

LAW BY NIGHT

JONATHAN GOLDBERG-HILLER

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GLOBAL AND INSURGENT LEGALITIES,
edited by Eve Darian-Smith and Jonathan Goldberg-Hiller

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To my students

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x · ACKNOWLEDGMENTS

INTERRUPTIONS

Continuity is one of the postulates of positive law: permanent as well as general, legal rule is a sun that never sets. —**Jean Carbonnier**

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? In fact, the presence of the law is its concealment. —**Michel Foucault**

The values of the day become the obsessions of the night.
—**Andrea Dworkin**

Lon Fuller's iconic and enduring 1949 article, "The Case of the Speluncean Explorers," has greeted thousands of students in their first course in legal theory. In this fictional story of anthropophagy set far into the future, Roger Whetmore is eaten by his fellow spelunkers after the cave they were exploring collapsed, blocking their exit for thirty-two days. Eventually realizing that their rescue would be delayed far beyond the limit of their provisions, the cavers agreed that, by lot, one man would be killed in order to nourish the rest. Whetmore had proposed this solution, and when he lost the cast of the dice—despite his last-minute bid for a delay and expressed withdrawal from the procedure—he was dispatched and consumed. In the fictional reconstruction of the case, the trial court convicted the remaining cavers of murder and sentenced them to hang, but both jury and judge pleaded for executive clemency, acknowledging the inequities

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of the statutory laws and professing their sympathies for these explorers' cruel fate. The divergent opinions rendered by the several appellate justices that comprise the allegory tell the conflicting stories constructible by mid-twentieth-century jurisprudence. Students are left scrambling to follow the paths of legal reasoning: Was this murder, necessity, or a simple matter of freedom to contract?

While many have debated and extended Fuller's review of the philosophical landscape, making it a veritable "cave drawing for the ages," few have delved into the meaning of this cave for legal thought and pedagogy.¹ What is so compelling about a dark and remote cavity for legal theory? Perhaps one answer lies in what the cave means for law's relation to time. Fuller situates the case in the year 4300, but the cave is a cultural symbol of prehistoric origin against which the progress of law to re-create social norms is measured. Justice Keen, ventriloquizing the sociological jurisprudence of Roscoe Pound, intimates a parallel with Plato's allegory of the cave:² "I wish to emphasize once more the danger that we may get lost in the patterns of our own thought and forget that these patterns often cast not the slightest shadow on the outside world."³ This Platonic cave seems to situate the justices themselves, as they each seek to articulate rationales avoiding oracular obscurity. The transcendence of this dark past and concern for law's proper dominion—both symbolized by the cave—draw many of the justices to a central metaphor of light: statutes must be interpreted with the "light of . . . evident purpose" (Justice Foster, Justice Tatting), the light of "human realities," or the light of "common sense" (Justice Handy).⁴ The manifold and divergent formal, moral, and popular means of construing the meaning of Whetmore's death in the cave constitute the miasmic darkness from which the law must drag itself into the visible realm of public life.

And yet the persistent metaphors of light, so central to legal discourse in our day (consider, here, the terminology of "bright-line tests," "blue sky laws," and "bargaining in the shadow of the law," as well as constitutional "penumbras" and zones of twilight), ironically seem to reinforce an imminent, lurking darkness, whether it be the dark ages of the past eclipsed by the Enlightenment and modern law, or formal public law writing over the violent cave of the night.⁵ The cavernous gloom of night brings us face to face with the physical needs and precarities associated with the body; Whetmore is all of us and, perhaps in gruesome Freudian logic, *in* all of us as well. "The Case of the Speluncean Explorers" is a textual echo of Sigmund Freud's story of legal and symbolic origin—the killing and eat-

ing of the primal father—and Whetmore's cannibalized body drives the search for jurisprudence attentive to the primal violence it will conceal and transcend.⁶

Hidden within the gloom of the cave, Whetmore might be less the vulnerable everyman and more the *Other*: the “dangerous” or disadvantaged individual taken by surprise in the dark so that others may live better or sleep peacefully, the one who has “whet” others’ appetites for political or economic power. Law privileges the powerful in this critical, alternative source for jurisprudence, unable or unwilling to account for what happens in the dark shadows, especially to the weak. This alternative inquiry—exploring the relations of power and darkness in their material and rhetorical manifestations sustaining or transforming social hierarchy—is the focus of this book. I seek to paint diverse pictures of legality at night in order to think anew the contribution of law to racial and gender hierarchies, to colonial relations, and to the positioning of the most socially vulnerable and precarious among us.

This chapter's epigraph by Michel Foucault challenges us to paradoxically locate law's concealment if we are to find law's real power, a speluncean task of discovery that requires deferring law's presence, or searching for a law gone dark. In his *History of Madness*, Foucault suggests that what has escaped history is frequently metaphorized as night. He claims that his intellectual return to the historical moment of the split between reason and madness, of “sense from senselessness . . . will allow that lightning flash decision to appear once more, heterogeneous with the time of history, but ungraspable outside it, which separates the murmur of dark insects from the language of reason and the promises of time.”⁷

Perhaps because Fuller had heard these dark, murmuring creatures, recently quieted in the fresh defeat of European fascism and its vast legal exceptionalism that Western legal theory had to explain and refute, his tale seems to presage later twentieth-century critical jurisprudence that has embraced the philosophical idea that there always is an element of the nonlaw sequestered within the law.⁸ This includes Fuller's own morality within and beyond law, Jacques Derrida's mythic and theological “mystical foundation” of the law, Slavoj Žižek's “obscene ‘nightly’ law” that necessarily parallels and infuses the public law, Walter Benjamin's originary violence that founds or sustains a legal order, Robert Cover's field of pain and death on which the law is repeatedly inscribed, Giorgio Agamben's and Carl Schmitt's sovereign exception at the heart of law, and Alain Badiou's nonlaw as law, to name a few.⁹

The cave (and the dark fears and threats beyond law it represents) is metaphorical and allegorical, but it is not only rhetorical. Law's split between enlightened reason and the darkened cave of cannibal madness is not so distant that it must bear a vast historical search for origins. Discovering the cavernous darkness as an alibi for a necessary legal enlightenment need look no further than the celestial cycles of night and day and their sociological and sociolegal qualities. Like others, I claim in this book that law has not outrun its dark interiors, but I find these not only in their figurative tropes—the legal, philosophical, and racial rhetoric of darkness, blackness, sleepiness, and shadow—but also in the material and sociological consequences for law and legality of our organic bodies needing sleep, of the persistence of civilian and police vigilantism and terroristic interracial violence at night, of the curfew that imposes a lethal nocturnal order, and of the ways night and darkness are used by the disadvantaged to create sustaining legal ideas and political action. Night is a time of excessive absence, a parajudicial experience whose meanings for legal order and governance are too often ignored by legal scholars.¹⁰ Night, I suggest, is our speluncean cave, an evanescent center to thought about law. What happens at night and under darkness resembles Plato's *pharmakon*, which is simultaneously medicine and poison: a disordered and violent set of seemingly lawless encounters that nonetheless serves as the provocation to law—its protections and its violence—but also a stimulus to law's forgetfulness, the decaying memory of what is left unwritten in its books.

Night wasn't always absent in the law. Ancient legal norms regarding self-defense explicitly permitted extraordinary action after dark. Mosaic law, for example, immunized from retributive blood feud any homeowner who killed while defending his house from a burglar at night.¹¹ The English common law absorbed this norm, constricting the crime of burglary, which Sir William Blackstone called "nocturnal housebreaking," only to the hours of night; theft or robbery in a domicile by day made violators appear "deranged" rather than criminally culpable.¹² Other crimes were made exceptional if they occurred at night. Early medieval sanctuary laws and practices allowed protection for homicides, but canon law forbade eligibility for "public thieves and 'nocturnal destroyers of fields.'" ¹³ The revolutionary Haitian Constitution of 1801 protected the nocturnal home absolutely: "The residence of any person shall constitute an inviolable asylum. During night-time, no one shall have the right to enter therein unless in case of fire, flooding or upon request from within. During the day, authorities shall have access for a particular objective determined either by

a law or by an order issued by a public authority.”¹⁴ Students in the early European Renaissance were admonished not to study the law at night. As Peter Goodrich recounts, “Night . . . was the time of fantasy or imaginings, of images and women, and all were perceived as threats to the capacity, probity, and reason of law, for ‘night always comes on with the mind disturbed.’”¹⁵ In Roman law and its incorporation into medieval European law, contracts and wills made at night were suspicious, if not void.¹⁶ Law took explicit account of night, even framing it in criminal terms: “Night-time in the eighteenth century was defined not in terms of the setting of the sun but according to the law against burglary.”¹⁷ Kings in Europe and elsewhere performed an intricate political theater to project their ever-wakefulness so that the law could be imagined to remain perpetually in place, allowing their subjects to safely sleep after dark.¹⁸ In postbellum America, Black men and women were banned from the streets at night in some cities, and from the entire environs of “sundown” towns through the twentieth century.¹⁹ The homeless regularly faced bans on sleeping and were subject to particularly disruptive treatment at night. As these many historical fragments suggest, night had a distinct history that affected and was affected by the law. Night had its own crimes, its own dangers, and its distinctive ways of knowing.

