualities. Unlike the spatial past which is composed of *instants* in time (qualifying trigger, *mens reas* etc.) and whose pastness is explained by virtue of adjudication's positioning *ex post*, the enduring past is altogether different. The enduring past precedes (or more accurately *pre-exists*) the spatial past when it was happen*ing* and, resembling the accumulatory nature of Bergson's durée, it is not a fleeting moment, a point in time that starts then ceases (such as qualifying trigger). Take *Ahluwalia* for example. It would be unusual to say that the fact (or past) of the defendant's Battered Woman Syndrome was a *point in time* and that it did not pre-exist the spatial past in question (i.e. pouring petrol). It seems entirely intuitive however to describe it as enduring and having pre-existed the spatial past in question. This is how pre-existing *conditions* manifest in the factual rendering of adjudication's backward reasoning. Notably, this particular fact of a defendant (BWS) is qualitatively different from say a qualifying trigger, for the reasons that the former is enduring and the latter is fleeting; in other words the former embraces the characteristics of durée, while the other embraces the features of spatial time.

The third and final *sedimented past* is a type of pastness which develops Gadamer's effective history as the situational context of the natural persons. In his anti-method approach, Gadamer describes his hermeneutical exploration as providing the *conditions for understanding*. Whereas the spatial past is glued together by causal associations, the sedimented past introduces *conditions of living* to enrich the factual rendering of what happened. The term sedimentation described as 'the deposit of the subjects past interactions with its physical and social situation' (Winter 1990, 1488). Rosemary Coombe, in describing what Gadamer means by context says that, 'it would seem to include historical and social factors' (Coombe 1989, 603).

To expand on how the variegated past introduces *conditions of living* into adjudication's factual construction, Alan Norrie's account of the distinction between causes (spatial past) and conditions (variegated past), in his effort to problematise

the causal and voluntary underpinnings of criminal law, is particularly useful. To help illustrate this point, he refers to the Scarman Report published in 1981 following the Brixton Riots and quotes him saying 'deeper causes undoubtedly existed, and must be probed: but the immediate cause of Saturday's events was a spontaneous combustion set off by the spark of one particular incident'(Scarman 1981, 8932). Norrie then goes on to analyse the report:

> Which factor 'makes the difference', the 'deeper causes' or the 'immediate cause'? If those 'deeper causes' (relating to poor social environment, racial discrimination, police harassment) are part of the 'normal conditions of life in the late twentieth-century, are they for that reason excluded from our account of what caused the riot? It would perhaps be convenient for the law, with its emphasis on the individual, if they were. Elsewhere in his report, Lord Scarman did draw a distinction between the 'causes' and the 'conditions' of the riots (1981,16). This was shortly before he argued that the conditions of young black people cannot exclude their guilt for grave criminal offences which, as causal agents, they have committed (Norrie 2011, 137).

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

*Cause*s and *conditions* can be characterised as qualitatively different types of pastness which are contingent on particular theories of time- *hence typologies of past*. In effect, pasts can be 'temporally distinguished' and are indicative of the types of pastness that are engaged in adjudication. Conditions are all but elided in conventional forms of judgment, arguably as they have potentially exculpatory effect that destabilises the rational underpinnings of the subject of law. Concrete judgment, tempered not just with mercy but also by knowledge: not only of the conduct in question and its context, but knowledge of our character…in all our particularity, prefaced by a confluence of Bergsonian–Gadamerian temporality, produces a situated subject of law (Winter 1990, 1486) through the production of types of pasts in which the radical singularity of the subject emerges. Abstract judgment which judges us not in all our particularity but as identical abstract beings,

and which may now may be referred to as spatially-temporal adjudication, produces a subject of law that transcends these very differences, which is *born, killed and reborn at each moment* to construct the paradigmatic 'rational and so the legally competent…classic contractor' (Naffine 2003, 362). Thus time is the difference between the exclusively constituting rational subject of law and the constituted legal subject.

