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A Rhetorical Matter of Life and Law: The Speculative Futures of (Bio)political Reproduction

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Abstract

This essay argues that the “materiality” of life and law are today technological artefacts of a biopolitical project, and that sexual-reproductive and legislative boundaries are the boundaries around which power coheres and materializes—making life law’s matter, an effect that is slyly taken up as legal “cause.” I offer as case studies readings of two purposely incommensurable texts: Milan Kundera’s early political fiction, *The Joke*, and the contemporary fertility industry, an instantiation of biopolitical techno-science. Bringing into tension the “materiality” of life and law across these two sites, I hope to surface some of the vernaculars of (bio)political power—rhetorical matters of historical, political, socioeconomic, and technological concern that nevertheless claim the objectivity of “matter.” Both texts also concern reproduction—sexual, artificial, cultural, political—and how it is deployed to promote a certain ideology of citizenship and to regulate political “freedoms.” While Kundera’s novel, written in the mid-1960s in Czechoslovakia, represents a critique of “old” materialism in the reproduction of Communist State power, here, in juxtaposition, Kundera’s fiction occasions my critique of (legal) “new” materialism—as neoliberal and biopolitical investment in the speculative futures proffered by the fertility industry. In both cases, I argue, biopolitical power exploits and abuses the figure of “hope”; and yet, hope is not altogether foreclosed if we hold open the possibility for a literary reading of life and legal rhetorics.

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1 Introduction

If this essay were to address a legal or juridical object, that object would be life itself. And if I concerned myself with law's power over life, in a particular time or place, according to a specific piece of legislation or judgment, I would certainly fail to address life—as matter, as object, or otherwise—and how life matters for us. Life is not just what we are—as living beings—or what we hold in common with other living things; life holds moral value for us, it conditions—and it *is* the condition of—law or any legal materialization, any materiality. This contribution does not take a legal or juridical 'object', but rather enquires into the rhetorical and mediatized conditions of possibility for 'life' to appear *as* a legal 'matter'—a matter that wears the mantle of a certain objectivity. And it does. I write in the context of a spate of harrowing U.S. legislation enacted to restrict women's reproductive rights, frequently voiced in the name of life. How such life matters—and whose lives matter—is here as elsewhere perhaps as much about religious belief and political ideology as it is about biology, citizenship, women's rights, men's rights, the rights of the unborn, and so on. Indeed, 'life' is at once the most molecular of phenomena and the most angelic; but law, too, has many

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faces, many points of application and production. In what follows, I take ‘law’ and ‘life’ as capacious terms in correspondence—part of the wider rhetorical and media-ecological context for the (re)production of human subjectivity. To invoke several lines from Derrida (1991), this wider context should be understood as ‘everything that links the “subject” to conscience, to humanity, to history ... and above all to the law, as subject subjected to the law, subject to the law in its very autonomy, to ethical or juridical law, to political law or power, to order (symbolic or not)...’ (99). To these many faces of law we must add the biopolitical technologies that (re)mediate each of these intersecting and ramified fields of subjectivation.

Lives—whether factual or fictional—are undoubtedly conscripted by law, sites of law’s many applications and productions; and yet ‘life’ also conscripts law in significant ways. Whatever the term signifies and however it matters for us, ‘life’ mutates historically, politically, according to fashion, and circulates memetically in and across our media networks. Law is subject to this fluidity, I contend. Far from a sovereign power whose prerogative is to ‘take life or let live’, increasingly law and life are technological artefacts of biopolitical power—a power that ‘makes live and lets die’ (Foucault 2003). This paper offers readings of two ‘case studies’ or, rather, ‘sites’—one factual, one fictional—and brings them into correspondence. In doing so, I hope to surface some of the vernaculars of biopolitical power, across law and life—rhetorical matters of historical, political, socioeconomic, and technological concern that nevertheless claim the objectivity or materiality of ‘fact’. Both sites index the circulation and (re)production of power, one focusing on the fertility industry as an instantiation of biopolitical techno-science, the other through a piece of political fiction written by Milan Kundera in the mid-1960s. Drawing on the work of Derrida (1987), I read both sites through the conceit of the ‘postcard’—a trope whose transmission is neither quite public nor private, subject to fictionalizations as well as factual repercussions. While Kundera’s novel, *The Joke*, has little to do with the fertility industry as we know it, it nonetheless speaks to political production and reproduction, blurring the public and the private, and enlisting them as regulative matters of moral law, political

law, power, and social order (symbolic or not). The fictional genre has the added benefit of providing us some critical distance—temporally, politically, geographically—from which we might reflect on the political powers, and ruses, of our contemporary moment. But more than this: Kundera's novel stages a critique of the political atrocities of an 'old' materialism, in its Communist zeal to abolish private property. This resonates uncannily, I suggest, with neoliberal 'new' materialism and its ideological 'privatization' of life, as we see in the fertility industry. This essay is situated in the dissonant spaces between these two political ideologies, legal regimes, and instantiations of 'life itself'.