In more contemporary times, night may appear to lose its distinctive character. Streetlights pierce the urban darkness, work continues around the clock, and electronic surveillance persists, unimpeded by obscurity in a way that optical observation is not. Increasingly quantified and studied, sleep has to some degree become a politically cultivated means for assuring daytime alertness in public transportation and schools, and a key to securing diurnal citizenship.²⁰ The connections among night and sleep, economic and public worlds, give support to what Gilles Deleuze has called societies of control, in which the disciplinary “environments of enclosure,” such as factory, school, and family, have melted away into the smooth spaces and times of governance through continuous means.²¹ It is easy to agree with the historian of night A. Roger Ekirch, who “imagine[s] a time when night, for all practical purposes, will have become day—truly a twenty-four/seven society in which traditional phases of time, from morning to midnight, have lost their original identities.”²² For Eric Santner, this is our Kafkaesque “life-world that has itself come to resemble a kind of office that never goes dark.”²³

I take a different tack in this book, rejecting the future anterior expectation that night, culturally opposed to the aspirations of day, is destined

for irrelevance. Instead, I emphasize the periodic darkness that persists in our lifeworlds and the forms of legal governance and social violence that the oscillation between night and day enables. While contemporary governance has indeed sutured many aspects of night to day, night has not been entirely colonized, to use Murray Melbin's popular terminology.²⁴ Much as in early modern times, sociological and geographic boundaries matter today for nocturnal strategies of authority, with consequences for racial hierarchies and gender violence, as I explore in the chapters to follow. Not all people live nights in the same fashion, or suffer night's disabilities and gain its advantages in equal manner, making night a time for social and political struggle. Cultural meanings that situate night as a time of danger and form what Robert Williams called a "contrapuntal space" remain potent, legitimating violence on and resistance by those who are culturally designated as threats.²⁵ The physiological need for sleep is the object of biopolitical efforts to harness, control, and render it useful for economy and social order, but the defense of sleep is also a site for conflict where and when the state and biopower appear to falter. Foucault famously argued that our thinking about law cannot fully shake the philosophies and theologies of the Middle Ages, and to the extent that night once explicitly mattered to law and legal thought then, I argue, we will find that it still matters today.²⁶

To understand what night means for our thinking about, and varied experiences with, law and legality, I suggest that we must find multiple ways to look deeply into what has been hidden in the cave of the night. Martin Heidegger argued that there is no light without, first, an opening into which it can shine: "Outward appearance, however, is a manner of presence. No outward appearance without light—Plato already knew this. But there is no light and no brightness without the opening. Even darkness needs it. How else could we happen into darkness and wander through it?"²⁷ I elevate histories, philosophies, cultural works, and sociology—the panoply of sociolegal devices—that can reveal this opening and permit scholarly wandering through the darkness. While disciplinary studies of night are still in their infancy, brought together they offer a scaffold from which to scrutinize Foucault's paradox of the law's concealment as its ultimate presence. The assembly of various perspectives on law's authority at night exposes the intricate contingencies that constitute legality, what Michel Foucault, Giorgio Agamben, Gilles Deleuze, Davide Panagia, Roberto Esposito, and others have called the *dispositifs*—or the arrangements and apparatuses—of governance.²⁸ For Agamben, *dispositif* refers to "a set

of practices, bodies of knowledge, measures, and institutions that aim to manage, govern, control, and orient—in a way that purports to be useful—the behaviors, gestures, and thoughts of human beings.”²⁹ *Dispositifs* do this work, according to him, by capturing living beings through subjectivities produced within the struggles over their capture. These subjectivities are not totalizing, in Deleuze’s reading, and “the productions of subjectivity escape from the powers and the forms of knowledge of one social apparatus in order to be reinserted in another, in forms which are yet to come into being.”³⁰ *Dispositifs*, therefore, can change philosophical orientations from what Deleuze calls the Eternal toward the creative production of the new.³¹ They also break our philosophical attachments to the state as the sole authority for law, and as the central organizer of violence and power.

The *dispositif* is a mainstay, by other terms, in many corners of Anglo-American sociolegal studies, such as inquiries into the “mobilization” (or citation) of law by social movements, and research into legal consciousness designed to ascertain law’s many possible meanings. Michael McCann, for one, emphasizes a “decentered” view of law with behavioral significance only where, and when, it interacts with other institutional forces that together comprise the elements of social control. Decentered law means “not only that law is pluralistic and relatively independent of the state, but that its role in sustaining traditional hierarchies, and hence in structuring potential strategies of resistance, varies significantly among different terrains of social struggle. As such, attention to tactical options concerning the particular sites, terms, and timing of struggle are an important concern for analyses of legal mobilization.”³² One important finding of the legal consciousness literature is that the various orientations that people consciously (or unconsciously) take to the law (resisting it, aligning themselves “before” it and the power it purports to hold, or treating law mostly as a game to be strategically maneuvered with particular skills) reveal the myriad ways that law infiltrates and extends other dynamics of power.³³ These plural orientations to law “reveal the amazing capacity of law to roll with the punches, exhibiting a kind of Zen flexibility that strengthens rather than diminishes its power.”³⁴ One key to understanding the varied significance of legality is law’s importance for individual identity. According to David Engel and Frank Munger, “Not only does identity determine how and when rights become active, but rights can also shape identity. . . . Rights may influence identity by altering how individuals perceive themselves or by changing how they are perceived or treated by others, bringing about a

new perspective on who one is and what one expects. The self, so constituted, acquires an identity that can, under certain circumstances, lend itself to the perception that he or she is being treated unfairly—that rights are being violated.”³⁵ Similar to the theory of the *dispositif*, it is subjectivity that is mutually constituted by and in legal relations, affirming some ways of being and energizing some experiences of becoming.

An important implication of these philosophical and sociolegal perspectives for this book is that there may be no “theory” of night that can be abstracted from its temporal contributions to various *dispositifs*. Indeed, if Deleuze and the sociolegal scholars are right, one consequence of *dispositifs* or a decentered view of law is that there are no universals, a somewhat ironic way to examine modern legal phenomena that are ideologically driven by their universality. Unlike a Hegelian historicism of reason, or a liberal affirmation of the growth of individual liberty emerging from the darkness of traditional authority, thinking in terms of *dispositifs* takes us to an aleatory and transitory history intertwined with present possibilities.³⁶ A night of many stars, perhaps, more than a day with its singular sun.

LAW AND TIME

Attention to the variability of law is not new. By dissolving the Marxist and functionalist claims for the social and historical utility of law, critical scholars have drawn attention to the plural forms of legal and normative ordering, the divisions between sovereign/juridical and biopower, the cerebral gap essential to legal aesthetics, the historical significance of the opposition to legal rights, and the fields of pain and death with which the law is inevitably entangled. This pluralist orientation has reimagined the rule of law to be pointillist, as in a painting by Georges Seurat, its granularity offering contingent contributions to governance.

Recent studies of legal temporality have converged with this picture. The various orientations to time within legal discourse are no longer as monolithic as the poet W. H. Auden once satirized:

Law, says the judge as he looks down his nose
Speaking clearly and most severely,
Law is as I've told you before,
Law is as you know, I suppose,
Law is but let me explain it once more,

Law is The Law . . .
Law is the clothes men wear
Anytime, anywhere,
Law is Good morning and Good night.³⁷

The orientations to past precedent (“as I’ve told you before”) as well as to future consequence, the distant horizons of the common law’s “time immemorial” as well as beliefs in the constitutional framers’ historically fixed thought-worlds, are all temporalities that frequently mix into “a technique of faith” illustrated by what Oliver Wendell Holmes called “the path of the law,” an Enlightenment temporal flow by which “history, in illuminating the past, illuminates the present, and in illuminating the present, illuminates the future” in Benjamin Cardozo’s interpretation.³⁸ This autochthonous, synoptic temporality that makes modern law appear “anytime, anywhere,” in Auden’s words, is undercut by recent anthropological and historical scholarship that has located the source of law’s myth of continuity in the abrupt encounters with colonialism and its temporal “othering,” uncovering an imperial “politics of time.”³⁹

Legal and social time have the potential to diverge, one driver of this political reality. Within Western law it is possible to find a linearity by which progress is given meaning and a cycle of return through which iterative regularity reconciles community with the past, as well as the complex interactions between both.⁴⁰ Similar temporal mixtures infuse the political constitution of sovereignty, particularly the reconciliation of the medieval king’s two bodies, one corporeal, finite, and cyclically replaceable, and the other institutional and enduring.⁴¹

Of course, legal discourse and doctrine have always declared their own sense of time—as once did the monarch. Glimpsed in the irony of “all deliberate speed” that facilitated white resistance to the *Brown* court’s demands for an end to racial segregation in education, in the adherence to past precedent, and in the persistent rule of *res judicata* that affixes temporality to legal decisions, legal discourse controls the time frames by which it orders itself and makes itself authoritative in other discursive domains. For example, Kunal Parker has shown how the nonhistorical “time immemorial” that authorized the common law tradition provided a dynamism for legal development that kept law proximate to democratic values.⁴² This temporal openness, understood as the commonality between life and law, anticipates the event that lies beyond structure, the disruption that makes legality discontinuous and ultimately political.

It is surprising that in this constellation of diverse temporal orientations, another discontinuity, that of the cycles of night and day, which have played a much more significant role in what we might call legal literature, is so frequently overlooked by legal scholars interested in questions of temporality and governance. Few have drawn sociolegal attention to what H. G. Wells intimated when he wrote in *The Island of Doctor Moreau* that the hybridized “beast people” who were forced to live by human norms under a law decreed by the doctor “broke the Law only furtively and after dark; in the daylight there was a general atmosphere of respect for its multifarious prohibitions.”⁴³ Likewise, it is the hanging of Herman Melville’s Billy Budd at the very instant of dawn that seals the metamorphosis in which “innocence and guilt . . . in effect changed places.”⁴⁴

In the chapters that follow, I approach the natural oscillation between night and day as a constant generator of legal pluralism in order to think about the contexts in which this daily rhythm may contribute to governance.⁴⁵ I don’t think that it is the quantity of law that is altered at night; the idea of the quantum of legality is a remnant of behaviorist sociolegal thought.⁴⁶ Yet behaviorism gets some things right: using tools designed for knowing law in daytime, perhaps we understand very little about how to think about law at night, how to collect useful data, or how to comprehend how the state “sees” after dark.⁴⁷ These epistemological uncertainties mark the limits of abstract legal doctrines about time, and they magnify the significance of the body with its own circadian rhythms and experiences of nocturnal vulnerability. Not knowing what is in store as darkness falls and the state’s vision wanes enhances the experiences of anticipation, another form of legal temporality requiring our attention. This sense of anticipation is different from the delay attendant on—or even integral to—the legal process.⁴⁸ The shifting between nocturnal and diurnal governance may encourage a vigilant waiting for daybreak, or, for others, an embrace of the obscurity of darkness.

