ROUTLEDGE FOCUS

RHYTHM

New Trajectories in Law

Conor Heaney

ROUTLEDGE Focus

Rhythm

This book analyses the conceptual and concrete relationships between rhythm and law.

Rhythm is the unfolding of ordered and regulated movement. Law operates through the ordering and regulation of movement. Adopting a *rhythmanalytical* perspective – which treats natural and social phenomena in terms of their rhythms, repetitions, motions, and movements – this book offers an account of how legal institutions and practices can be theorised and explained in terms of rhythm. It demonstrates how the category of rhythm has jurisprudential significance – from the way Plato envisaged the functioning of the city-state, to the operation of the common law, as well as in our relationship to contemporary digital technology. In music, rhythm "orders" the movement of sound, binding together the motions and vibrations of sound in a way that is neither pure noise nor pure mechanics. In this way, rhythm can be deployed as a concept in the analysis of one of the central purposes of legal institutions and practices: to order the movements of bodies, whether the bodies of citizens in everyday life or of prisoners in rituals of punishment. This book engages with the mutual intersections and points of illumination between rhythm and law, such as ritual, measure, order, and change.

This book is an experimental *rhythmanalysis* of law, offering conceptual and methodological starting points, as well as proposing directions that could be deployed in future research. It is aimed primarily at legal scholars intrigued by rhythmanalysis and rhythmanalysts more generally. This book will also be of interest to those in the fields of philosophy, political and legal theory, sociology, and other social sciences.

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Contents

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Abbreviations

Laws. Plato. 2016. *The Laws*. Ed. M. Schofield. Trans. T. Griffith. Cambridge: Cambridge University Press.

Tim. Cornford. F. 1997. *Plato's Cosmology: The* Timaeus *of Plato*. Indianapolis/Cambridge: Hackett Publishing Company.

Introduction

The Clock, the Monastery, and the Prison Timetable

§1 Repeating

This is a book about approaching the nature of legal institutions, practices, and processes through the concept of rhythm. This *rhythmanalytical* approach to law has explanatory and epistemological purchase, and it is critically and politically significant. For introductory purposes, we can approach rhythm through thinking about how we experience and identify patterns in temporal processes. When listening to a song, we (sonically, vibrationally) experience the repetition of elements in the context of flux and flow such that these experiences are given a temporal "shape". The shape of vibrations in time is the rhythm. Rhythm is temporal and aesthetic (related to experience and affect), and it is also subject to formal study and abstraction: rhythm moves between the most abstract and intellectualised and the most embodied, emotional, and unconscious. Think about the Benedictine monks that Lewis Mumford (2010: 13) gestures towards in the following quote, whose devotional practices were repeated in a daily cycle:

> Opposed to the erratic fluctuations and pulsations of the worldly life was the iron discipline of the rule. Benedict added a seventh period to the devotions of the day, and in the seventh century, by a bull of Pope Sabinianus, it was decreed that the bells of the monastery be rung seven times in the twenty-four hours. These punctuation marks in the day were known as the canonical hours, and some means of keeping count of them and ensuring their regular repetition became necessary.

The bells of the monastery would ring, functioning as signal of devotional duty for monks to repeat the religio-aesthetic practice of prayer.

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This sonic and temporal signal gave form and rhythm to everyday life in the monastery. At the abstract level, our technical capabilities have become increasingly devoted to developing technologies for measuring time (from the sundial, to the mechanical clock, to the contemporary atomic clock) through which our institutions regulate and produce social time. Our bodies are tuned by circadian rhythms themselves co-evolved with the daily rhythmic cycles of the Earth with the Sun. Rhythm thereby places us in the contexts of cosmology, ecology, biology, and theology, and sometimes all at once, given the Sun's historical religious significance in the regulation of daily, seasonal, and annual cycles.

How, then, do we get from rhythm to law? By approaching law *through* rhythm and thereby conceptualising law rhythmically, we do not treat law as a discrete social zone which can be isolated from the broader context a consideration of rhythm puts us in (e.g. cosmology, ecology, biology, etc.). Law is in operation when there is the attempted synchronisation and harmonisation of social flows, consolidating those social habits (e.g., custom) which order expectation frameworks in everyday life, as well as providing expectation frameworks for when those social habits are themselves frustrated (e.g., rituals of dispute resolution). Our rhythmanalysis of law centralises those previously mentioned *temporal* and *aesthetic* components at the forefront. For introductory purposes, we will say a little on what we point towards when using each of these terms.