My claim throughout is that the 'materiality' of law and life are today technological artefacts of a biopolitical project, and that sexual-reproductive and legislative boundaries are the boundaries around which power coheres and materializes—making life law's matter, an effect that is slyly taken up as legal cause. I am interested in biopolitical technologies and the regulation of 'life' for a number of intersecting reasons, which are fleshed out in the tensions and juxtapositions of my two 'sites'. Both 'sites' concern reproduction—sexual, artificial, cultural, political—and how it is used to promote a certain ideology of citizenship and to regulate political 'freedoms'. Power in this guise is less about a coherent *raison d'état* in the model of top-down governance or will-to-power, signalling instead diffuse *technologies d'état* that are today overwhelmingly privatized, highly mediatized, and driven by neoliberal ideology. My deepest concern is that the 'materialities' of law and life are defined in advance through (bio)political and technoscientific rhetorics—defined in advance, or better, *as* an advance on (and investment in) the 'hopeful' futures that are meant to seem within our wilful grasp today.

This essay first introduces the trope of the 'postcard' (Derrida 1987) as a (re)productive figure in generative transmission. Alongside Derrida's 'postcard' it then reads the postcard that is pivotal to the plot of Kundera's political novel. It then turns to select 'postcards' from the fertility industry to advance a critical political argument about the manipulation of hope in the speculative futures of neoliberal

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techno-science. Drawing on my correspondent readings of both ‘sites’, the following section addresses the rhetorical matter of law and life, arguing that new (legal) materialisms falter in at least two related ways: temporally and rhetorically. That is, the concept of (legal) materiality cannot quite account for speculative futurity or for the generative agency of its own language, which, I contend, rhetorically constitutes legal materiality without itself being a legal ‘matter’. The final section returns in refrain to my juxtaposed sites to offer a close reading of two juxtaposing scenes from Kundera’s novel. I argue for the significance of these juxtapositions for the biopolitical understanding of fertility in today’s neoliberal milieu. My argumentative style in this essay is to write through fiction, rather than in a strictly propositional form: this is a performative gesture that refuses to close up the space—the ‘void’—between my two ‘sites’ and to permit their ethical collision.

2 Postcards

Throughout *The Post Card*, Derrida admits his obsession with a certain postcard that served both as occasion and writing ‘material’ for his own postcards from Oxford to Paris in 1977–78, and for his own reading and ‘raving’, as he puts it—*la délire*, or the ‘unreadable’—of its scene, which he confesses he finds ‘obscene’ (see Figure 1). The image depicts Plato standing closely behind Socrates, who is seated at a scrivener’s table. The placement of the philosophers inverts the conventional and longstanding relation between master and disciple: we have been taught that Socrates spoke whereas Plato later fictionalized Socrates’s speech, his life and death, in writing. No surprise that Derrida was delighted to find such an artefact. His comments on this postcard—written on countless copies of them—are worth glossing in this context: ‘I tell you’, Derrida writes, ‘that I see *Plato* getting an erection in *Socrates*’ back and see the insane hubris of his prick, an interminable, disproportionate erection ... sliding, still warm, under *Socrates*’ right leg’ (1987: 18). The insane hubris involves the ‘emission of sense or of seed’, Plato’s power over Socrates through his writings (themselves ‘postcards’ of sorts), and the power of the written word across our media ecologies of production

and reproduction. ‘Imagine the day’, Derrida continues,

that we will be able to send sperm by post card, without going through a check drawn on some sperm bank, and that it remains living enough for the artificial insemination to yield fecundation, and even desire. (1987: 24)



Figure 1: Plato and Socrates, the frontispiece of *Prognostica Socratis basilei* (13th c.), by Matthew Paris

We are meant to imagine that this day has arrived, and as I argue below, the fertility industry materializes Derrida’s metaphor. The postcard itself is a curious reproduction of a frontispiece from a thirteenth-century fortune-telling book—an early technology of speculative futures. Writing from one such future, and reflecting on this image, Derrida suggests that the postcard—in its specificity, but also as metaphor—inverts the generational transmission that we have always held as true. The ‘charter’ or the ‘contract’, ‘which quite

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stupidly one has to believe', writes Derrida, runs as follows: 'Socrates comes *before* Plato, there is between them—and in general—an order of generations, an irreversible sequence of inheritance' (1987: 20). And yet this 'irreversible' sequence, the temporality of generation, is as it were inverted by the technologies of (re)production, old and new. The alternations take their turns. And yet this intermediation is difficult to grasp, as N. Katherine Hayles (2005) writes:

The contemporary indoctrination into linear causality is so strong that it continues to exercise a fatal attraction for much contemporary thought. It must be continually resisted if we are fully to realize the implications of multicausal and multilayered hierarchical systems, which entail distributed agency, emergent processes, unpredictable coevolutions, and seemingly paradoxical interactions between convergent and divergent processes. (31)

A temporal destabilization of generational relations, of genetic code and moral code, would be dismissed by staunch materialists as a joke. But any joke is in the timing and the telling—in its transmission, its reception, and (especially) everything in-between.