Attention to the daily interruptions in fields of legal organization, the institutional shifts attributable to darkness, and the mobilization of human vulnerabilities generated by the needs for sleep and security at night furthers the aims of critical legal pluralism that seeks to disrupt the state’s “monist” monopoly over law and its attendant rationalism and idealism.⁴⁹ For Margaret Davies, pluralism “describes a situation in which incommensurable terms coexist in a comparative space.”⁵⁰ The understanding of law as a plural experience began within anthropological thought about the (sometimes colonially enforced) persistence of Indigenous legal norms in

Africa and elsewhere but rapidly became applied to other social contexts.⁵¹ Critical legal pluralism champions the discrete separation of legal norms, which is a direct challenge to the ideology of legal centrism.⁵² In Desmond Manderson's words, "Pluralism welcomes incoherence. . . . There is a trust in disorder here and an attraction to the small-scale, contingent, and even contradictory workings of what Clifford Geertz called 'local knowledge.'"⁵³ Strong forms of legal pluralism may coexist with weaker ones, permitting state law to be seen as fundamentally "singular plural," a conceptual cohesion, akin to the *dispositif*, that remains fragmentary in practice and divergent in experience.⁵⁴

The political theology of the two bodies of the medieval European king suggests that the state and, paradoxically, its commitment to a unitary concept of sovereignty have long been invested in performances around plural temporalities. Attention to the ways that the state has always had to invent and adapt to other *dispositifs*, particularly to account for nightfall, allows a recognition of the state's own febrile basis for claiming a persistent rule of law. For instance, South Vietnamese rule, for which the Americans fought during the 1960s, persisted and was intensified only during daylight in many peasant hamlets that their enemies, the Viet Cong, controlled after dark.⁵⁵ How distinct is this alternation outside wartime? Perhaps more than we recognize, violence at night by state officials and a willful "blindness" to private enforcers of social hierarchies legitimated by the dark shore up law and legal order as much as these performances during the day.

WHAT HIDES AT NIGHT?

The movement of night to day, as its own *dispositif*, should be understood contingently and ambivalently, producing various subjectivities. Nocturnal *dispositifs* interrupt those of the day, encouraging some advantaged by legal order to believe in the seamless continuity of the law and others to wait patiently for the dawn, desired to offset the threats and vagaries of the night, or to sleep peacefully, only to wake again in a familiar world.⁵⁶ Foucault calls this vigil for the morning "after evening" for its indebtedness to what has come before. In contrast, others orient themselves "before morning," approaching night as an opportunity for political and social novelty, an occasion—regularly repeated or singular—to challenge spatial boundaries, thwart legal norms, or simply escape the agents of enforcement.⁵⁷ Both orientations are linked to distinctive cultural experiences of

night that couple night to law. One is the rather intuitive idea that night is a more dangerous time than day. Fear raises concerns for law's effective control of social and community threats in the dark. The other cultural idea is often recognized obliquely, if at all: that night contains the potential for experiencing and reconstructing notions of equality, sometimes confounding social and legal status through the production of new legal meanings corresponding to shared needs for resting, sleeping, defying boundaries, avoiding authority, even dreaming. Both cultural ideas, I argue, can contribute to violence by activating a politics of fear and by threatening the social hierarchies that appear by day, authorizing not just legal authority but extrajudicial force. One promise of the study of night is a greater understanding of how this violence operates in and is legitimated by the dark.

BUMPS IN THE DARK

In many but not all cultural ontologies, the darkness of night condenses fears for personal and community security, the waning influence of rationality, and the limited capacity of political institutions.⁵⁸ This set of fears, sometimes psychologized as nyctophobia, has a long genealogy. In the European Middle Ages, “darkness play[ed] an important symbolic role as a metaphor of pagan obscurantism—deviancy, monstrosity, diabolism.”⁵⁹ Witches and werewolves, who played benevolent roles in some peasant societies, were accused by the church of subverting social, moral, and legal orders at night, sleeping with the Devil, as well as committing theft and other maleficence.⁶⁰ The ecclesiastical accusation of witchcraft and the interrogation of accused women stoked legal development in Europe, including the nature of trials and the adoption of the Roman law, which was integrally concerned with the improprieties of magic.⁶¹

Sorcery was not the only danger of the night that produced legal order. In the sixteenth and seventeenth centuries, European cultural authorities helped spread the idea that “the night is perilous for the body and the soul, it is the threshold of death and of hell.”⁶² Nightwalkers, who de facto violated formal and unofficial nocturnal curfews, were targeted as a threat to social order. Matthew Beaumont observes that “nightwalking seems to have functioned as a sort of floating signifier used by the authorities to criminalize or ostracize any errant, irritating or undesirable activity after dark.”⁶³ Policing practices, including the night watch, emerged as a

response to nightwalking, thieves, and other nocturnal threats and dangers. Even rudimentary street lighting was thought to reduce the dangers of the night, and law quickly stepped in to mandate the carrying of lanterns by passersby and watchmen (and in colonial America, enslaved and free Black people) to expose their presence.⁶⁴ Today fears of witches have given way to concerns for urban “light pollution,” but night continues to be perceived as a dangerous time for the law-abiding, and illumination—perhaps incorrectly—as one key to personal security at night.⁶⁵ So significant has been the association of fear of crime and night that Ekirch has suggested that day may be thought of as the time of civil law, night its replacement by criminal sanction.⁶⁶

Despite the obstacles of crime control, the night was and remains for many a time of freedom and community, reminding us that the fears of nocturnal crime and calamity are not anthropological but were and are produced politically.⁶⁷ In the shadows of the streetlamps and beyond sight of the watchmen, night in early modern Europe remained for some “a time for conviviality, intimacy, experimentation, excitement and spectacle.”⁶⁸ While urban areas were transitioning away from sovereign prohibitions on nocturnal movement and toward *dispositifs* of regulated control of night-time activity in the late seventeenth century, a process the historian Craig Koslofsky calls “nocturnalization,” rural communities in Europe reflected a different pattern, balancing entertainment and sociality with fears of disorder at night.⁶⁹ Public houses and spinning bees, respectively, brought adults and courting youth together after sunset.⁷⁰ Even sleep in early England was patterned with social interruptions. The waking interregnum between “first” and “second sleep” was a time for social and sexual intercourse, quiet meditation, and private prayer, suggesting that night was not a time solely given over to the defense against threats.⁷¹ However, night provided an opportunity to commit acts of petty—and not so petty—crime and to anonymously reproach one’s neighbors.⁷² Yet Alain Cabantous has shown that the most dangerous time in sixteenth- and seventeenth-century France was most likely at dusk, rather than in the darker hours of night.⁷³

Both church and state increasingly tried to discipline nocturnal life, privileging the activities of “respectable” bourgeois citizens over youth in the city and struggling “to *clear* the rural night of its traditional activities . . . and create an ordered time largely empty of activity.”⁷⁴ By the seventeenth century, this control of the night involved curfews and laws against the sinfulness of carnal activity and security dangers after dark. Although the

laws may have been mostly symbolic, public and ecclesiastical authorities nonetheless sought to actively govern by augmenting fear of immoral and criminal behavior.⁷⁵

The fueling of fears is still a tool for governance today and, in many ways, continues to focus on the night.⁷⁶ In the protests following the killing of George Floyd by a police officer in 2020, violence by police and protesters flared after dark, prompting calls by worried authorities to respond even more aggressively.⁷⁷ Fears of disorder play distinctively on sociologically divergent groups. For example, enslaved people, who often made community, conspiracy, and flight at night, were often warned of nocturnal dangers (a menace made real by vigilantes).⁷⁸ Movie theaters were once considered by elites to be too dark, and thus too dangerous for middle-class and white patrons, and were lightened accordingly, while films avoided offensive darkened scenes in the early twentieth century.⁷⁹ Today Black men are most often misidentified as the source rather than target of nocturnal threats.⁸⁰ Women are conditioned to feel, and report on, extensive fear for their safety in public at night, even while they are statistically most endangered in their homes.⁸¹ While night still draws many out of doors, at some level most people in Western societies live nights differently than days, and insecurities (as well as respect for insecurities that others may hold) about criminals, cars, animals, vigilantes, the supernatural, and the dark make for a collective nocturnal anxiety. Night is a time-space, for the geographer Robert Shaw, “in which we are more open, more uncertain, more tentative and perhaps more vulnerable.”⁸²

Cultural and philosophical associations of night with fear are legion.⁸³ “Sable Night, mother of Dread and Fear,” wrote William Shakespeare.⁸⁴ His Theseus exclaims, “In the night, imagining some fear/ How easy is a bush suppos’d a bear!”⁸⁵ Rudyard Kipling confirmed the emotional potency of the dark: “Comes a breathing hard behind thee—snuffle-snuffle through the night—/ It is Fear O little hunter, it is Fear.”⁸⁶ For Edgar Allan Poe, the night has its own populace, bringing forth “every species of infamy from its den.”⁸⁷ These links between night and fear are “primitive” and intrinsic for Claude Lévi-Strauss and Sigmund Freud.⁸⁸ Friedrich Nietzsche mused in his aptly named *Daybreak* that the ear is the organ of fear and could only have evolved at night.⁸⁹

The politics of fear projects blame, and blame lubricates violence at night, most often against the weakest members of society rather than those posing the greatest threats.⁹⁰ The idea that the night holds dangers beyond the normal abilities of the state to control becomes a potent excuse for

emergency powers, but rarely in a discrete format. Not every night brings a curfew, but every night authorizes the power of the police hunt, often unencumbered by surveillance through cell-phone and body cameras symbolically promising restraint.⁹¹ Not every night calls for a posse comitatus, but night helps hide the identities of vigilantes and provides excuses for lone gunmen “standing their ground” against racialized threats, as well as opportunities for domestic abusers to quietly punish and torture their partners through the denial of sleep. Every night *is* an emergency, normalized to some degree by the *dispositifs* of nocturnal power: the police and private authorities working hard to build and repair the social hierarchies that appear flimsy in the daylight, often justified by a nocturnal foundation of fear. Gabriel Naudé illustrates how this inversion of law, which he called the *coup d'état*, positions the political night before, and not following, day:

In these *master strokes of State*, the Thunderbolt falls before the Noise of it is heard in the Skies. . . . Prayers are said before the Bell is rung for them; the Execution precedes the Sentence; he receives the Blow that thinks he himself is giving it; he suffers who never expected it, and he dies that look'd upon himself to be the most secure; all is done in the Night and Obscurity, amongst Storms and Confusion, the Goddess *Laverna* presides, and the first Grace requested of her is this,

Make me a Saint and Just to human Sight,
But wrap my Cheats in Clouds, and Crimes in Night.⁹²

Cheats and crimes reveal law as carnivalesque, the coups d'état of night underwriting the day of legal reason.