Lawful Excuse, Temporality and Responsibility

In *Ahluwalia*, temporality allows us to reveal the factual differences in the trial, appeal and re-trial. At trial, conditions were elided in adjudication's factual narrative to produce particular agential configurations of the legal subject that apportioned it responsibility. In the re-trial, the Battered Woman Syndrome defence was establishing using a concrete form of judgment, predicated on Bergsonian–Gadamerian time, that allowed for the emergence of the enduring past. Had the adjudicative approach been abstract, predicated upon Kantian spatial temporality, only pasts which were 'fleeting moments' and causal would have been determined as part of the narrative and BWS would not have been established as a defence.

Another case that illustrates the difference between abstract and concrete judgment (the qualitatively different types of past and, fundamentally, temporality) is the crown court judgment of *R v. Saibene and others*[9] which can be distinguished from an identical case heard some 20 years prior, *R v. Hill* and *R v. Hall*[10] (hereafter *Hill and Hall*) which unlike *Saibene*, unsuccessfully invoked the defence of lawful excuse. It is claimed that the different outcomes may be explained by the different forms of judgment adopted which differntially produced constructed subjects of law and apportioned responsibility (or didn't) accordingly.

Hill & Hall involved two appellants[11] charged under s.3 of the Criminal Damage Act 1971, after having been found with a hacksaw and admitting to its intended use to saw through part of a fence of the US Naval Facility at Brawdy. They attempted to justify this attempt under s.5 lawful excuse. In order to satisfy the statutory defence that the damage amounts to protection, the courts have to establish what the defendant's honestly held belief was (need not be justified), that the property was in immediate need of protection, and that the means adopted were reasonable having regard to all circumstances.

Ms Hill's reasoning was that the damage was directed against the naval base in an effort to force the UK to abandon their nuclear weapons programs and prevent destruction to their property and their neighbours. The trial judge directed the jury to convict on the bases that there was a lack of causative relationship between the act and the alleged protection such that it could not *objectively* be seen as a protective

[9] *R v. Saibene and* other (Crown Court, 2011); 'Judge Bathurst-Norman: the full summing up' (The Jewish Chronicle, 15 July 2010) <http://www.thejc.com/35771/judge-bathurst-norman-full-summing> accessed 9th January 2015.

[10] (1989) 89 Cr. App. R. 74.

[11] The cases were factually identical and so the appellate judge dealt exclusively with the evidence of Ms Valerie Hill.

act; and that she could not be said to have believed that the property was in need of immediate protection. An application to appeal was brought on the grounds that this was a purely subjective test, which is certainly what the wording of the statute appeared to suggest.

Lord Lane CJ paraphrased and accepted what constituted Ms Valerie's belief and sought to rely upon the test that 'whether the defendant's actions on the facts believed by them could constitute protection, was a matter of law'.[12] Lord Lane CJ quoted the trial judge citing, 'the causative relationship between the acts which she intended to perform and the alleged protection was so tenuous, so nebulous, that the acts could not be said to be done to protect viewed objectively'.

On the immediacy element, the judge was similarly critical. At the trial stage, when probed about this element of the threat, Ms Valerie Hill replied by outlining an indeterminate, speculative threat which had not materialised at the time of the appeal.[13] It could not be said as a matter of law, that their actions amounted to protection of property belonging to another on the bases that the proposed action was too remote from the defendants' eventual aim (i.e. it was too remote into the future) and it also lacked immediacy. The application was refused.

In establishing the causal relation between the intended criminal act and the threat (immediacy), the beliefs of the risks that were attributed to Ms Hill were entirely speculative.[14] By speculative, it is meant that the responses Ms Hill gave were hypothetical, future-oriented and would find considerable difficulty being woven into a narrative of what happened. Nothing in her evidence attempted to engage the variegated past, such as previous incidences that would suggest the likelihood of an attack (much like in anticipatory self-defence claims) or other pre-existing conditions which may be responsible for her intent to commit criminal damage; instead the arguments were anchored primarily in an *indeterminate future*. Even more problematic is that the threat was still yet to actualise, making the causal link infinitely more tenuous and making it doubly difficult to establish immediacy. A reasoning that is not rooted in pastness but in *speculative futures*, renders the representation of the natural persons problematic in ascribing responsibility. The absence of the variegated past, predicated on Bergsonian–Gadamerian time, is what is claimed to have been the reason for the failure of the defence. Though 'threats' are based upon indeterminate futures, their likelihood can often be contextualised by engaging the variegated past. A variegated past which suggested the likelihood of