Derrida's postcard imposed itself on me as I read Milan Kundera's 1967 novel, *The Joke* (1992), in which the plot hinges on the reception (or interception) of a postcard intended as a joke. In the 1960s, this book had for two years been kept from publication in Prague by Communist censorship, not for its inclusion of a fictional postcard, but for the political message it implied despite its status as a work of fiction or a 'joke'. On my reading, and in my use of Kundera's fiction here, *The Joke* helps us to read our contemporary political moment, and to take some critical distance from it. The novel's fervent young protagonist, Ludvik, a student leader in the Communist Party, finds himself, to his horror, 'excommunicated' from the Party, expelled from university, socially ostracized, and imprisoned for many years in a labour camp for writing a postcard—a joke—to his would-be girlfriend, Marketa. Marketa was away at a two-week Party training course, a summer retreat intended to indoctrinate students in the tactics of the revolutionary movement. Her political zeal ostensibly fortified, she wrote to Ludvik full of gushing

enthusiasm for the programme, praising the early-morning calisthenics, the talks, and the 'healthy atmosphere'. This may have been a coded script. But Ludvik, infatuated and naïve and sexually frustrated (a self-confessed 'skirt-chaser'), was overcome with jealousy and sullen that she was not with him. 'I quite agreed with what she said', he narrates,

I too believed in the imminence of a revolution in Western Europe; there was only one thing I could not accept: that she should be so happy when I was missing her so much. So I bought a postcard and (to hurt, shock, and confuse her) wrote: 'Optimism is the opium of the people! A healthy atmosphere stinks of stupidity! Long live Trotsky! Ludvik'. (1992: 34)¹

Is this message a matter of libidinal cathexis, insane hubris, phallic emission, or something else? Joke or no joke, its delivery misfires, and its misdelivery is incendiary.

Ludvik's postcard is intercepted and scrutinized. What follows might be described in today's terms as a right-wing troll storm, using a Party platform and mobilizing media connections. Shunned and demonized by his former comrades, Ludvik finds himself interrogated by the District Party Secretariat, and eventually defending himself in what proves to be a kangaroo court. They recite to him his postcard to Marketa, to which he replies, 'Comrades, it was meant to be funny'. 'Do you consider it funny? one of the Comrades asked the other two. Both shook their heads'. Ludvik protests, 'it was just a few sentences, a joke, I didn't give it a second thought. If I'd meant anything bad by it, I wouldn't have sent it to a Party training course!' 'How you wrote it is immaterial', his Comrades respond. 'Whether you wrote it quickly or slowly, in your lap or at a desk, you could only have written what was inside you. That and nothing else' (37–38).

Kundera's lines above strike me as profoundly contemporary: the truth of fiction in direct correspondence with the fiction of our truth. We might parse these lines in the language of identity politics, where one's identity authorizes in advance—and demands—a certain speech and action, and conversely, where one's speech/acts are always already inexorably tied to one's identity, and subject either to privilege or a

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police-function, approbation or admonition. Lauren Berlant (1999) describes identity politics as a 'feeling politics', a direct correspondence between affect and truth: 'the notion that the feeling self is the true self, the self that must be protected from pain or from history, that scene of unwelcome changing' (56). The postcard is material evidence of desires 'inside you' that cannot be disavowed—that and nothing else. Nobody 'gets' the joke because it is on them: pious obedience to the Party line can be no laughing matter, or, in more contemporary terms, one's *identity* can be no joke, an emission of sense or of seed: it must be reproduced, disseminated, in the vulgar credos of the day. In the postcard, on it, the public and the private enter into confusion and, ultimately, fusion. Ludvik says, 'I came to realize that there was no power capable of changing the image of my person lodged somewhere in the supreme court of human destinies; that this image (even though it bore no resemblance to me) was much more real than my actual self; that I was its shadow and not it mine' (50). This is a socialist aphorism *and* an identity politics. Another of Kundera's characters describes a more ardent Communist comrade: 'he never tired of repeating that the new man differed from the old insofar as he had abolished the distinction between public and private life' (17). As I suggest in the next section, this distinction has been abolished for us by virtue of biopolitical technologies, (social) media, and a neoliberal ethic.

3 (Re)producing hope

Consider for a moment what I shall call digital 'postcards' from representatives of the fertility industry—several random screenshots gathered from websites discovered through simple Google searches. Figures 2 and 3 hail from India: take note of the complexion of hope and happiness that each purveys. As Valerie Hartouni (1997) has noted, fertility and motherhood are predominantly represented as white (45), though increasingly this is a matter of reproductive tourism, appealing to a clientele themselves imagined to be western and white.



Figure 2: Screenshot from www.ivfgenetics.in



Figure 3: Screenshot from www.fertility-clinic.in.



Figure 4: Screenshot from www.christcenteredmama.com.

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Hope and/as life are inscribed in the Christian-evangelical fertility narrative as well, with messaging resembling a postcard or partisan placard (see Figure 4). The examples are legion and could be multiplied. It is from within this media ecology, I argue, that we must read the fertility industry, its hopes and potential harms. For the techno-scientific aspirations of fertility do not stand in isolation from the innumerable mediatizations of race and face, of desirable futures, of citizenship, of law and liberal human rights discourse, or of the myriad value scripts that shore up and normalize a certain neoliberal biopolitics, an ontology by which some will be ‘made’ to live, brought to life and light, while others will be left to perish on the dark margins of technological ‘progress’.

