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Law Without Matter? The Immateriality Thesis: A Critical Commentary

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Abstract
Despite its popularity in recent theorisations of law as an artifact, the idea that law is an immaterial being, independent from even the documents that contain legal acts, has not been subjected to a focused analysis. This paper fills this noticeable gap. After providing generalizing account of the Immateriality Thesis, based on its different expositions in the literature, the paper criticises it. First, it argues that it is based on the counterfactual assumption that semantic content can exist beyond any carrier for itself. The paper then elaborates on the thesis' empirical implausibility, particularly its ignorance of how much the law is as it is due to writing. Third, the paper reveals how the thesis is difficult to combine with other jurisprudential issues, notably law's effectiveness. Following such a critique, the paper considers the possible origins of and reasons for the thesis. Given its highly questionable character, the paper concludes with some general ideas on taking law's materiality seriously.

Keywords Ontology · Ontology of law · Artifact theory of law · Immateriality · Materiality

1 Introduction

The aim of the paper is to critically discuss one of the recurring themes of significant socio- and semiotic-legal relevance in contemporary analytical legal theory and philosophy. This theme can be called the Immateriality Thesis (IMT). It is primarily part of a broader tendency in current analytical legal theory and philosophy, which is named the artifact theory of law[1] (ATL), but, as is argued below, the manner of

[1] As its representatives, one can consider the following publications (in chronological order): [34, 100, 35, 106, 26, 36, 16, 17, 101, 37, 38, 18, 22 (review: 51), 20, 63, 27, 49, 104, 64, 105, 23]. Brian Z. Tamanaha [116] offers an interesting critique of ATL from the sociological and socio-legal perspective and his approach is close to the one employed below, but he treats the issue of immateriality very per-

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thinking about law's ontology can be found in discussions that significantly precede ATL.

Returning to IMT itself, according to this thesis, law's existence is essentially understood in terms of intangible, social, intersubjective states, in which there is a general, if unspecified in precise quantitative terms, consensus in a given population regarding the law, its system, and its particular institutions. In effect, law is conceptualised as mind-dependent or, to be more precise, a minds-dependent semantic construct of human beings. To put it differently, law is "in thin air," in(-between) people, in their mental states of mutual agreement and recognition. What should be stressed here is that the commented thesis is meant to address also the law in contemporary Global Northern context, on which this paper is focused.

There are three main reasons justifying a critical analysis of IMT. First, the role of materiality (tangible objects that are not human) has become widely recognised in the humanities and social sciences,[2] and social ontology as a field has also started to acknowledge materiality (e.g., [39, 40, 61, 124]). Second, despite these noticeable tendencies, IMT is still proposed in the literature. Third, IMT is a relatively popular idea of fundamental significance to the ontology of law. In the end, it decisively argues that law is intangible and, in effect, excludes from it any materiality. However, despite its popularity and importance, heretofore it has not been subjected to any focused investigation. This paper aims at filling this gap.

The paper is structured as follows. First, IMT is presented through examples that are used to provide a more generalised account of the thesis. The paper then proceeds to a critique of IMT consisting of three interrelated criticisms: (1) IMT is based on exaggeration, even a hypostatisation of general (and not exclusively law-related) analytical distinction between semantic content and its carrier(s); (2) IMT's explicitly law-related empirical controversies; and (3) significant tensions

Footnote 1 (continued)
functorily, which is the main subject in this paper. Tamanaha [116: 16] says just that "construing law itself as an artifact distracts attention from the ways in which actual artifacts—offices, courtrooms, computers, files, memoranda, funding, and so forth—constitute the material dimensions of legal activities that help render them socially stable and enduring."

[2] Given the vastness of this tendency, and its various theoretical inspirations and chosen objects of application, it is practically impossible to provide a representative overview in a considerably brief footnote. In the end, one might first consider that, despite most believing that the contemporary interest of the humanities and social sciences in materiality was inaugurated by Arjun Appadurai [5], it actually can be regarded as reaching far back, not only to Jean Baudrillard [7], but to various analyses of Karl Marx. However, a discussion on the exact beginning of that interest is less important. For this paper, it is more crucial to show that, for a considerable time now, this interest has produced a plethora of diverse works analysing the role of materiality in social life. For more general expositions of this issue, see, for example, [28]. Next to such studies, that to a large extent draw from others, there are works that are devoted from start to finish to the focused presentation of a specific take on the issue, see, for example, [65, 73]. Such varying conceptual frameworks and approaches to materiality often feed back into discussions in general sociology, see, for example, [45, 97], and many other disciplines, which is most clearly visible through many edited volumes, see, for example, [9, 12]. This strong tendency has started to influence reflection on the law as well, as evidenced not only by shorter, mostly overview works, see, for example, [24, 53, 68, 69], but also by larger studies, of general as well as much more focused character, and with varying degrees of concentration on some of the already developed theories on materiality, see, for example, [29, 54, 66, 84, 92].