EQUALITY AT NIGHT

Help me to shatter this darkness,
To smash this night,
To break this shadow
Into a thousand lights of sun,
Into a thousand whirling dreams
Of sun!

—Langston Hughes

The experience of fear at night becomes a source for imagining not only retribution and transgression but also forms of nocturnal equality through which legal norms and social hierarchies can be rearranged or leveled.⁹³ Elias Canetti opens his masterful work on crowds and the equality that they facilitate with the seminal nocturnal fear of being touched in the dark. “In the dark,” he begins, “the fear of an unexpected touch can mount to panic.”⁹⁴ Canetti draws an affective link between this nightly fear and the transformation of crowds, where jostling and touching become a comfort when confronting the wolves of the night. Murray Melbin, who pioneered the sociology of night, noted something similar. “Aware that they are out together in a dangerous environment, people identify with each other and become more outgoing. The sense of safety that spreads over those together at night in a diner or in a coffee shop promotes camaraderie there.”⁹⁵ Beyond the shop, the streets themselves are never fully controlled by illumination, observation, and the discourses of danger. Michel de Certeau writes of the tactical skill of using the dark, analogized to a Roman driver, “ceaselessly recreating opacities and ambiguities—spaces of darkness and trickery—in the universe of technocratic transparency.”⁹⁶ In the antebellum South, despite the expansive exertions of slaveholders and police who effectively controlled the day, “every Southern city had its demimonde, and regardless of the law and the pillars of society, the two races on that level foregathered more or less openly in grog shops, mixed balls, and religious meetings. Less visibly, there thrived ‘a world of greater conviviality and equality.’ Under cover of night, ‘in this nether world blacks and whites mingled freely, the conventions of slavery were discarded, and . . . the women of both races joined in.’”⁹⁷ As Langston Hughes poetically observes, night is a time for shattering oppressive norms, for transgression, for reordering and enchanting the world. Night makes “revolution against the archetypal,” and darkness is not just preserved alongside illumination but cultivated for these other insurgent values.⁹⁸

The shared need and preparation for sleep may also require overcoming nocturnal fears. Jean-Luc Nancy writes that “night is the wilderness of fears” and sleep “presupposes the fear of night has been conquered.”⁹⁹ Certainly, not all have the freedom to experience a good sleep, as I explore in later chapters. Nonetheless, the universal periodic need for sleep constitutes a rhythmic equality distinguishing itself from the inequalities of day, even where it is not fully actualized. For Nancy, “all nights are equal. All equally suspend the time of difference, the time of differentiations of all kinds, like that of speech, of food, of combat, of travel, of thought.”¹⁰⁰

Sleep once rehearsed a symbolic leveling. The historian A. Roger Ekirch writes that in the eighteenth century, “a French priest noted, ‘The Prince hath no advantage over his subjects, when they are both asleep.’ In bed, kings forswore their crowns, bishops their miters, and masters their servants. ‘Sleep hab no Massa,’ affirmed a Jamaican slave proverb.”¹⁰¹ Sleep and the night, in essence, expressed a shadow *dispositif* of sovereignty in which all were equal, because equally vulnerable. The expansion of extreme penalties for nighttime crimes in the seventeenth and eighteenth centuries suggests that “despite the steadily rising powers of the state, nighttime defied the imposition of government authority.”¹⁰² Historically, then, nighttime was not without laws, as it remains law bound today, but those laws then, and frequently today, may seem more fragile in the night due to the desire for alternative social orders and the reality or imagination of limited state capacity. The resultant sense of increased vulnerability not only permits other forms of sociality but also leaves sanctioned space for extrajudicial vigilantism.

What other kinds of equality are expressed at night? Martin Jay has shown the ways vision has long been critical to the iconography of political equality through his study of the artworks of Jacques-Louis David and the ever-seeing Masonic Eye that French revolutionaries used as a symbol of equality following the destruction of the monarchical center of power.¹⁰³ And yet vision is also instrumental in discerning social inequalities at a distance. Darkness renders these significations difficult or inoperative, obscuring the markers of clothing, age, gender, and color; night historically brought a relaxation of otherwise strict sartorial and social rules.¹⁰⁴ Freedom from labor and social scrutiny meant “night revolutionized the social landscape.”¹⁰⁵ Jacques Rancière emphasizes that this revolution emerges from where the temporalities of work and rest are shaken off by those workers who lucubrate and in so doing share equally with the bourgeois aesthetes the world of imagination:

It is not day but night that is involved here, not the property of others but their “chagrin,” their invented sorrow that contains all real sorrows. It is not knowledge of exploitation that the worker needs in order “to stand tall in the face of that which is ready to devour him.” What he lacks and needs is a knowledge of self that reveals to him a being dedicated to something else besides exploitation, a revelation of self that comes circuitously by way of the secret of others: that is, those intellectuals and bourgeois people with whom they will later say . . . they want to have nothing to do.¹⁰⁶

One important implication of Rancière's history is that night should not be subsumed under the empire of sleep and work, especially for those seeking social and political justice. Where Maurice Blanchot recognizes that too often "sleep belongs to the world; it is a task. We sleep in accord with the general law which makes our daytime activity depend on our nightly repose," Rancière responds that night holds an aesthetic and epistemological equality freeing it from the social and material inequalities of the day for those who can seize its other opportunities: "The inventors, the poets, the lovers of the people and the Republic, the organizers of the cities of the future, and the apostles of new religions. The worker needs all of these people, not to gain scientific or scholarly knowledge of his condition, but to entertain and maintain his passions and desires for another world. Otherwise the constraints of labor will level them down to the mere instinct for survival and subsistence, turning the worker brutalized by work and sleep into the servant and accomplice of the rich people bloated with egotism and idleness."¹⁰⁷ The enhanced possibility of aesthetic imagination at night creates an equality but at the same time, and integrally, a possible resistance that comes from reimagining the world, "not as a specific single world but as a conflictive world: not a world of competing interests or values but a world of competing worlds."¹⁰⁸

For some, the night has always held another world of pleasure allowing for new encounters that frequently escape legal and other forms of order. The feminist philosopher Hélène Cixous observes, "What is outside of us during the day takes place within us during the night."¹⁰⁹ Henri Lefebvre parallels this embodiment with his theory of spatiality: "Space is divided up into designated (signified, specialized) areas and into areas that are prohibited (to one group or another). It is further subdivided into spaces for work and spaces for leisure, and into daytime and night-time spaces. The body, sex and pleasure are often accorded no existence, either mental or social, until after dark, when the prohibitions that obtain during the day, during 'normal' activity, are lifted."¹¹⁰ The lifting of prohibitions may become a strategy for male power; Simone de Beauvoir observes, "In the shadows of night man invites woman to sin. But in full daylight he disowns the sin and the fair sinner."¹¹¹ Darkness also permits less patriarchal forms of sexuality to thrive. Urban night life has been critical to various youth cultures, identities, and personal growth, sometimes ordered by night economies promoted by governments and businesses, leading to exclusions based on class, ethnicity, and gender.¹¹² But night also allows for the development of social networks among people whose diurnal differences are no longer

preeminent, allowing a new commonality or equality to emerge. With the loss of sanction, new and experimental forms of life emerge and express what Elisabeth Anker has recently extolled as “ugly freedoms.”¹¹³ Night and darkness long provided cover for illicit public homosexual liaisons, for example. Prosecutions of homosexuality in the late Middle Ages in Florence were directed by a committee known as “Officials of the Night.”¹¹⁴ Hundreds of years later, London’s “Night Czar” was appointed in 2016 to help protect smaller nocturnal venues, particularly those catering to sexual and other minorities.¹¹⁵

In this book I explore the tensions between the fears that create a collective wariness at night and the pleasures of an equality that many can indulge—often against other “officials of the night”—only at night. The interests of some in retaining social hierarchies that are legally governable by day but more easily flattened at night (absent intensified nocturnal strategies) suggest that our attention to these temporal cycles may provide insight into what supplements we should append to our understanding of sociolegal phenomena. We can also gain access to those inequalities that are exacerbated by darkness and night, for example, the modes of security that allow some to sleep well because others are prevented from doing the same, and the nocturnal strategies used to struggle for power.