Herein lies the differential and discriminatory power ‘to make live and let die,’ Michel Foucault’s (2003) well-known definition for biopolitics. All lives do not matter, it would seem, or their matter and mattering do not obey the same scripts: some will be made to live, others left to die. As Kafka once quipped, ‘There is plenty of hope—only not for us’. It is hardly remarkable, then, that fertility clinics capitalize (on) a hope as ostensibly innocent as a child’s, but selectively destined for and marketed globally to a clientele who can afford fertility services. Each ‘postcard’ bears distinct addresses and addressees. In Cornelia Vismann and Markus Krajewski’s terms, they are ‘transfer media’, which are legal in their own right: ‘Law relies on transfer media and yet is itself a transfer system; it transfers rights’ (2007: 91). However, I understand these media not simply as transference nodes in an economy of (legal) rights. Rather, they wield the rhetorical and transitive power to produce subjects *of* rights, subjectivity, or legal standing ‘before the law’, to invoke Kafka once again. Polyvocal and itinerant across our media ecologies, these ‘postcards’—much like the services they advertise—are agentic technologies, shaping postures, attitudes, expectations, desires, and perceptions. They are relational yet not necessarily causally related; it is difficult to trace their interstitial effects, repercussions, and pedagogies. They are not simply unrelated snapshots lacking frame or context. They constitute, rather, a *fictional* exchange within a wider marketplace of speech/acts that perform—in

and as correspondence—a certain hope and, often, a nostalgia that hails us, offering discrete yet syncretizing sites of affective identification.

In my small selection of ‘postcards’, just as with Derrida’s and Kundera’s, it is as if the effect ontologically *precedes* the cause. In other words, that which is artefactual and counterfactual appears as a priori materiality or fact. Much as Plato’s writings generate Socrates, or Ludvik’s postcard predestines him as the political enemy he will become, for each fertility industry ‘postcard’ there is a corresponding addressee who is already conscripted, mobilized, and haunted in and by that address—even as this mobilization and generation are eclipsed, obscuring their agentic and generative traces. For the claim here is not simply about biological reproduction, but rather about the reproduction of reproduction itself, and how this matter is transmitted, instilled, and symbolized as ‘hope’, or, in the fullness of time, as future-matters of legal custody, genealogy, inheritance, filiation, objecthood. As Derrida writes (once again a postcard), ‘A child is what one should not be able to “send” oneself. It never will be, never *should* be a sign, a letter, even a symbol’ (1987: 25). Every loving parent locked in a custody battle for their child knows the pain of legal objecthood. And yet the fertility industry materializes precisely here, in this space.

Under neoliberal biopolitics, as under communism, we might say, optimism or hope is what matters, making of life a public-private partnership. Both political regimes seem to converge on this revolutionary promise, on its utopian futures, and though their means of arriving there diverge markedly, this is serious business: ‘no great movement designed to change the world can bear sarcasm or mockery’ (242), we read from one of Kundera’s characters. In our contemporary context, the fertility industry provides a key case study in the solemn yet speculative futures of making matter, making life, and making living matter (see Figure 5). The abdication of optimism or hope is anathema: hope is a biopolitical diktat, a happy future inscribed into the techno-scientific and marketized ruses of progress, a marketing slogan repeated across fertility blogs, by clinics, right down to hope-inspired apparel and accessories produced for fertility-industry mothers and babies. In

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recent years, hope itself has also been materialized, biomedicalized, its absence pathologized: consider the burgeoning psychological ‘science of hope’, with ostensibly evidence-based interventions that include empiricist ‘hope scales’ and ‘hope therapy’ (e.g., see Gallagher and Lopez 2017). Temporally, it represents what Jack Halberstam (2005) calls ‘ReproTime’, a temporization that figures as both natural and desirable: the ‘normative scheduling of daily life (early to bed, early to rise) that accompanies the practice of child rearing’ (5).



Figure 5: Screenshot from www.fertilefuture.ca

From within the temporal inscriptions of futurity, of promise—from within this counterfactual future—we are not meant to dwell on the opportunity costs, the collateral damages, or negative externalities of ‘making live’, as if doing so could only signal the monstrous repudiation of life itself. And yet, these injunctions notwithstanding, sometimes hope does *not* materialize, and desire does *not* yield fecundation. Despite the egg-freezing cocktail parties, flexible finance plans, aggressive marketing, blogs and social networks, current success rates are based on probability modelling and there are little concrete data; indeed, there are little data on any long-term health consequences for mothers and none for their offspring. ‘Hope’ seems to stand in for the absence of facts, or stands in *as* fact.

The serial fertility ‘postcards’, themselves fertile sites and rites of passage, are material instantiations, salvos—as material as the clinics and fertility treatments themselves—working in and on and around

bodies conscripted to emit a hope that is always and only impossibly *immaterial*, even when that hope bears fruit. For what is hoped-for, what comes to life and comes to matter, if it does, is not hope itself, despite the industry's metonymic slippage between hope and the child, means and end, cause and effect (see Figure 6).



Figure 6: Screenshot from www.newhopefertility.com

If the child were hope's material object and objective, then hope too would be (its) matter. The fruits of these labours are sometimes referred to as 'hope babies' (or 'rainbow babies' if the birth happens after a miscarriage, stillborn, or neonatal death). In this metonymy, infancy and childhood are fetishized as innocent and pure, a matter of cultural projection and cathexis. As Lee Edelman (2004) remarks, the child represents 'variously sentimentalized cultural identifications, has come to embody for us the telos of the social order and come to be seen as the one for whom that order is held in perpetual trust' (11).