between IMT and other crucial issues in general reflection on law that render IMT difficult to be connected with such classical concerns as law's change or effectiveness. The fourth part of the paper provides possible explanations of IMT—plausible reasons for why this thesis is proposed. The paper ends with its fifth part, which briefly addresses potential alternatives to IMT. In the end, if law's immaterialisation in accordance with IMT proves to be entangled in various controversies, then it is perfectly justified to ask the question: what about the law's (re-)materialisation?

2 The Presentation of the Immateriality Thesis

When it comes to IMT itself, one should first recognise that in the current, mostly ATL-related literature, one can find different kinds of the thesis that are distinguishable on the basis of the exact "legal object" to which the idea of immateriality is applied. For instance, Luka Burazin ([19: 113–114; see also [20]), the most devoted developer and proponent of ATL, argues that legal systems, next to their assumed artifactual and institutional nature, are abstract, which means that they are "ontologically immaterial (in the sense that a legal system would not cease to exist if, for example, all the original normative texts of a system were destroyed)."[3] Similarly, Kenneth Einar Himma [63: 125] argues that a "legal system could not be a physical object." He [63: 137] reiterates this general point by saying that legal systems are "non living non sentient non physical abstract artifacts," and [64: 81] that they "are neither material objects nor constructed out of material objects." Already, given these two proposals—Burazin's and Himma's—one might say that there is legal system-IMT—the immaterialisation of entire legal systems as kinds of "legal objects."

[3] What should be noted here is that recently Burazin appears to significantly change his position on the issue in question, even to a point of contradicting his approach quoted in the main text, because he [21: 14] argues that "a legal system is constantly dependent on the normative documents or the memory of legal norms. Namely, if all the copies of all the normative documents were destroyed and nobody were to recall any of the norms of their legal system, the legal system would cease to exist." However, there are few reasons that justify referring in the main text to his idea of a legal system immune to the destruction of legal texts. First, as shown below, his idea expresses well the immaterial approach to law among other theorists, who seem to stick to IMT and not change their opinion. Second, the goal of this paper is to investigate IMT in general, not Burazin's version of ATL and IMT specifically. Third, Burazin does not explain in any way this clearly noticeable tension, if not contradiction, in his writings on an important part of the theory he is proposing. Moreover, in [21], on the one hand, he suggests a clear change from his earlier approach as seen in the quote above and in the phrase "created immaterial objects existentially dependent on a variety of other entities" [21: 2, 15]. On the other hand though, he still appears to downplay the role of materiality, on the narrow example of documents. Namely, his [21: 7] statement that "[f]or the legal practice to be possible in systems of mostly written law (such as our contemporary legal systems), there need to be some normative documents (written linguistic formulations of legal norms) …" is commented in the footnote [21: 7, fn. 24] in the following way: "Well, one might imagine a situation where all the copies of these documents have been destroyed. However, a set of norms as meanings of these documents would be maintained if the norms remained in the memory of the relevant officials and citizens." In light of this and Burazin's earlier writings, one can still wonder what his exact position on the issue in question is. Nevertheless, his suggestion in [21] of an immaterial entity that is still existentially dependent on some material entities can be read as a specific defence against criticisms of IMT and, because of that, it is brought up below, as well as his take on human memory.