METAPHOR AND MATTER

What does it mean to write about night when thinking about the law? As well as a daily terrestrial phenomenon, night is complexly metaphorical and idiomatic across many cultures, reflecting various “nightly practices.”¹¹⁶ Although administrative rules, such as those for aviation or driving, technically define night’s beginning and its end, for most other endeavors night is understood in a practical and variable manner.¹¹⁷ Often, it is night’s effects—such as darkness and quiet, the closing of financial and judicial offices, somnolence and sleep, the start of the graveyard shift or the end of the workday, the affect of fear and the expectation of caution, the desires for love or sex—that give night its sensibility, even in courts of law. While night is a culturally defined period of time, it is also deployed to signify the clarity of distinction (“like night and day,” lacking daylight between this and that), the lack of or singularity of encounter (“like ships in the night,” “one-night stand”), the inaccessible (“night of oblivion,” “left in the dark,” the Dark Ages), death (that “good night”), the sketchy (“fly by

night”), and other idiomatic meanings. Legal metaphor, enchanted by the Enlightenment, stresses light, clarity, and visibility, but it sometimes extols its reason through tensions that emphasize darkness and finality (e.g., the permanence and indubitability of “black letter” laws or the value of leaving a matter “in the constitutional shade”).¹¹⁸

In this book I treat night as a real, terrestrial time when the sun is below the horizon, as well as a trope. We know that not all nights are dark, that not all shadows hide their lurking occupants, that not all reason is illuminated, that not all sleep occurs after the sun goes down, and that dawn and dusk complicate the binary of night and day. Nonetheless, common associations of night with darkness and danger, obscurity and incapacity, sleep or fatigue, can be mobilized without undue justification to excuse inattention, to explain actions based in fear or doubt, and to distinguish self-defense from murder. At the same time, as I have argued, darkness can be cultivated as a kind of freedom and pleasure in itself and a source for community that law would otherwise protect; here, it may escape the edict of the law or promote new associations of law and life, what we commonly call *legality*. We sing of dancing in the dark; we dim the lights to improve the mood and enliven social gatherings. Some assemble ritually in the dark nights before solstice or Easter sunrise (“faith sees best in the dark,” wrote Søren Kierkegaard) or retreat into darkness to meditate.¹¹⁹ Some freedom at night is only won by hiding from legal authority. How should we account for this variability in social practice and meaning when accounting for night as metaphor?

The French *noir* can be translated as “dark” or “black,” and this entanglement of meanings—separated and compartmentalized in English yet equally attributable to night—perhaps explains the attention paid by French philosophers to subtle distinctions otherwise obscured by Enlightenment ideals. François Laruelle writes, “Black is without opposite. . . . Black is anterior to the absence of light . . . [it] is the Radical of color, what never was a color nor the attribute of a color, the emotion seizing man when affected by a color.”¹²⁰ Dark can be made light, but black resists such efforts. Black absorbs light, radiating none, making it unlike other colors. For Nicola Masciandaro, who ponders Laruelle’s “Radical,” black is omnipresent and impenetrable, “the vision of something whose presence is nothing other than the form of its own non-visibility.”¹²¹ Like the black letter of law, this black stands beyond reproach. Unilluminated, neither is it “sighted, imagined or known.”¹²² Black retains its secret status, exceeding

“the dialectical opposition light defines it by.”¹²³ From this dialectical perspective, black is not the same as darkness, which may be an evanescent property of night, but black is always anterior to shadow. “Black is the Void of the colors,” writes Alain Badiou, that which we cannot know (such as the nameless, formless god of Genesis, who creates the universe and only then separates the night from the day), or that which we do not know but infer (such as the black hole and dark energy, neither of which can be seen, but both of which can be known).¹²⁴ When we name torture centers *black sites*, we play with this secret form where, despite knowing about them (they are not disavowed), we know nothing of them.¹²⁵ In this playful sense, as Badiou shows, black spontaneously fissures, revealing not dialectical synthesis but dialectical fecundity where one divides into two. Black is the flag of anarchy with its vision of reconciliation, as well as the barbarity of fascism and nihilism, he observes.¹²⁶

Daylight and vision disperse dark spaces and interrupt some of the dividing power of black. Revealed to scrutiny (perhaps by “sunshine laws”), black sites no longer emanate their secret valence of power. Badiou recalls various games in his youth played strictly in the dark; one rule was “there could be no daytime trace of the dark.”¹²⁷ Not all traces can or need be erased or made secret to hold their spell. Black’s void is productive of power in multiple registers. Maurice Blanchot’s concept of the *other night*—not the night of darkness but the black night without stars that we cannot reach but can glimpse in our dreams—expresses his aesthetic inspiration, a lightless source for artistic light.¹²⁸ Emmanuel Lévinas contrasts this with the long tradition of critical philosophy’s homage to the sun: “Art is light. Light from on high in Heidegger, making the world, founding place. In Blanchot it is a black light, a night coming from below—a light that undoes the world; leading it back to its origin, to the over and over again, the murmur, ceaseless lapping of waves, a ‘deep past, never long enough ago.’ The poetic quest for the unreal is the quest for the deepest recess of that real.”¹²⁹ In a parallel manner, the legal theorist Niklas Luhmann argues that law’s opacity vis-à-vis other systems of meaning—its closed character and impenetrability—is paradoxically what makes it “open” to other social systems. As identity *and* difference—an “operatively closed communicative system”—law orients communication toward itself (its formalism and rulemaking) and external meanings (its value for other systems) simultaneously, speaking effectively from its blackness.¹³⁰ Black’s fecundity, identified by these philosophers, reveals the potential to think

theoretically and aesthetically as much with darkness and blackness as can be achieved with light.

Black's alterity and impenetrability to light interleaves with, and is frequently dominated by, the long history of racial antagonism. Achille Mbembe writes that from the inception of the slave trade, color served as "the exterior sign of a basic indignity, a foundational form of degradation. Over the course of the eighteenth and nineteenth centuries, the epithet or attribute 'Black' referred to this inaugural absence. . . . It drew its strength from its capacity to suffocate and strangle, to amputate and emasculate. The name was like death. . . . Night is its original envelope."¹³¹ Kim Hall has demonstrated that the distinction of dark and light, black and white, predated but blossomed in the English Renaissance with the conceptual incorporation of the New World and the instrumentality of social difference.¹³² More than markers of beauty or morality, Hall argues that tropes of blackness ultimately come to express self and other through their discursive entanglement with disorder, unruly (women's) sexuality, and racial difference. Frantz Fanon arrayed these meanings in this manner: "Blackness, darkness, shadow, shades, night, the labyrinths of the earth, abysmal depths, blacken someone's reputation; and on the other side, the bright look of innocence, the white dove of peace, magical, heavenly light. . . . The Negro is the symbol of sin."¹³³ The writer Toni Morrison observes the historically long American distinction of black and white that secretes its racist meanings into language: "Neither blackness nor 'people of color' stimulates in me notions of excessive, limitless love, anarchy, or routine dread. I cannot rely on these metaphorical shortcuts because I am a black writer struggling with and through a language that can powerfully evoke and enforce hidden signs of racial superiority, cultural hegemony, and dismissive 'othering' of people and language which are by no means marginal or already and completely known and knowable in my work."¹³⁴ Morrison's "playing in the dark" with the limitations of language has relevance to law. As Patricia Williams observes, the conservative efforts to promote originalist interpretations of the Constitution extol a color-blind "aesthetic of uniformity." "Uniformity nullifies or at best penalizes the individual. Non-interpretive devices, extrinsic sources, and intuitive means of reading may be the only ways to include the reality of the unwritten, unnamed, nontext of race."¹³⁵ Exposing the nontext of race is akin to making black resonant, if not fully visible.

The geographer Katherine McKittrick furthers this resonance with her concept of a "black sense of place" denied by slavery, contained by spa-

tialized violence, and undergirded by the loss of diasporic histories and geographies, making it an “unspeakably intelligible trait within the practice of geographic violence.”¹³⁶ For McKittrick, a black sense of place is where Black life encounters and reproduces itself, as it has despite the dominance of whiteness that claims a universal hold on civilization while practicing social division. For example, the advent of urban electric street lighting, an extension of Enlightenment commitments to visibility and safety at night, frequently illuminated white and commercial areas while leaving Black neighborhoods intentionally in the dark.¹³⁷ This racist policy may account for the real and metaphorical darkness of the urban ghetto, enhancing the singular visibility of the police helicopter’s laser-like (and blinding) searchlight targeting Rodney King (in 1991) or some other alleged perp.¹³⁸ I pay particular attention to racial meanings and practices associated with night in the chapters that follow, not only because they are a dialectical aspect of Enlightenment thought—and thus embossed in the law and social order—but also because racial oppression generates its own alternative forms of life with emergent ideas of legality, many lived in the night.

Although blackness, darkness, sleep, and night exchange associations among themselves for reasons that are biological, physical, social, and cultural, these are all ultimately political terms. As a scholar striving to tease from the shadows the subtle valences among these, I am conscious and cautious of the hegemonic commands and desires to leave the cave for the sunlight. The goal of this book is not to continually spread light into dark spaces. Such an Enlightenment project would tend to universalize law, which I resist. Where dark spaces and the night hold opportunities to reinvent and reaffirm ways of life, flooding them with light holds its own metaphorical lethality, much like a germicidal lamp spreads sterility. I seek somewhat contradictory ends: to explore the significance of night (and its cognates) for legality and the governance of social hierarchy, and to draw from these dark spaces of law their overlooked potential to enliven choices and textures of law and a more egalitarian social life.

PLAN OF THE BOOK

This book uses night as an optic to further critical inquiry about law and legality. The tension in my metaphor is intentional. Optics work with light, and night as both a time of darkness and a metaphor for obscurity makes

seeing challenging. One task of this book signaled by my metaphor is to attend to what it means to know both facts and norms at night, to plot a nocturnal jurisprudence. Night disturbs surveillance, changes access to legal institutions and policing, and yet does not attenuate law. How we know or imagine law at night is also related to its ontology. For Michael Serres, night secures our realities, even where we must find other ways to know them. “Darkness does not betray, nor does shadow: in them a thing remains a thing, veiled or not, visible or not, always accessible through touch. Fog betrays, completely fills the environment with potential things. Whether they are objects or vapours—we cannot tell. Night unsettles phenomenology, mist disturbs ontology. Shadow reinforces the distinction between being and appearance, mist blurs it. Thing or veil, being or non-being, that is the question.”¹³⁹ Pursuing law at night by reading its shadows, I suggest, deepens our senses of law’s power while refiguring its ontology to account for its concealment.