We might well be, understandably, nostalgic for the postcard's delivery, even before it arrives, inducted into the loss of what will (not) have been, with the promises of techno-science available, for a price, to secure this future today. Here is figured the reproductive body (*mater*, or 'mother') as matter and matter-ing, both biologically and through the cultural performatives of optimism or hope. If we believe industry messaging, we are expected to concede the perverse materialism of the reproductive body, 'priceless' yet rendered as human (venture) capital to be realized, in sense and in seed. This suggests, as Michael Warner (1991) phrases it, 'a relation to self that finds its proper temporality and fulfillment in generational transmission' (9). But who or what, after all,

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is the *destinataire*—the addressee—of hope’s address? What destiny or density lies in futures ‘held in perpetual trust’? Fertility industry ‘postcards’ are as much material as *materiel*—the aggregate of objects required to run a business (distinguished from its personnel or human face), but also munitions for battle in the culture wars. Together, the ‘postcards’ constitute a repertoire of images that shore up and imprint, or materialize, the (dollar) value of ‘life’.

Foucault (2008) employs a telling example in his assessment of American neoliberalism and ‘human capital’. It is worth citing at length:

the neo-liberals tried to explain, for example, how the mother-child relationship, concretely characterized by the time spent by the mother with the child, the quality of the care she gives, the affection she shows, the vigilance with which she follows its development, its education, and not only its scholastic but also its physical progress, the way in which she not only gives it food but also imparts a particular style to eating patterns, and the relationship she has with its eating, all constitute for the neo-liberals an investment which can be measured in time. And what will this investment constitute? It will constitute a human capital, the child’s human capital, which will produce an income. What will this income be? It will be the child’s salary when he or she becomes an adult. And what will the income be for the mother who made the investment? Well, the neo-liberals say, it will be a psychical income. (243–44)

The matter and measure of time and of (future) capital become increasingly speculative, increasingly vigilant and anxious, within the temporalities of the fertility industry. The would-be parent’s ‘psychical income’ demands an investment in hope but also often a capital investment in the fertility industry. But rather than ‘income’ in the strict sense, now or for tomorrow, ‘hope’ here is mattered and measured in economies of psychical and material *debt*, and sometimes failure. They are fictional economies, (re)produced and propped up by an industry that hopes most to profit, to reap a return-on-investment. Hope, too, much like the stock market, has become deregulated, virtual, outside of legal jurisdiction. Much of the fertility industry operates in a legal grey zone without even the instruments of ‘soft law’ (guidelines, accreditation,

regulated data collection, reporting). But this also suggests law's failure to imagine—and to regulate—the profoundly speculative futures of neoliberalism, the temporality of generation, whether this represents the transpersonal generation of future wealth, a future child, or, stated more obliquely, a future held in perpetual trust, venture 'capital' hostage to 'hopeful' biotechnologies.² For an increasing number of U.S. states, it is no contradiction whatsoever that the law should intervene to regulate and restrict women's reproductive freedoms (e.g., through 'personhood' initiatives), including the availability of pregnancy termination: here, too, a certain 'life' is understood, cultivated and exalted, according to differential political and ideological calculi—all of which suggests that law's silence on the fertility industry has little to do with law's interest in securing someone's 'freedom to choose', and more to do with how law has been conscripted by a certain techno-political understanding of 'life itself'.

4 On matter and method

New materialist scholars typically situate themselves somewhere in relation to 'matter' and 'discourse', sometimes negotiating the terms of their correspondence, or charting a path between empiricism and relativism, realism and idealism. But my 'object' (if that is what it is) does not quite yield to the micropolitics of such binarity—nor to the 'binary mode' of either algorithm or law—'the mode of decision-making' (Vismann and Krajewski 2007: 91), which materializes in its own way and obscures the temporizing persuasions of circularity and circuitry, whose densities, we might say, verge on the immaterial. If this paper wades into the emissions of sense or of seed, then, it is not to pick a side or to propose yet another way that matter *is* discourse, or vice versa, but to think through some of the presuppositions that these terms tend to secrete and reproduce. I agree with Kang and Kendall's 'legal materialist approach' inasmuch as it 'takes care not to collapse into either a materialist determinism or a hermeneutic self-referentiality'; however, I am less certain how 'a legal materialist mode of inquiry mediates between these two poles...' (Kang and Kendall, Introduction: 5). Mediation is at stake, certainly, and yet I'm not certain that these two

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poles occupy opposite ends of a single continuum; and if there are ruptures or discontinuities between them, these frustrate attempts to negotiate a mediation.

My thesis, then, is mindful of ruptures and discontinuities, which I have tried to stage here through the readings of my 'sites' as well as in their juxtaposition(s). In this respect, (legal) new materialism falters in at least two, related, ways: temporally and rhetorically. First, temporally, with respect to hoped-for futures cast in the speculative temporality of techno-science: this is a future that often does not materialize, and while it relies on material practises in the present (e.g., capital investments in hormone treatments, the freezing of embryos or blastocysts), these practises are not 'materializations' of future hopes or even psychical 'investments'. It is only by a reifying sleight of hand, by conjuring, that we speak of the (materialist) 'agencies' of future-matters that do not yet or may never exist. The future always holds its own secrets, and future-matters always belong *to* the future, in its rupturable and discontinuous coming-into-being. If, then, as Kang (2018) states, 'Legal matters need to be situated' (456), what might it mean to 'situate' matters *temporally* rather than spatially? And if we did, how would we begin with our 'ontological qualifications' (462) of them? And it is here, I suspect, that we glimpse law's bias: its sovereign jurisdictions rely on precedential appeals to the past, whereas neoliberal biopolitics and techno-science project onto future-oriented counterfactuals, in a fictional time to-come rather than in a 'concrete' place. As Derrida says, we are obliged '*de laisser de l'avenir à l'avenir*'—'to let the future have a future' (Derrida and Stiegler 2002: 85), or, to leave some of the future to what is still to come.³