However, due to the work of other scholars, also those more clearly involved in ATL, one can speak of at least two other specific types of IMT: legal institution-IMT and law-IMT. As an illustration of the former, consider Corrado Roversi's [102: 98] account of a legal institution as "an *immaterial rule-based artifact*, that is, the outcome of (1) a *deliberative history* tracing back to (2) an *intention-rooted linguistic creation process* whose content is (3) a *system of constitutive rules defining interaction plans* that work only if (4) their *mechanism, that of shared acceptance* within the community, actually exists." In relation to the latter, law-IMT, one should acknowledge those who refer the immateriality idea to the broadest, most general "legal object" there is: law. Consider, for instance, Giovanni Tuzet [123: 217], who says that "law is not a material artifact (as a table) but an intellectual one" and Andrei Marmor [82: 59], for whom "[t]he law is a compound intangible artifact."

Despite the breadth of the proposed distinction between law-, legal system-, and legal institution-IMT, this width is merely apparent. It is easily conceivable to apply the immateriality idea to other "legal objects" than those already mentioned; for instance, legal rules. As a confirmation of this claim, consider Kenneth M. Ehrenberg, who appears to endorse IMT, but his theorisation seems to go beyond the three noticeable types of IMT identifiable in the literature. Namely, he [38: 170] argues that "[l]aws and legal systems are […] abstract institutions in that they are not identical with the people constituting the legal officials, the words written in books or scrolls of law, or the geographic area of their jurisdiction." For the sake of clarity, it should also be stressed that Ehrenberg [38: 11, fn. 22] explicitly states that he sees "the 'abstract' modifier as indicating only that the artifact is ontologically immaterial."

Even though IMT is a significant part of contemporary ATL, one can come across such a way of thinking about the law in various other writings on the ontology of law, and even in those preceding ATL. Consider, for instance, Paul Amselek's [2: 15] legal ontological confession: "all objectivist conceptions of law seem to me, by their very nature, to be untenable. Law cannot be observed amongst the objects of the external world, or in Nature: it is confined to a quite different place, and one from which it is impossible for it to escape—the minds of men" (similarly, in the same volume, see [121]).[4] The more recent remark of Amie L. Thomasson is even more worthy of quoting because of the extent to which it predates Burazin's idea, cited above in the main text, concerning IMT's important consequence for the law—that law is (supposed to be) completely independent of material beings, even as stereotypically legal as the physical documents of legal acts and decisions. Thomasson [119: 549] argues that "if congress votes with a majority in favor of a bill and the president signs it, then a new law is created. That law, however, is not identical with

[4] There are also other antecedents to the mentioned proponents of IMT who are more-or-less distant to the analytical tradition represented by them. Consider, for instance, Leon Petrażycki's psychologism-inspired so-called legal solipsism [44: 10]: "*the hypothesis according to which legal realities exist exclusively in the psyche of each individual*," or Niklas Luhmann's well-known dematerialization of social systems, legal system included [77: 73–74]: "neither paper nor ink, neither people nor other organisms, neither courthouses and their rooms nor telephones or computers are part of the [legal] system."

any piece of paper the president signs (it may continue to exist even if that paper is destroyed)."[5]

Of course, these quotes invite a distinction between merely assuming the immateriality of law and/or other "legal objects," and stating this idea clearly and firmly. This differentiation can be used as a specific interpretative key to look at previous, often classical standpoints and arguments in legal theory and philosophy. For instance, one can investigate the various manners in which figures such as Hans Kelsen, Herbert L. A. Hart, Ronald Dworkin or Joseph Raz can be regarded as sympathising with or even proposing IMT.[6] Needless to say, such an enterprise, although unquestionably interesting to pursue, far exceeds the aim of this paper, which is devoted to critical analysis of IMT, an idea most explicitly expressed within the ATL discussions, not to identifying and commenting on its various possible antecedents.

Even though the IMT-ATL connection is raised here, not everyone endorsing the idea of law's artifactuality share the commented thesis on one of the fundamental characteristics of law. Consider, for instance, Jonathan Crowe in his *Natural Law and the Nature of Law* [27], in which he engages in the discourse about the law in terms of artifactuality, but does not seem to accept IMT. Obviously, this fits the more general observation concerning many other differences among those who can be considered representatives of ATL or, at least, participants in this specific discussion. These differences go along the lines of, for instance, the controversy over whether an artifactual being can have an essence specific to itself[7] or the problem of what exact kind of law is artifactual.[8]

However, these and other tensions among those involved in ATL do not pose the challenge to the justifiableness of the task undertaken in this paper. IMT can and should be treated as a subject in its own right, worthy of interest and analysis, particularly given the fact that the general idea of law's immateriality appears to reach far back in time to before the clear emergence of ATL, as suggested above.