I search for law’s power in the chapters that follow in three major ways. The first is an exploration of law’s contribution and response to nocturnal subjectivity. Night, I suggest, leads us to rethink what it means to be a legal subject endowed with rights and entitled to “access” the law. In chapter 1 I consider the sleeper—whom we all become for hours per day—whose unconscious life lacks the agential qualities of reason and responsibility that law demands. Sleep is not only a biological impediment to the rationality presumed by the legal person. It also interrupts the vigilance that the law presumes, punctuating our ability to actively grasp (and remain grasped by) the law. The ancient legal principle of equity, *Vigilantibus non dormientibus jura subveniunt* (Laws aid the vigilant, not the sleepy), uses the exception of sleep to metaphorically tie vigilance to a notion of diligent (legally ordered) timeliness: one caught “sleeping on one’s rights” forfeits the entitlement to litigate them.¹⁴⁰ For law to take greater account of sleep requires a means for thinking its social basis: our dependency on and duties to others that guarantee sufficient security for sleep. Sleep takes us, I argue, to a more collective, more expansive idea of legal subjectivity, and because some sleep poorly so others may sleep more securely, the politics of sleep also reveals new ideas of justice commensurate with this new legal subject.

Nocturnal struggles for power raise a second alteration to our understanding of legality’s contingent relationship with other social dynamics. Robert Cover has argued that law’s relationship to violence is modulated

by an assemblage of deed, role, and word.¹⁴¹ Legal violence destroys the shared moral world, he argues, and the feelings of revulsion caused by doing violent deeds are attenuated by this assemblage: the division of roles permits judges to act conscientiously, solely with words, and apparently with clean hands as jailers and executioners do the violence that they authorize, assured that they act as cogs and not as morally culpable agents. Night upsets this *dispositif*. Darkness inhibits some aspects of representation; words may pierce the night, but signs of order are less tangible or rendered invisible. In this obscurity, roles may diverge from the text of law: police may more easily become the authors of law, and vigilantes may assume their own enforcement roles. The night, therefore, exposes us to the ways that law operates without the full force of its compensatory schemes of representation. Night is often when violence becomes more pronounced, but it is also where other means can be deployed to take account of what happens in the darkness, means that are reincorporated into schemes of legal order.

These themes are explored in chapter 2, where I present a history of American interracial violence to illustrate the ways that law and vigilantism enable the rights of white individuals to bear arms, while concomitantly disarming Black people. I show how the persistent duty of disarmament, which I identify as one of the main functions and meanings of the militia, has frequently operated at night, when Black men and women have asserted freedom of movement and have thus been identified as dangerous to white interests. The militia is a core republican concern, but I argue that the political philosophy of republicanism, so influential in American institutional development, never had a theory of the night that could account for this nocturnal politics, allowing violence to persist without adequate critique. I link the history of controlling the night to contemporary police and vigilante killings of Black people, which I show have a previously overlooked temporal dimension.

The desire for law and legal order—its mobilization by individuals and by social movements—is also enhanced and modified by the uncertainties and the emergencies of nights, a third direction for inquiry. This condition of emergency is officially declared and enhanced in the case of the curfew, when normal rules permitting movement and sociality are suspended, most often at night. Chapter 3 explores the political function of the curfew. Although curfew has frequently been deployed in colonial efforts at Indigenous pacification, and has been extended to control youth and stabilize

urban racial violence, little has been written about how curfew works. Curfew establishes a brief and temporary form of sanctuary, and I argue that this temporality works to augment the power of law through the creation of desire for law's certainty and more predictable forms of violence manifest in the day. I link the premodern curfew to its modern forms in this chapter, seeking to understand what role the night plays in the efficacy and political limits of this emergency technique, and I explore its role in contemporary critical theory and political theology about emergency.

Even without an official designation of curfew, behavioral norms restricting and altering nocturnal movement often diverge from those practiced in daylight. The Enlightenment promised transparency, rationality, and generality, all qualities attributable to law and imagined as disseminating light. The appeal of these values is not necessarily self-evident, especially for those who have historically been disadvantaged by legal norms and by restricted legal subjectivity. Chapter 4 is a study of feminist activism nominally designed to "Take Back the Night." I ask what this politics, oriented against the persistent problem of violence against women, enacts with its nighttime marches. Unlike much other feminist and identity politics generally, nocturnal protests perform an opposition to Enlightenment norms and institutions, as well as representation generally as they target the law's inadequate protection of women from men. Rather than rejecting law, tout court, I argue this activism asserts a new property relationship: a desire to "take back" and possess what has been stolen, metaphorized as the night. I explore what this property in night can mean and what it portends for women's safety. I use this analysis to explore the contemporary value and the limits of feminist theory expounded by Andrea Dworkin, who was an early proponent for Take Back the Night activism. This chapter is a study of one way in which night, opposed to Enlightenment norms, is valuable for political ends.

Although this book tries to "see" night in our legal relations, the common scholarly neglect of night is also associated with a paucity of specific attention to day.¹⁴² The tradition of legal scholarship that attends to metaphorical and analogical reasoning—both indebted to images of light—indirectly gives homage to day. Chapter 5 concludes the book by relating the analogy of night to its rhetorical and ontological status in the law. Using the important work of Derrida, who has written on the significance of the heliotrope, the centralizing image of the sun integral to all metaphorical thinking, I ask what it might require to bring night back

into legal thought. This question requires us to attend to the propagation of Enlightenment metaphors that dominate legal reasoning. The deconstruction of the heliotrope makes day explicit while leading to a greater understanding of the significance of law's dark places, permitting us to better account for the violence and freedom of night. Finding night and law's concealment, as Foucault suggests, is the key to locating law's power.

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INTRODUCTION: INTERRUPTIONS

Epigraph 1: Carbonnier, *Flexible droit*, 61 (translation mine).

Epigraph 2: Foucault and Blanchot, *Maurice Blanchot*, 33.

Epigraph 3: Dworkin, "Night and Danger," 15

- 1 D. Shapiro, "Case of the Speluncean Explorers." The article has been cited hundreds of times in the secondary legal literature and been the object of several symposia. It has also attracted a number of updates and "further proceedings." See, for example, Kozinski et al., "Case of the Speluncean Explorers"; Eskridge, "Case of the Speluncean Explorers"; and D'Amato, "Speluncean Explorers."
- 2 Plato, *Republic*, bk 7. Pound sometimes used Plato as a device for explicating his legal theory. See Pound, "American Law School."
- 3 Fuller, "Case of the Speluncean Explorers," 642.
- 4 Fuller, "Case of the Speluncean Explorers," 624, 628, 637–38, 644.
- 5 Hibbitts, "Making Sense of Metaphors," 230–32; and Mnookin and Kornhauser, "Bargaining." In an interesting article on how the blind "see" race, Osagie Obasogie has argued that visibility is socially constructed, pointing toward the significance of such metaphors. Obasogie, "Do Blind People See Race?" Penumbras of constitutional amendments (*Griswold v. Connecticut*, 381 U.S. 479 [1965]) draw from this daylight metaphor, as do references to legal "twilights" such as this: "The law that governs between states, has at times, like the common law within states, a twilight existence during which it is hardly distinguishable from morality or justice, till at length the imprimatur of a court attests its jural quality." *New Jersey v. Delaware*, 291 U.S. 361, 383 (1934), Justice Benjamin Cardozo. See also *Youngstown Sheet and Tube v. Sawyer*, 343 U.S. 579, 637 (1952), Justice Robert Jackson, concurring: "zone of [Constitutional] twilight."
- 6 Freud, *Totem and Taboo*, 164–67. See also Schroeder, "Totem"; and Fitzpatrick, *Modernism*, 11–36. Jacques Derrida, particularly, casts the story in a different light, suggesting it is a nonevent that reveals an "impossible story of the impossible." Derrida, "Before the Law," 198–200.
- 7 Foucault, *History of Madness*, xxxiii. Foucault argues that madness will always persist as a "carcass of night," as a "relationship of a culture to the very thing that it excludes" (542, app. 1), a parallel to my arguments about law.

- 8 E. Mensch, “Mainstream Legal Thought.” Although Carl Schmitt’s European theory of the sovereign and legal exception played little role in American jurisprudence during Fuller’s time, his work now anchors this thought in Anglo-American and Continental legal theory. See Schmitt, *Political Theology*; and Agamben, *Omnibus Homo Sacer*. See also Fuller’s subsequent debate with H. L. R. Hart on the moral nature of law. Hart, “Positivism”; and Fuller, “Positivism.”
- 9 Fuller, *Morality of Law*; Derrida, “Force of Law”; Žižek, *Plague of Fantasies*, 93; Benjamin, “Critique of Violence”; Cover, “Violence and the Word”; Agamben, *State of Exception*; Schmitt, *Political Theology II*; and Badiou, *Theory of the Subject*, 159–75. See also Bosteels, “Force of Nonlaw.”
- 10 I borrow the terminology of *excessive absence* from Davina Cooper, private communication.
- 11 “If a thief be found breaking up, and be smitten that he die, [there shall] no blood [be shed] for him. If the sun be risen upon him, [there shall be] blood [shed] for him; [for] he should make full restitution; if he have nothing, then he shall be sold for his theft.” Exodus 22:2–3 (King James version). For an extended discussion of this limit, see Kopel, “Torah and Self-Defense,” 26–27.
- 12 Blackstone, *Commentaries*, 2:222; and Ekirch, *At Day’s Close*, 40.
- 13 Shoemaker, *Sanctuary and Crime*, 158.
- 14 Title 13, Art. 63, in L’Ouverture, *Haitian Revolution* (translation modified).
- 15 Goodrich, *Oedipus Lex*, 3, quoting Marsilio Ficino (1480).
- 16 Ekirch, *At Day’s Close*, 84; Carbonnier, *Flexible droit*, 63; and Koslofsky, *Evening’s Empire*, 199. One antecedent barring nocturnal legal practice can be seen in the debates over the legitimacy of the trial of Jesus. “The Mosaic code was the law applicable in the Jewish court, to the trial of Jesus. Under this law a trial could not be held in the nighttime and sentence of guilty could not lawfully be pronounced until the third day after the finding and after a second vote of the court. It was an axiom of this law that the function of the court was to protect human life.” White, *Law in the Scriptures*, 312n10.
- 17 Beaumont, *Nightwalking*, 124.
- 18 Kantorowicz, *King’s Two Bodies*, 142n167. Similar problems were grappled with in ancient Chinese political theory, where sleep and drunkenness were mutual threats to leadership. See Richter, “Sleeping Time,” 31. The Japanese emperor had institutionalized watches representing his rule while he slept. Steger and Brunt, “Introduction,” 14.
- 19 Loewen, *Sundown Towns*.
- 20 See Matricciani, Olds, and Petkov, “In Search of Lost Sleep”; Dement, *Promise of Sleep*; and Barnes, Ghumman, and Scott, “Sleep.”