On the *temporal* dimension, the law is full of temporal ideas, concepts, and practices, including the following examples. *Due process* names a particular temporal sequence or steps which liberal institutions designate as necessary for the operation of the *rule of law*, the proper *separation of powers*, and so forth. We can assess the extent to which legal processes are just or not through how they regulate and govern our movements in time, as with *fair trial rights* or *fair procedures*, which Conor Crummey (2020) has argued can function as an important aspect of participatory democratic citizenship. The temporality of procedure in lawmaking is suggested by some to constitute a criterion of legal validity and legitimacy (Manderson, 2000: 74; Raz, 1979). In common law systems, the adjudicative principle of *precedent* binds together past, present, and future, establishing the temporal continuum of the legal system; the common law 'synthesizes past, present, and future; its temporal movements forge the basis of its authority' (Mawani, 2015: 256). In Michel Foucault's famous opening passage of *Discipline and Punish* (1991: 3–7), a contrast is

drawn between the methodical public torture (and burning) of Damiens in late 18th century Paris and the prison timetable schedule for prisoners as drawn up and imagined by Léon Faucher's (1838: 274–282) text on prison reform. While the former is a spectacular and violent public spectacle of punishment, the latter describes a vision of punishment defined by strict regularity and repetition, a cycle of daily activities (including prayer, work, and schooling) detailing prescribed quotidian rhythms for prison life. Key components of this contrast are the vastly distinct ways in which these different forms of punishment organise and order the movements and experiences of the judged through time. Following his attempted regicide, Damiens's torture and execution were temporally concentrated in an intense and excruciating day (28 March 1757), while the prison timetable is a temporally stretched cycle to be repeated for as long as is demanded by the judicial system. The prison sentence is a quantitative marker for the duration of liberty-deprivation, but the subjective experience of long-term prison sentences can transform and warp the sense of time. As Alyson Brown (1998: 97–98) notes, the everyday cycle of activities of continuous and ceaseless repetition can deprive 'prison time of meaning', merging 'all the days into an extended present'. This extension of the present is coupled with a change in how the past is remembered (as ever more remote) as well as how the future is imagined (as a fantasy of escape, or as something to repress). Regarding Foucault's contrast, these are principally different modalities of social repetition, two temporal rituals of punishment. These distinct penal styles are distinct rhythms of punishment, different methods of juridico-motional regulation from distinct milieus: they seek to institute *order* in their different ways. Whether it is the rituals of legal process, the performances of the trial, or the timetables of punishment, law temporally orders the movements of bodies and institutes social habits, adjudicating upon transgressions.

The second dimension of law opened through its rhythmic conceptualisation is its *aesthetic* one. In some legal theory, this aesthetic dimension is often given its sense through using the realm of art and literature as providing analytically useful comparisons (as simile or metaphor). Most famously, Ronald Dworkin's *legal interpretivism* founds itself on such comparisons. Conceiving of the law as a chain novel, each judge is imagined 'like a novelist in the chain' whose contributions to the law are ones that must *fit* with the legal genre and must also interpret and contribute to it in the 'best possible way'

(Dworkin, 1982: 193; 184; Kingwell, 1994). As Dworkin emphasises, this entrance of aesthetics into law is not meant in any way to entangle the domains of law and aesthetics too deeply: 'law, unlike literature, is not an artistic enterprise. Law is a political enterprise' (Dworkin, 1982: 194). We agree with Desmond Manderson that Dworkin does not appear to take the aesthetic comparison all too seriously, remaining as it does at the level of *comparison* (implying a relatively strict separation between law and aesthetics); instead, our approach entangles the legal and the aesthetic: 'aesthetics is already in the law' (Manderson, 2000: 31). This is not, as it may sound to some, a demotion of law to "mere" aesthetics. As we have already hinted, aesthetics (as from its Ancient Greek root αἴσθησις [aísthēsis], meaning *perception* or *sensation*) in fact pertains to the entire domain of what is sensed and felt, limited not just to language but to myriad forms of communication (such as linguistic and symbolic), engaging our affective, emotional, and unconscious capacities, as well as our rational, sense-making ones. Law is communicated not simply through language (written or spoken) but through gesture and the movement of bodies, through non-linguistic sounds and participation in ceremony and ritual, and in the ways objects are spatially arranged and navigated in time (such as the layout of the courtroom and the architecture of the prison). As Norman W. Spaulding argues (2013: 315, quoted in Parsley, 2021: 441), the American approach to the notion of due process is one that is 'intimately bound up with the location, design, and use of law's administrative space'. Legal institutions distribute social order via spatial quantities as well as kinetic and temporal flows, forming how legal institutions are perceived and experienced. While realms of art are *particular* realms of aesthetic experimentation with these quantities and flows, our milieus are entirely aesthetic vibrational continuums.

Two clarificatory examples of the aesthetics of both punishment and judgment follow. The torture of Damiens, as depicted by Foucault, was a public spectacle (public spectatorship being a crucial factor), and punishment often included various symbolisms. (Foucault mentions the piercing of the tongue of blasphemers, as well as Damiens holding in his 'guilty right hand the famous dagger with which he had committed the crime' [1991: 45].) Such symbolisms perform political functions, where an injury to the sovereign (the crime) is reciprocated back onto the body of the subject who violated the law in ways that are often *imitations* of the original crime: the punishment is both temporally concentrated (on a particular day) and spatially