[5] Next to these rather brief remarks of Burazin and Thomasson that basically follow the same way of thinking, there is also its more elaborate presentation by Ehrenberg [38: 110], starting with reference to Scott Shapiro's argument that "if a nuclear bomb exploded over a small country such as Belgium, wiping out all its inhabitants, we wouldn't think there was a continuing need to dismantle its legal system. While I do wonder about the possibility that Belgians happening to be abroad at the time might need some sort of official procedure, it is nonetheless clear that an institution still depends upon the people involved with it and their beliefs for its continuing existence. If the people of Belgium woke up tomorrow having amnesia about their own legal system and believing themselves instead to be a province of Luxembourg, there would be no need for any dismantling of the Belgian legal system so long as the Luxembourgians and the rest of the world are willing to go along with these beliefs."

[6] For instance, already given the fact that Kelsenian theory is called "'pure' […] because it only describes the law and attempts to eliminate from the object of this description everything that is not strictly law" [71: 1], one can expect that the immaterialisation of law is strongly yet most likely merely implicitly present in it. When it comes to nonsecular jurisprudential currents, notice that law's immaterialisation can even be identified already in, for instance, various religious natural law theories. Basically, they can be said to be locating law in some highest, divine entity (or entities) transcendent to this present and material world. However, the commented IMT is strictly related to ATL, that follows secular approach, much in line with the contemporary Global North, upon which the paper is focused.

[7] For instance, Brian Leiter [75: 669–670, 76] argues against such a possibility.

[8] For instance, Dan Priel [96] denies the artifactuality of the common law and customary law.

Moreover, despite the various kinds of IMT, distinguishable on the basis of the specific types of "legal object" assumed to be intangible, it is justified to provide a generalised account of this idea that is well-suited for its long-missing, first-to-date analysis.

IMT argues that law—with its system, institutions, and rules—is non-physical, intangible, and immaterial. One can use many synonymous expressions, but the key point is that the law is in no way identical to various material nonhuman objects, such as printed legal codes and does not consist of such entities. In short, the law's being is purified from the inclusion of any tangible objects. Moreover, known instances of IMT in the current literature often clearly entail an underestimation of material objects that can be regarded as at least relevant to the law. To acknowledge this, consider not only the previously quoted (in the main text) statements by Burazin and Thomasson in which they argue that legal systems and regulations would continue to independently exist even if all the legal documents were destroyed, but also Tuzet's [123: 223] clarification of his position, in which he argues that "[w]e do not see the law, strictly speaking. Of course we can read legal documents, codes, written acts, and so on. But again we perceive some signs that convey a legal content." Here, one can see clearly a distinction, which most likely underlies other explicit statements regarding IMT, between the content and its carrier(s). Content is a purely mental being, whereas the latter can take many different material forms that are merely instrumental to the sense they pass on. The ontology of law is grasped through the concept of content, while content's carriers are rendered secondary.

However, one should also address a specific controversy connected with inferring a general account of IMT out of the writings of its various proponents. When thinking more carefully about IMT, one can identify an issue: whether any materiality takes some part in the creation of law, its system, institutions, and rules; not in the law as such, but in its production process. Recognition of this specific problem is provoked by another statement of Marmor [82: 47], who argues that "[i]ntangible artifacts supervene on tangible things." In connection with the quote from Marmor cited earlier in this paper, this can be read in the following manner: the law is intangible, but its creation involves some tangible objects. However, are there any formulations of IMT, which, unlike Marmor's, would be more radical and even exclude materiality from the law's production processes (and not only from the law itself)? This hypothetical position would be clearly empirically false, particularly with respect to law in the contemporary Global North, where the law's creation involves a plethora of material objects, such as entire buildings for parliamentary institutions, energy, IT networks, computers, printers, paper, pens and pencils.

Despite that, it should be stressed that Marmor's argument on intangibles supervening on tangibles goes beyond provoking one to consider analytically possible, yet practically untenable, idea of immaterial law being created in a similarly immaterial process. Just as Tuzet's position helps identify the distinction between content and carrier and the prioritisation of the fomer that appears to underlie IMT, so Marmor's arguments allow the illumination of another crucial differentiation. There is a product and its production or, to use Tuzet's [122: 281, 123: 219] terms, a result-/

product-/entity-ontology and a process-ontology[9] (but not in a Whiteheadian[10] or a Deleuzean[11] sense).