- 21 Deleuze, "Postscript on Control Societies"; see also Crary, 24/7.
- 22 Ekirch, *At Day's Close*, 339; see also Crary, 24/7.
- 23 Santner, *Weight of All Flesh*, 33.
- 24 Melbin, *Night as Frontier*.
- 25 R. Williams, "Night Spaces," 525.
- 26 "Where relations between right and power are concerned, the general principle is, it seems to me, that one fact must never be forgotten: In Western societies, the elaboration of juridical thought has essentially centered around royal power ever since the Middle Ages." Foucault, *Society Must Be Defended*, 25.
- 27 Heidegger, *On Time and Being*, 67.
- 28 Agamben, *What Is an Apparatus?*; Foucault, "Confession of the Flesh"; Deleuze, "What Is a Dispositif?"; Esposito, "Dispositif of the Person"; and Panagia, "On the Political Ontology."
- 29 Agamben, *What Is an Apparatus?*, 12.
- 30 Deleuze, "What Is a Dispositif?," 162.
- 31 Deleuze, "What Is a Dispositif?," 163.
- 32 McCann, *Rights at Work*, 9–10; see also Scheingold, *Politics of Rights*, preface.
- 33 Ewick and Silbey, *Common Place of Law*. See also Nielsen, "Situating Legal Consciousness"; Engel and Munger, *Rights of Inclusion*; and Engel and Engel, *Tort, Custom, and Karma*.
- 34 Calavita, *Law and Society*, 44.
- 35 Engel and Munger, *Rights of Inclusion*, 242.
- 36 Deleuze writes, "In each [dispositif] we have to untangle the lines of the recent past and those of the near future: that which belongs to the archive and that which belongs to the present; that which belongs to history and that which belongs to the process of becoming; *that which belongs to the analytic and that which belongs to the diagnostic*." Deleuze, "What Is a Dispositif?," 164.
- 37 Auden, "Law like Love."
- 38 Goodrich, *Languages of Law*, 51; Holmes, "Path of the Law"; and Cardozo, *Judicial Process*, 53. On belief in the constitutional framers' historically fixed thought-worlds, see Scalia, "Originalism." Henry Maine could see one path through both law and society as a movement from familial status to individual contract. Maine, *Ancient Law*.
- 39 On colonialism and law, see K. Davis, *Periodization and Sovereignty*; see also Greenhouse, "Just in Time"; McClintock, *Imperial Leather*; Fitzpatrick, *Mythology of Modern Law*; Bhandar, *Colonial Lives of Property*; Mills, *Racial Contract*; Grovogui, *Sovereigns*; and Anghie, *Imperialism*. On the imperial "politics of time, see Fabian, *Time and the Other*, x.
- 40 Engel, "Law, Time and Community"; and Kunal Parker, *Common Law*.
- 41 Kantorowicz, *King's Two Bodies*. See also Santner, *Royal Remains*.

- 42 Kunal Parker, *Common Law*. See also Mawani, "Times of Law," 262.
- 43 Wells, *Island of Doctor Moreau*, 149.
- 44 Melville, *Billy Budd*, 57.
- 45 Marcel Mauss described a parallel type of pluralism among northern peoples who oscillated between winter and summer forms of family and property law. Mauss, *Seasonal Variations*, 62–75.
- 46 The argument that there is a measurable quantity of law is one of the premises of Donald Black's work, for example, Black, *Behavior of Law*. Black does address the night in his book in several places in order to bolster his claim that "the quantity of social control varies across settings" (110), though his attention to night is not sustained.
- 47 Scott, *Seeing like a State*. James Scott's metaphor of the state's active vision does not account for the metaphor or social facts of night.
- 48 Latour, *Making of Law*, 151–52. Marc Galanter has noted the significance of delay in Indian civil litigation, as well as in the tactics of litigation that advantage parties with sufficient resources to wait. Galanter, "Why the 'Haves'"; and Galanter, "Legal Torpor."
- 49 William James understands this ontologically: "Pluralism stands for the distributive, monism for the collective form of being." W. James, "One and the Many," 114.
- 50 Davies, "Pluralism and Legal Philosophy," 587. See also H. L. A. Hart's "internal aspect of rules," Hart, *Concept of Law*, 56; and Oliver Wendell Holmes's "bad man." Holmes wrote, "If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience." Holmes, "Path of the Law," 459.
- 51 Merry, "Legal Pluralism."
- 52 Griffiths, "What Is Legal Pluralism?," 5.
- 53 Manderson, *Songs without Music*, 169–70.
- 54 Davies, "Pluralism and Legal Philosophy," 586 (echoing Jean-Luc Nancy).
- 55 See Davison, "Some Observations."
- 56 Philosophically, this position is perhaps best enacted by Friedrich Nietzsche's Zarathustra's ten years of solitude, patiently waiting every morning for the sun to rise. This is what Deleuzian thought might call a *becoming-same*. Nietzsche, *Thus Spoke Zarathustra*, 3; and Zourabichvili, *Deleuze*, 174.
- 57 Foucault reviews a novel, *La Veille* (1963), by Roger Laporte in these terms. "To keep vigil for Laporte, means to be not after evening but before morning, without any other 'before' this lead that I myself am on all possible days. And in this night, or rather (because the night is thick, closed opaque; the night partakes of two days, draws limits, lends drama

- to the sun that it restores, prepares the light that it restrains for a moment) in this 'not yet' of morning, which is gray rather than black and as though diaphanous to its own transparency, the neutral word vigil gently glistens." Foucault, "Standing Vigil," 218.
- 58 Levos and Zacchilli, "Nyctophobia"; Edensor, "Gloomy City"; and Dunn, *Dark Matters*. In contrast, Polynesian cosmologies understand night (pō) as female, generative, and productive of sovereignty. Pualani Warren, "Theorizing Pō"; and Silva, *Aloha Betrayed*, 100.
- 59 Galinier et al., "Anthropology of the Night," 820.
- 60 On witches and werewolves as benevolent, see Ginzburg, *Night Battles*; Ginzburg and Lincoln, *Old Thies*; and Federici, *Caliban and the Witch*. On the church's attitude toward them, see Levack, *Witch-Hunt*, 46–50; and Verdon, *Night*, 57. Brian Levack suggests that belief in flying witches was not common in England compared with the Continent. Levack, "Possession, Witchcraft, and the Law," 1614. Night flight was also noted as a belief about witches in the area of early twentieth-century Ghana. See John Parker, "Northern Gothic," 359. Werewolves were men thought to prowl at night and throw themselves onto the backs of other men, an image of homosexual practice. See Bernhardt-House, "Werewolf as Queer"; and Spadoni, "Strange Botany." For Derrida, the werewolf shares with the sovereign a position outside or beyond the law. Derrida, *Beast and the Sovereign*, 1:64.
- 61 Noel Johnson and Koyama, "Decline of Witch Trials"; and E. Peters, *Magician*. Accusations of witchcraft continue to be a prod to legal development in Africa, Oceania, and Islamic countries, among others. Forsyth, "Regulation of Witchcraft."
- 62 Thomas Dekker, quoted in Ménager, *La renaissance et la nuit*, 10 (translation mine).
- 63 Beaumont, *Nightwalking*, 27.
- 64 O. Williams, "Regimentation of Blacks," 333. See also Schivelbusch, *Disenchanted Night*, 82.
- 65 On light pollution, see Meier et al., *Urban Lighting*; Edensor, "Reconnecting with Darkness"; and Stone, "Value of Darkness." Taylor Stone notes nine values behind the desire to preserve darkness: efficiency, sustainability, ecology, healthiness, happiness, connection to nature, stellar visibility, heritage and tradition, wonder and beauty. On illumination as protective, see Katyal, "Architecture as Crime Control." Although Neal Kumar Katyal husbands the traditionally accepted evidence for a positive association of lighting and crime reduction, recent studies have been less certain about this relationship. See Brands, Schwanen, and van Aalst, "Fear of Crime"; and Perkins et al., "Effect of Reduced Street Lighting."
- 66 Ekirch, *At Day's Close*, 85.
- 67 See, for example, Ahmed, *Cultural Politics of Emotion*, 69.