[12] (1989) 89 Cr. App. R. 74 [77]- The appellate court agreed with the decision in the case of *Ashford & Smith* (unreported) which followed the court in *R v. Hunt* (1977) 66 Cr. App. R. 105 in which the appellant set fire to a guest room in an old people's home to draw attention to the defective fire alarm system; that the first limb of s.5(2)(b) of the defendants belief was a subjective test and that the second limb (despite contestations from the advocate) of determining the causal relation and immediacy of the speculative act was an objective test.

[13] (1989) 89 Cr. App. R. 74 [*77*].

[14] Interestingly, in the unreported crown court case of 'The Kingsnorth 6' which successfully invoked the lawful excuse defence for six environmental activists who had climbed a smoke stack at a coal station and wrote the word 'Gordon' on the side, expert advice testified that there was an immediate need to protect property endangered' by rising sea levels (a constitutive horizon or sedimented past), rather than relying upon a speculative future threat. See also Harvey, Richard. 2010. 'Climate change in the courtroom' *54,* Socialist Lawyer, *20–25.*

the threat, such as similarly previous incidences of attacks on American navel basis, *may* have, this paper believes, strengthened the relation between the speculative threat and the appellates' intended action, not on causative grounds, but situating it within the condition of the threat from a constitutive horizon. Otherwise Ms Valerie Hill is existent only from the point of approaching the naval base ('delayed appearance') and dissipates into a speculative future. Therefore, with the absence of conditions of living emergent in the variegated past, the rational legal subject is not destabilised and notions of responsibility cannot be seriously challenged.

The *Saibene* case could be said to overcome this limitation, by adopting a concrete adjudicative approach (rather than the abstract approach in *Hill & Hall*), by rooting the relation between the act and its causal relation to an immediate threat, in the variegated past. After having exhausted all democratic means, the defendants broke into an American defence company, EDO MBM (hereafter EDO), throwing filing cabinets and computers out of the factory windows causing damage in the region of £180,000. This was seen as a last resort in response to the 2008/2009 war in the Gaza Strip, *Operation: Cast Lead*. EDO was targeted because it provided component parts for Israeli F-16 jets that were crucial in the military operation. All seven defendants were charged with conspiracy to commit criminal damage but successfully invoked the defence of lawful excuse. The claim is that this can be explained with the judge's appeal to the variegated past, convincing the jury to acquit.

The similarities to *Hill and Hall* are notable. Both included acts (and intended acts) of civil disobedience, in pursuits purported to protect property belonging to another, with *Saibene* attempting to stifle the Israel Defence Forces' ability to damage property in Gaza. *Saibene* could have had its pasts similarly constructed along the lines of *Hill and Hall*. However, the *first reconstruction* of the pasts could be said to have broadened the legal event, or adopted a broader time frame, based on the evidence that there was prior agreement (hence the conspiracy charge). However, the broadening of the legal event is still only operant within the spatial past. How the case emerges as significantly different from the previous case, and hence why the lawful excuse defence succeeded, is that it engaged the variegated past too (predicated on a non-spatial temporality).

The manner in which the lawful excuse defence in *Saibene* constructed its pasts, and which was different from the aforementioned case, was the necessary engagement of the variegated past which situating the civil disobedience within the *conditions of living*. The judge spent ample amount in his summing up engaging the sedimented past. In an effort to encourage the jury to 'look at the evidence coldly and dispassionately', he stated

> I am going to start with the background relating to Israel and Palestine and to the evidence which points to the war crimes being committed by Israel in Gaza…[UNSC]resolutions condemning Israel on no less than forty occasions…the barrier, and the judgment of the International Court holding it illegal and to stop building settlements in the West Bank are simply ignored…so with that broad picture in mind let me concentrate on Gaza…It is surrounded by a fence. That fence is patrolled by Israeli tanks, planes fly