Before subjecting IMT to a critical and not strictly reconstructive analysis, there is a point to make that is closely connected with the above remarks. It is rather clear that IMT immaterialises law by considering it as content independent of carriers. In short, law is pure semanticity, something that can be said to belong to the Popperian [94] third world.[12] However, discussions on IMT do not appear to clearly explain how the thesis in question approaches the often explicitly tangible referents of various semantic beings, such as legal rules. These refer to actual, physical entities such as people, animals, plants, areas, buildings, vehicles and other moveable objects. The sense, the meaning of these and other semantic entities, is not independent of their referents and whether they actually exist. On the contrary, particularly in the case of law, the lack of referents renders that which refers to them practically meaningless. In consequence, even something so seemingly purely immaterial as meaning appears to be inseparably entangled in the material.[13] If that is the case, then there are two possibilities for IMT: assume that content is independent from its referents, or that content depends on them. The first option is a rather peculiar one to take, whether for the sake of IMT or beyond it, particularly in the face of the general observation on the sense-maintaining function of referents (without them, that which refers to them loses its sense). The second option is rather uncontroversial. However, in the specific context of IMT, it may prove to be dubious as it may provoke one to wonder: if a material referent is often indispensable to content, and the law is considered a content, can one still argue that law is not "constructed out of material objects" [64: 81] at all? Despite the potential gravity of this issue, it is unfortunately difficult to find any remarks in relevant discussions that would allow one to somehow deepen IMT's approach to the suggested problem.

In the light of two reconstructable conceptual axes—content-carrier and product-production—and another one noticeable—content-referent—one can provide some additional details to the generalising account of IMT sketched earlier. IMT is focused on the law considered as a finished product, clearly cut off from its creation, and having an immaterial, mental, semantic nature or, to be more exact, being a content, for which any of its possible material nonhuman carriers are ultimately irrelevant, yet with no clearly specified take on content-referent relation and its implications. Law is a product-semantic content, is non-identifiable with any material

[9] Of course, the production-product distinction in the legal context is much older, as it reaches back, at least, to Kelsen [71: 2].

[10] For instance, [126]. For a legal application see, for example, [80].

[11] For instance, [32]. For a legal application see, for example, [30, 74, 87, 88].

[12] If such an interpretation is adequate, then the question arises: why are proponents and sympathisers of IMT not admitting clearly "deep" sources and inspirations for the idea they propose? This question is even more justified in the light of other legal scholars working on the ontology of law who draw from Popper's famous idea explicitly, see, for example, [81: 292, 13: 189–214, 46: 76–79].

[13] One can refer at this point to, for instance, [93: 36]: "[m]eanings (and thereby signs) without a referent do not exist […] referents are not external to sign reality […] *Referents are not external to the network of signs*."

objects, even law-relevant ones such as printed legal acts, and does not consist of any tangibles. However, its production process can and, as suggested earlier, contemporarily must involve diverse material elements.

The expressions of IMT made thus far in relevant discussions are rather perfunctory. They allow a more confident reconstruction of several points, while others are left practically uncommented upon, as demonstrated above. With this reservation, and having clarified, as much as possible, the object of this paper's inquiry—IMT, as it is generally understood in the context of ATL and related discussions—by adhering strictly to the writings of its various proponents and sympathisers, the critical analysis can begin.

3 Critique of the Immateriality Thesis

3.1 Hypostatisation

It is reasonable to begin the critique by addressing what appears to be the most fundamental issue. Namely, IMT, as it is currently proposed, seems to be based on the exaggeration or even hypostatisation of some general, in the sense of not being restricted to the law, analytical distinction. This is the first line of critique.