- 68 Edensor, "Gloomy City," 423.
- 69 Koslofsky, *Evening's Empire*, 200.
- 70 Koslofsky observes, "The night significantly facilitated all aspects of the passage from single youth to husband or wife. From meeting a group of potential spouses at a spinning bee or village dance, to getting to know a specific individual in the dim intimacy of a chamber during a Heimgarten visit or while bundling, to the physical consummation of the relationship (ending, it was hoped, in marriage), the night was a constant companion to the couple. Church and state gave their sanction to the marriage during the day, but husbands and wives were made at night." Koslofsky, *Evening's Empire*, 209.
- 71 Ekirch, "Sleep We Have Lost."
- 72 Ekirch, "Sleep We Have Lost," 370; and Koslofsky, *Evening's Empire*, 214.
- 73 Cabantous, *Histoire de la nuit*, 165.
- 74 Koslofsky, *Evening's Empire*, 219.
- 75 Schlumbohm, "Gesetze," discussed in Koslofsky, *Evening's Empire*, 222.
- 76 Simon, *Governing through Crime*; Simon, "Fear and Loathing"; Murakawa, *First Civil Right*; and Garland, *Culture of Control*.
- 77 *New York Times*, "Protest Groups Defy Curfew."
- 78 On how enslaved people made use of the night, see Reiss, *Wild Nights*, ch. 4; and Palmer, *Cultures of Darkness*. See extensive discussion in chapter 3 of this book. On vigilantes, see Fry, *Night Riders*.
- 79 Somerville, *Queering the Color Line*, 45.
- 80 Pain, "Gender, Race, Age and Fear."
- 81 Snedker, "Explaining the Gender Gap"; G. Valentine, "Women's Fear"; and G. Valentine, "Geography of Women's Fear."
- 82 R. Shaw, "Pushed to the Margins," 118.
- 83 Dunn, *Dark Matters*.
- 84 Shakespeare, "Rape of Lucrece," in *Complete Works*, 1088, line 107.
- 85 *Midsummer Night's Dream*, act 5, scene 1, lines 21–22.
- 86 Kipling, *Second Jungle Book*, 191.
- 87 Poe, "Man of the Crowd," 181.
- 88 Lévi-Strauss, *Elementary Structures of Kinship*, 495. On Freud's intimation that the fear of darkness is commonly experienced by children, see *Three Essays on Sexuality*, 90. Freud commonly used metaphors of darkness to discuss women's psyches. See Khanna, *Dark Continents*; and Macey, *Lacan in Contexts*, ch. 6. See also Lucretius, who acknowledges the childhood fear of the dark. Lucretius, *Nature of Things*, 46.
- 89 Nietzsche, *Daybreak*, 250.
- 90 Consider the ways in which civil rights activism was transmuted into criminality, and the ways that immigrants are blamed for violent crime today, for example. See Beckett, *Making Crime Pay*; and Murakawa, *First Civil Right*. Simone de Beauvoir writes, "Fear is always mixed with the

- blame attached to woman's licentious conduct." Beauvoir, *Second Sex*, 204.
- 91 Haygood, "Police No Longer Need." Wil Haygood argues, in light of the well-publicized killings of George Floyd and Ahmaud Arbery that provoked national and global responses, that police no longer feel bound to the night: "American society has landed on the other side of its nocturnal nightmares."
- 92 Naudé, *Political Considerations*, 59–60, also quoted in Foucault, *Security, Territory, Population*, 266 (with a different translation).
- 93 Epigraph: Excerpt from Hughes, "As I Grew Older," in *The Collected Poems of Langston Hughes*, 93–94, 1926.
- 94 Canetti, *Crowds and Power*, 15.
- 95 Melbin, "Night as Frontier," 13.
- 96 Certeau, *Practice of Everyday Life*, 18.
- 97 Woodward, *Strange Career of Jim Crow*, 15, quoting from Richard C. Wade, *Slavery in the Cities*, 259. Wade argued that "slaveowners considered these rendezvous extremely dangerous; the public consistently attacked them; the police tried every expedient to suppress them. Yet they multiplied and apparently prospered." Wade, *Slavery in the Cities*, 85.
- 98 Mohaghegh, *Night*, 1. See also Dunn and Edensor, *Rethinking Darkness*; Palmer, *Cultures of Darkness*; and Ekirch, *At Day's Close*.
- 99 Nancy, *Fall of Sleep*, 39.
- 100 Nancy, *Fall of Sleep*, 21.
- 101 Ekirch, *At Day's Close*, 287. This sentiment may have classical roots as well. Sophocles's Antigone does the moral deed of burying her brother against the directive of Creon, the sovereign, under cover of night.
- 102 Ekirch, *At Day's Close*, 88.
- 103 Jay, *Downcast Eyes*, 95–97. On David's painting, see Santner, *Royal Remains*, 89–94.
- 104 Ekirch, *At Day's Close*, 135.
- 105 Ekirch, *At Day's Close*, 227.
- 106 Rancière, *Proletarian Nights*, 20. See also Palmer, *Cultures of Darkness*, 104–5.
- 107 Blanchot, "Sleep, Night," 264; and Rancière, *Proletarian Nights*, 20.
- 108 Rancière, "Thinking of Dissensus."
- 109 Cixous, *Stigmata*, 60.
- 110 H. Lefebvre, *Production of Space*, 319–20.
- 111 Beauvoir, *Second Sex*, 204.
- 112 Gallan, "Night Lives"; Roberts, "Big Night Out"; Thomas and Bromley, "City-Centre Revitalisation"; Van Liempt, "Safe Nightlife Collaborations"; and Van Liempt, van Aalst, and Schwanen, "Introduction."
- 113 Anker, *Ugly Freedoms*. Anker argues that the concept of ugly freedom captures not only the freedom to exploit and subjugate others (as have

gun rights, opposition to vaccines, and slavery at various times) but also those exoriated freedoms that emerge below dominant social and political judgments. In this regard, night freedoms may be one form of ugly freedoms.

- 114 Ekirch, *At Day's Close*, 230. For contemporary discussions of nocturnal queer life, see Campkin and Marshall, "London's Nocturnal Queer Geographies."
- 115 Busby, "London's Night Czar Criticised"; and Campkin and Marshall, "London's Nocturnal Queer Geographies," 83. Other night officials such as Washington, DC's "night mayor" are appointed to address problems interfering with the night economy. Codrea-Rado, "Europe's 'Night Mayors'"; Delgadillo, "Rise of the 'Night Mayor'"; and Zaveri, "Washington Wants to Hire."
- 116 The term is from Nancy Gonlin and April Nowell, "Introduction to the Archaeology of Night," in Gonlin and Nowell, eds. *Archaeology of the Night*, 11–12. See also Galinier et al., "Anthropology of the Night"; and Dowd and Hensey, *Archaeology of Darkness*.
- 117 "Night means the time between the end of evening civil twilight and the beginning of morning civil twilight, as published in the Air Almanac, converted to local time." Title 64, Code of Federal Regulations, ch. 1, "Federal Aviation Administration," § 1.1, 2022. Night's definition was changed in 2012 in reaction to several air accidents. See Tipton, "FAA Measures."
- 118 *Medellin v. Texas*, 552 U.S. 491, 566 (2007), Justice Breyer, dissenting.
- 119 Kierkegaard, *Gospel of Sufferings*, 36. This phrase has been made more prominent by President Joseph Biden's repetition.
- 120 Laruelle, "On the Black Universe," 106; originally published as Laruelle, "Du noir univers."
- 121 Masciandaro, "Secret," 50.
- 122 Masciandaro, "Secret," 56.
- 123 Masciandaro, "Secret," 58.
- 124 Badiou, *Black*, 34.
- 125 Consider the extralegal "dark zones" of the repressive state, or the black bars used to redact a document. Here, "black exists in these states simultaneously—a color, a non-color, a practice, a presence, an absence, and a *void*. Therefore, as with the illegible spaces of black sites and black ops, in its most critical application we take black as the singular warning—'there is nothing to see' (and you're seeing it)." Linnemann and Medley, "Black Sites, 'Dark Sides,'" 345, quoting Thacker, *Starry Speculative Corpse*, n. 79.
- 126 Badiou, *Black*, 48–50.
- 127 Badiou, *Black*, 10.
- 128 Blanchot writes, "But when everything has disappeared in the night, 'everything has disappeared' appears. This is the *other* night. Night is this

apparition: ‘everything has disappeared.’ It is what we sense when dreams replace sleep, when the dead pass into the deep of the night, when night’s deep appears in those who have disappeared. Apparitions, phantoms, and dreams are an allusion to this empty night.” Blanchot, “The Outside, the Night,” 162. See also the beautiful interpretations of Blanchot in Farberman, *Other Night*.

- 129 Lévinas, *Proper Names*, 137, quoting Laporte and Noël, *Deux lectures de Maurice Blanchot*.
- 130 Luhmann, *Law as a Social System*, 75 (see also the following pages).
- 131 Mbembe, *Critique of Black Reason*, 72, 152.
- 132 K. Hall, *Things of Darkness*. This construction of light/dark, civilized/barbarian, as an essential cultural expression is not unique to the West. See James Scott’s arguments on Southeast Asia: Scott, *Art of Not Being Governed*, 116–19.
- 133 Fanon, *Black Skin, White Masks*, 146.
- 134 Morrison, *Playing in the Dark*, x.
- 135 P. Williams, *Alchemy of Race*, 117.
- 136 McKittrick, “On Plantations,” 953.
- 137 Schivelbusch, *Disenchanted Night*; and C. Harrison, “Extending the ‘White Way.’”
- 138 I am indebted to Sankaran Krishna for this imagery. Private communication with the author.
- 139 Serres, *Five Senses*, 70. See also Helms, “Before the Dawn,” 179.
- 140 Blackstone, *Commentaries*, 2:187.
- 141 Cover, “Bonds of Constitutional Interpretation.”
- 142 Gallan and Gibson, “New Dawn or New Dusk?,” 2511.

CHAPTER 1. IS THERE A RIGHT TO SLEEP?

Epigraph 1: Aristotle, *Politics of Aristotle*, bk. 5, 1314a24–25.

Epigraph 2: Hart, *The Concept of Law*, 195.

- 1 Karandinos et al., “Moral Economy of Violence,” 20.
- 2 Dayna Johnson et al., “Association of Neighborhood Characteristics”; S. Johnson et al., “Neighborhood Violence”; Simonelli, “Perceived Neighborhood Safety”; Chen-Edinboro et al., “Neighborhood Physical Disorder”; Umlauf, Bolland, and Lian, “Sleep Disturbance”; and R. Gruber, “Short Sleep Duration.” For a sociohistorical analysis of the linkages between the institution of slavery and contemporary sleep disparities, see Reiss, *Wild Nights*, ch. 4.
- 3 On abuse and sleep, see Lowe, Humphreys, and Williams, “Night Terrors”; and Simonelli et al., “Impact of Home Safety.” On homelessness and sleep, see Beckett and Herbert, *Banished*; Hayes-Jonkers et al., “Hidden