Second, rhetorically, (legal) new materialism as a methodological or analytic apparatus does not quite appreciate the immaterial force of language and rhetorical tropes, and in particular, fictional language. And this is so, ironically, even as it relies on language, tropology, and fiction. What, after all, is the 'materiality' of the allegory, the metaphor, or the metonym, which ruptures reference, and is discontinuous with propositional logic? The 'joke', too, as Kundera so artfully

demonstrates, cuts in more than one way. Rhetorical ambivalence and equivocation are essential and cannot be outstripped; I would wish to amplify their significance in ways that disorient ‘new materialisms’ and ‘object-oriented ontologies’. As Kang (2018) rightly points out, ‘it is extremely difficult to make the forces which hold and move matters “appear,” let alone to interpret them’ (454). Perhaps this is why new materialists tend to privilege examples derived from molecular biology, physics, and chemistry, but rarely from rhetoric. And yet the force of law relies on performative speech acts, which, according to J. L. Austin (1962), are illocutions that say what they do and do what they say. And to complicate matters, there are rhetorical tropes, which sometimes do more or otherwise than they say and say more or otherwise than (what) they do. ‘Appearances’ are deceiving. Even our everyday words sometimes lack any material referents, as they must. After all, there is no matter for ‘love’ or for what ‘matters’, for, love is not some prior possession I have to give; nor does its giving—for I am given in that giving—secure any return to sender: speech/act, acting-out, actualization, it’s immaterial. (This shares in the ‘old’ materialist critique of private property). What matters is, rather, *called forth*. And thankfully, the ambivalence of the call, its precariousness, also cannot be outstripped. As Derrida puts it in one of his ‘postcards’—his *envois*—‘and when I call you my love, my love, is it you I am calling or my love?’ (1987: 8).

Writing through fiction, my approach in this essay invokes the ambivalence of the fugue, derived from *fugere* and *fugare* (‘to flee’ and ‘to pursue’). It is meant to suggest a polyphonic composition that echoes across our media ecologies and appears again in the form of Kundera’s novel itself, both in Ludvik’s ‘fugue states’ (psychologically) and in the importance of folk music for him, its call-and-response, its weightless densities and histories, its power ‘to create through the music a protective enclosure in the midst of the rowdy drunks, like a glass cabin suspended in the cold depths of the sea’ (315). This sentence, its simile, its imagery, and its sense are nonsense without figurative flights of language. As I elaborate below, the ‘subject’ and ‘speech’ are for me purposefully ambivalent as I navigate the spaces—the void—between

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my two 'sites' and their juxtaposition(s). As Foucault (1998) writes: "The 'subject' of literature (what speaks in it and what it speaks about) is less language in its positivity than the void that language takes as its space when it articulates itself in the nakedness of 'I speak'" (149).

And so my two 'sites'—one factual, one fictional—at least ostensibly—are less 'case studies' in their own right than they are in their juxtaposition(s), in the void, the space-between—a space to think—the ethical collisions between the fertility industry and Kundera's political-literary fiction, *The Joke*. The void 'object', then, comes at us obliquely, in the ruptures and discontinuities of 'postcards', as 'hopes', 'jokes', and in the hypostatizations of identity in and across these incommensurable milieus or jurisdictions, neither quite factual nor fictional, neither public nor private. I would insist on this void—call it a generative difference, if you will—and see here the limits of a materialist disposition, the space or place where materialism falters both temporally and rhetorically. Indeed, the equivocation of my 'sites'—and indeed, their rhythmic temporizations and tropic indiscretions—are not quite 'concrete' problems/matters or materials that yield to a (legal) new materialist approach. If these spaces appear as 'concrete' or 'material'—if their distance is collapsed rather than held open, as a wound—this is because we have been seduced by the ruses of technoscience, their promise that 'the future is now', and that these futures are at our material disposal in the present. Law's materiality, as Kang (2018) argues, is predicated on 'multiple representational practices, such as texts, spatial orderings and ritualised performances' (456). But the future remains—the Open—and cannot be 'materialized' in the present as anything but a speculative representation, or projection. Even risk is not concrete, it defies representation, however much we 'manage' it and hope to control it through statistical probabilities, modelling, etc. Nor is language the raw material—or tool—of representation, for this would strip language of its intrinsic powers of rupture and discontinuity, which are endless. I take seriously Kang's (2018) claim that 'Law's matters are not always material, and the latter word is meant in the sense of mattering' (457). I would like to see this affirmation developed in legal materialist scholarship because it sits so uncomfortably alongside

‘new materialist demands for being more attuned to the ways matters are, act or speak for themselves...’ (457). Even if matter is ‘vibrant’ (Bennett 2009)—a quasi-theological claim—I do not understand matter as ever *speaking* ‘for itself’, it is not the Word, and this marks another of my (rhetorical) breaks with new materialist ontologies and so-called ‘postcritique’. Language matters, but matter has no—and is not—language. And so language is only a ‘materiality’ in a fictional sense, or as a legal fiction—and these matter, certainly, and sometimes unto death, but there is no legal account here, no possible account, of law’s own language, whether material or metaphorical, or of the void that language takes as its space when law would (and it would that it could) articulate *itself*—a neuter *it-self*—in the nakedness of ‘I speak’.