Its general point can be most clearly demonstrated by focusing once again on the content-carrier distinction, easily identifiable in Tuzet's account, but also present implicitly in other writings on IMT. The thesis, in fact, argues that law is content and its carriers are irrelevant, but content and carrier are far from being practically separable from each other, and not only when it comes to the law. Of course, at the stage of purely theoretical, analytical discussions, one can consider content, sense, and information separately from their carrier, medium, or channel of communication, but beyond such discussions, in real-world conditions, there is no such a thing as content as such. Any piece of content, in order to actually be, to exist, has to have some carrier for itself. In short, without the carrier, there is no content.[14]

This is one of the general lessons it has been crucial to keep in mind since the very inception of communication theory with its various communication models, starting with the classical work of Claude E. Shannon and Warren Weaver [111].[15] However, it appears to have been completely forgotten in the immaterialisation of the law, which, as is detailed below, has vital, even paradoxical, consequences for IMT's proponents and sympathisers. For the law to actually be the law—for it to provide the behaviour guidance, not for the individual separated from others, but for human beings living next to each other and interacting—it cannot be purely mental. It has to be somehow passed on from one human being to another; otherwise it will

[14] Mario Bunge expresses this point in a few ways: "there is no such thing as pure information, that is, information without a physical carrier" [14: 27]; "no information without matter" [15: 11]; or "far from being self-existing like matter, information is a property of very special material systems, such as nervous systems and TV networks, and as such inseparable from stuff" [15: 67].

[15] For more recent overviews of various communication models, see [10, 25].

remain utterly private and something that in fact cannot be the law. For the law to deserve its name, it must circulate among the entire population and setting carriers of law-content in motion is necessary for it to do so.[16] In consequence, law as a content separated from any carrier's materiality proves to be deeply flawed as it can provide neither any behaviour guidance nor be effective. Due to its significance, this specific thread returns in the context of the next two lines of critique.

Returning to the main point, IMT can be said to be the result of treating elements of specific distinction, content-carrier, as if they are not only analytically but actually separable from each other in a clear-cut fashion. As already indicated, the hypostatisation of content beyond its carrier is simply implausible. It is completely unjustified from the perspective of the most rudimentary and widely held general ideas on communication. Additionally, when it comes to the law, this hypostatisation leads to very specific problems, of which only a mere glimpse has been presented so far.

However, when one focuses again on the way the content-carrier distinction is treated in IMT discourse, one can notice another controversy; one more subtly implied than the highly explicit separation of content and carrier. The proponents and sympathisers of the commented thesis appear to hold the deep, underlying assumption that sense is completely autonomous with respect to its carriers; or, to put it differently, carriers are perfectly neutral to content and thus do not influence what they pass on. Of course, such a standpoint is a consequence of treating content and carrier—easily distinguishable "on paper"—as if there is a content as such in the actual world. However, since at least Marshall McLuhan [85: 7–21], one can have serious, justified doubts regarding whether "the medium is [not] the message [as well]." In other words, the specific carrier one decides to use for the sake of content intended has a significant impact on the message and modifies it; for instance, along the lines of its seriousness, honesty, severity, or credibility. To acknowledge this, it suffices to imagine any semantic content and consider it through different carriers. An "I love you" text message displayed on a phone and "I love you" heard while holding intense eye contact and having a romantic dinner might be considered somewhat dissimilar. Law as a specific type of content is not immunised from this general communicational regularity. As is detailed below, there are many significant impacts on a legal rule that already depend on whether it has been passed on orally or in written, printed or electronic media. Meanwhile, a hypostatisation of content-carrier distinction leads not only to conceptualising law as a mental content that exists beyond any media while still somehow actually guiding the behaviours of thronging masses of people. It also renders carriers completely neutral and transparent concerning the content that may be put into them.

Having provided commentary on one of the crucial distinctions for IMT that has been clearly exaggerated, one may wonder about the others that are involved, such as the product-production opposition. In the end, IMT focuses on the law as a finished product and, in fact, ignores the specifics of its production, which is far from being immaterial, at least in the contemporary Global Northern context. Is this a

[16] For instance, as stated clearly by Lon L. Fuller [48: 49–51].