> overhead…Israel decides what goes in and out…[they] impose a land, air and sea blockade…the Dahiyah doctrine, namely that Israel would apply disproportionate force and cause great damage and destruction to any village…Israel's attack on Gaza involved the use of disproportionate force…in three minutes 40 seconds, 250 Gazans were killed on the first day…the Al-Quds hospital was bombed. Hospitals, ambulance depots, mosques, United Nations compound, industrial and agricultural sites, the sewage and the electricity power plants were all targeted and damaged or destroyed.[15]

Assuming that the variegated past had not been engaged (or instead predicated upon speculative futures as in *Hill & Hall*), there would be nothing to substantiate that property in the Gaza Strip was in need of protection. To smash up an arms factory and cause £180,000 worth of damage for the sake of it or premised on a non-actualised threat, would seem unreasonable; but within the context of the war in Gaza (the sedimented past), the purported criminal act was understood differently. The context of the war in Gaza was a necessary component of that pastness in which to understand the natural persons as constituted and the resultant enriched factual narrative revealed to the jury, changed their ascription of responsibility. This is an example of concrete adjudication premised on Bergsonian–Gadamerian time that engages qualitatively different types of pasts, in which conditions of living emerge. This, it is argued, produced a subject of law that was constituted by its (sedimented) past, as *Ahluwalia* was constituted by her (enduring) past and effects ascriptions of responsibility. Such pasts were absent in the analogous case of *Hill & Hall* and could be responsible for the failures of the defence for the variegated past had elements of exculpatory effect by situating the subjects of law.

Conclusion

Temporality helps to illustrate the different types of facts in adjudication, specifically those types of facts with partial exculpatory effect which are typically ignored in criminal law adjudication. In this brief but arguably adventurous reading of case law and theory, facts in adjudication have been distinguished with reference to the temporality upon which there are contingent. Causes are fleeting in a way that conditions (BWS, social duress, the 'Gaza war') are not. Causes are past merely by virtue of adjudication's positioning *ex post*, though the same cannot be said for conditions. The differences between these pasts are accounted for by the contrasting theories of time which distinguish the different forms of judgment. Abstract judgment's factual narrative is primarily concerned with immediate causes whereas concrete judgment is *also* invested in including conditions.

The differences between these antipodal forms of judgment, understood through temporality, are important for both normative ascriptions of responsibility and to illustrate what is ignored factually in conventional forms of criminal legal judgment.

[15] ibid 5–12.

It is through time that it is made possible the general ignorance of conditions of living in adjudication's construction pf past. Time has creatively been used to showcase the difference between abstract judgment and concrete forms of judgment. An abstract legal subject propounds sameness and is conducive to formalist forms of adjudication where cases and the subjects within those cases are congruous. A concrete legal subject however, expresses difference at every turn, emergent in its Bergsonian–Gadamerian countenance. It presents the subject of law as permeable and thus constituted and is conducive to a radically pragmatic form of adjudication.

Importantly however, concrete judgment is not about including all potentially mitigating factors through a richer retrospective narrative of 'what happened', but to observe what is 'missed out' in conventional forms of judgment and how an enriched narrative *may* mitigate responsibility. The inclusion of the sedimented past in concrete judgment's factual narrative poses tough questions *beyond law* about the very fabric of society. Indeed, Norrie refers to these as 'deeper causes'. However, just because they are part of the 'normal conditions of life in the late twentieth-century' (Norrie 2011, 137), Norrie resists the idea that they should be excluded from adjudication's (specifically abstract judgment) account of what happened. Temporality as a novel understanding of fact/past construction in adjudication illustrates the process of abstract judgment ignoring so-called 'normal conditions' (emergent in the sedimented past) in its determination of what happened. By conventionalising abstract judgment which typically ignores these categories of fact, it highlights the role that abstract adjudication has in normalising potentially oppressive conditions through its ignorance of non-spatial time.

Acknowledgements An earlier version of this paper was presented at the Critical Legal Conference 2014 and later, in the Society of Legal Scholars Conference 2015. I would like to thank those that participated in the discussion.

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