5 In refrain

By way of refrain, rather than conclusion, I invoke juxtaposing scenes—or ‘jurisdictions’—from Kundera’s novel: two faces of ‘hope’, or two openings perhaps, whose tempos and dictions attest to matters incommensurable. These two aspects are also in tension across the discursive ‘materialities’ of hope tendered by the fertility industry, which, much like legal fictions, must be read as speech/acts. In this reading, hope is a fiction, which is not to say that it does not matter but only that it is not matter. By ‘fiction’—and by extension ‘law’—I absolutely do not mean speech/acts that interiorize or ‘materialize’ a sovereign subjectivity in the liberal tradition which harkens back to ‘a time when the interiorization of the law of history and the world was being imperiously demanded by Western consciousness as never before’ (Foucault 1998: 150). And this is so even as we are enjoined today to embrace the imperious materiality of subjective identity—and identity politics—that convenes and seem to materialize in these fictional places. Rather, in gesturing to our postcards’ correspondence, and in their temporalities of generation, by ‘fiction’ I intend an opening, a rhetorical agency, or a

void in which the contentless slimness of ‘I speak’ is manifested ... [as]
an absolute opening through which language endlessly spreads forth,

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[and in] which the subject—the 'I' who speaks—fragments, disperses, scatters, disappearing in that naked space. (Foucault 1998: 148)

This nakedness, I contend, is fiction's hope, its opening and exteriority, which is not quite the dialectical *negation* of materiality—for this would serve only to bring 'what one negates into the troubled interiority of the mind' (Foucault 1998: 152). Here, the two ways that legal new materialism falters—temporally and rhetorically—come into relation, without quite (I hope) ceding on hope.

It is fifteen years since Ludvik was excommunicated from the Party and imprisoned in a labour camp. He is now a free man, but all he hopes for is to take revenge on those who condemned him so long ago, especially his former friend and fellow student, Pavel Zemanek, whose eloquent and spiteful testimony had sealed Ludvik's fate during his public 'trial'. Ludvik's plan is revenge by proxy: to ravage and possess something dear to Pavel—a tryst with his wife, Helena. 'I had dreamed this plan up with the power of fifteen years of rancor' (178), he says, in the troubled interiority of his mind. The plan is set in motion, but as he awaits the arrival of Helena's bus, this scene is interrupted by the appearance of many baby carriages in front of the town's National Committee Building. Ludvik is curious, he has time to kill, so—why not?—he enters.

What he witnesses in details painstakingly portrayed by Kundera is a highly ritualized—though secular, Communist—mass 'christening' or birthrite, officially called 'a welcoming of new citizens to life'. On stage, children begin to sing: solitary voices at first, with similar refrains that syncretize in chorus and draw an equation between babies and 'springtime', 'roses', 'flowers'. 'All of a sudden one of the boys ... said spring had come and all papas and mamas were rejoicing and the whole earth was rejoicing' (170). Another boy 'proclaimed that children were peace' (171). Then a man from the National Committee stands, in regal garb, and presides over the ceremony—the official in charge of citizen affairs.

He too spoke of spring, of flowers, of mamas and papas, he also spoke of love, which according to him bore fruit, but suddenly his vocabulary

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was transformed and the words duty, responsibility, the State, and citizen appeared; suddenly there was no more papa and mama, but father and mother, and he was enumerating all the blessings the State offered them (the fathers and mothers) and reminding them that it was their duty in return to bring up their children to be model citizens. (171)

Hope here is forcibly materialized in the future responsibilities of citizenship, the parents' signatures inscribed as promissory into the State's secular book of life (literally hypo-stated), and the young bodies of these new citizens fetishized as (always-already) material organs of the proletariat, of the body biopolitic. Obedient to an 'old' materialist logic, private property is abolished, subsumed by the State, made public. Ludvik learns that participation in this ritual was not compulsory, not officially at least, but 'the National Committee used attendance as a touchstone for evaluating people's sense of citizenship and their attitude towards the State, and in the end people realized that and came' (173).

The coercion of this scene linking matters of sex, future life, and the 'concretizations' of citizenship sits uncomfortably alongside the subsequent scene of coercion that unfolds in Ludvik's sexual liaison with Helena. 'I was wary of the slightest risk,' he narrates, 'afraid to bungle an opportunity that meant so much to me, not because Helena was particularly young, particularly nice, or particularly attractive, but purely and simply because her name was Zemanek and her husband was a man I hated' (175). This scene is without its own future, as Ludvik imagines it, despite what he promises Helena by way of seduction. The sexual act is invited, not quite forced, but nonetheless brusque and violent, a 'beautiful act of demolition' (196), he says. In the afterglow, Helena nevertheless professes her undying love and devotion to Ludvik, and imagines their future together, while he is at pains to extricate himself. His plan fails, however, not only because his extrication becomes complicated by Helena's attempted (but botched) suicide (she tries to overdose on what turns out to be laxatives), but because Helena and Pavel had in any case been estranged for several years, Pavel seeking a divorce and Helena seeking new love. Later, with some remorse, Ludvik confesses, 'I had acted vilely, having turned

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her into a mere object, into a stone I had tried (and failed) to throw at someone else' (283).

The joke, of course, sometimes enjoys its own fecundity in time, and like matter (and matters that matter), reproduces and cuts in more than one direction: 'that bad joke which, not content with itself, had gone on monstrously multiplying itself into more and more silly jokes' (288). The joke, the fiction, is a generative transmission because it does not speak in the interiorizing language of self-reflexivity: 'It must be directed', Foucault writes of literature, 'not toward any inner confirmation—not toward a kind of central, unshakable certitude—but toward an outer bound where it must continually content itself' (1998: 152). It does not make of identity a materiality; quite the contrary. 'What if history plays jokes?' Ludvik asks himself, to which he answers: 'And then I realized how powerless I was to revoke my own joke when throughout my life as a whole I was involved in a joke much more vast (all-embracing for me) and utterly irrevocable' (288–289). The state's 'welcoming' ritual of citizenship is one such joke, hoping to materialize that which matters otherwise. Conversely, the ceremonial of Helena's 'demolition'—on a body reduced to brute matter, a 'stone'—mocks sex, citizenship, and any instantiation of hope or of future. It is not enough, then, to sovereignly oppose one or the other 'materialization', but to analyse the non-sovereign legal, textual, and cultural fictions at play. In the interstices, as Foucault was fond of saying, between legal fictions and legal 'materialities', we might begin to read and to problematize the correspondence between the technologies of law, politics, and life. In the moment between nostalgia's past and our techno-scientific futures, then, and in vocal defiance of both sovereign and biopolitical diktats, a critical presentism and presentist critique finds its rupture, its discontinuity: 'I felt a tiny crack opening up between the person I had been and the person I should be (according to the spirit of the times) and tried to be' (32).

These juxtaposed scenes, finally, represent two 'laws' of kinship, both of which are legal fictions, whether expressly so, as in Kundera, or more allegorically (but no less really), as we see in the many faces—in

the hopes and the harms—of the fertility industry. Foucault (1998) might be said to summarize these two dimensions of law:

If it were self-evident and in the heart, the law would no longer be the law, but the sweet interiority of consciousness. If, on the other hand, it were present in a text, if it were possible to decipher it between the lines of a book, if it were in a register that could be consulted, then it would have the solidity of external things: it would be possible to follow or disobey it. Where then would its power reside, by what force or prestige would it command respect? (157)

The first is not law, Foucault says, and yet without the first the second is senseless. To obey or disobey, to respect or disrespect, are also matters of the heart, of one's conscience—that without which matter does not and cannot matter. In Kundera's scenes, the intimate ritual of Helena's 'demolition' is for her a matter of the heart, whereas for Ludvik it is a 'vile' material act. Nevertheless, for each the act is a matter of hopes that are held and that promise to hold open futures calibrated according to the kinship of love (for Helena) or of hate (for Ludvik), even if these particular futures are fated never to materialize. Hope's futures have their dark and atavistic dimensions, also (but not just) matters of the heart, and in and by which 'hope' is tendered, there, where subjects and subject matters are at times violently fragmented, dispersed, scattered, and disappear in the shadows. In the correspondence between Kundera's two scenes (which fiction invites but does not force), matters of 'the heart' do not underwrite or secure the legal materiality of 'external things'; rather, the correspondence only underscores law's fictionality, its joke. The ritual of 'welcoming new citizens to life' is a political charade and does not, for all its ceremoniousness, command respect or obedience; an instability guardedly masked as a fictive stability, it also cannot bridge the axes of political identity or communal life. Law, as fiction, folds back upon itself, fugally—both fleeing and pursuing: 'The law is the shadow toward which every gesture necessarily advances; it is itself the shadow of the advancing gesture' (Foucault 1998: 158). Kundera's 'old' materialist scene of state-sanctioned fertility shadows, today, in parody perhaps, the ritualized market-driven economies of

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the fertility industry, which supplant Communist onto-logics with Neoliberal and ‘new’ materialist ones—a joke that history is playing on us. Together, their ceremonials signal, and hope to secure, a future that their performances nevertheless belie as both anxious and uncertain, even paranoid, their solemn disavowals notwithstanding. And it is perhaps this latter correspondence, itself something of a joke, an ironic transmission, that calls forth in my reading some furtive hope.

Endnotes

1. Subsequent references to Kundera’s novel will cite page numbers only.
2. Legal scholars seeking a ‘bloodier’ case study—with its numerous legal battles—need look no further than the Theranos debacle. As the US Securities and Exchange Commission attests, Theranos investors were defrauded out of vast sums of money for nearly a decade (see www.sec.gov/news/press-release/2018-41). Everything I claim concerning the speculative futures of neoliberalism and biotech applies to this case as well. I thank Michael Dorland for bringing this to my attention.
3. I thank Tad Lemieux for bringing this text to my attention and for helping me to think more critically about temporality, rhythmicity, and not least, ‘the joke’ (see Murray and Lemieux 2019).

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