hypostatising exaggeration as well? In response to that justified question, one has to stress that, at face value, the product-production distinction is not merely an analytical tool to separate that which is ultimately inseparable for the sake of depth and subtlety of inquiry. In the end, there is a plethora of entities that would prove that the distinction is not analytical but real in the sense that they can be easily separated from whatever that gave rise to them. Consider, for instance, a bottle of beer. Experience shows that, once produced, it can exist in complete separation from its creation process, even to such an extent that, if the brewery that fermented and bottled it is closed and dismantled, the bottle with the beer persists (of course, until someone decides to open and drink it). With this in mind, it can be said that product-production differs significantly from content-carrier because the latter is explicitly analytical due to there being no content without the carrier, while there are products that are firmly cut off from their production. In other words, given the real and not exclusively analytical character of the product-production distinction, it does not fit the first line of critique of IMT devoted to the hypostatisation of the analytical categories. However, a question remains concerning whether the law is such an entity that, even if it can be considered a somehow finished and complete product, is it clearly independent from that which created it? To use a more concrete example, is some legal act introduced in a given legal system cut off from legislation, parliament, votes and signatures in as similarly clear-cut fashion as a bottle of beer is liberated from its brewery? This specific issue is addressed below because the product-production distinction is not only an analytical one and therefore goes beyond the first line of critique regarding IMT's hypostatisation of analytical categories that are not explicitly related to law.

3.2 Empirical Untenability

Despite having reached the end of the first line of critique, its analysis of the content and carrier pairing is specifically continued in the second line of critique. According to it, IMT is empirically controversial in relation to the law. First, consider once again the above-cited (in the main text) quotes of Burazin and Thomasson, who essentially argue that legal systems' and legal acts' existence is independent of all physical nonhuman objects, legal documents included. However, for the legal system, for even a single contemporary legal act, to be materially independent to this extent, people would have to have extraordinary, even superhuman, mental capacities to keep all the necessary legal knowledge in their minds. In the end, such memorisation of content is needed in case of the potential destruction of all its material nonhuman carriers, a catastrophe argued to be completely irrelevant for the existence and maintenance of the law. Obviously, one can seriously doubt that even highly trained and dedicated people can possess knowledge complete enough, whether now or in the future, to render them living legal information databases.[17] If that is the case, then IMT is simply untenable.

[17] Because of this, references of Burazin [21: 7, 8, 14] to memory, which do not problematize in any way its possibilities in the context of modern highly complex legal systems (on which Burazin's analyses are focused; see [21: 3]), can be regarded as putting way too much faith in the power of human mind.

Nevertheless, one can still wonder whether Burazin's and Thomasson's statements might be valid in conditions different to the improbable memorisation scenario just mentioned. Their idea can be hypothetically validated by making legal systems and acts small enough that it would be possible to keep them in the minds of people without any superhuman capacities. Under this peculiar, completely counterfactual condition of revisiting the past in terms of the quantity and complexity of law, one would indeed be able to validate IMT and its rendering of any materiality completely irrelevant to the law's being, as expressed in the above-cited (in the main text) writings of Burazin and Thomasson.

In the face of the above, IMT already proves to be empirically untenable. It either requires people with the superhuman memory to grasp contemporary law or for the law to be basically reduced to the scale of oral law. In consequence, IMT's value to the theorisation of the law is highly questionable unless one engages in some sort of futurological speculation on the human mind's possibilities and expansions or tenderly looks to the past's law, when everything was much simpler. Needless to say, the proponents and sympathisers of IMT, with a high degree of certainty, would say that their positions are far from these extremes. IMT then proves also to be paradoxical, as it appears to lead in directions that, one would assume, none of its adherents would actually take themselves.

However, it must be emphasised that the controversy concerning IMT's empirical adequacy is not limited to the rather radical scenario considered in the above-cited (in the main text) quotes of Burazin and Thomasson—the destruction of legal documents—and their conviction that the law would remain completely unharmed in such a situation, which, to remain valid, requires either intellectual savants or the return to law that is modest in size and simple. This controversy is already in IMT's clear, even definitional, underestimation of materiality (tangibles that are not human themselves), which includes explicitly law-related documents, such as printed legal codes. Such a standpoint is connected with the assumed image of law as content existing independently of physical nonhuman carriers that are completely neutral and, thus, do not influence in any way the content that is placed into them and passed on with their help. There is then a peculiar lack of recognition underlying IMT regarding the fact that, to a significant extent, the law is as it is due to materiality.

To acknowledge this, it suffices to recall the significance for the law of moves from exclusively oral communication to subsequent written, printed and electronic forms (e.g., [11, 120, 125]). Even materiality in this significantly limited sense—at this point, one is referring only to documents, typical carriers of semantic contents, and not to material objects such as judicial gavels (e.g., [89]), batons (e.g., [33: 1005]) and speed bumps (e.g., [73: 77–78])—can, to a considerable extent, answer the question of why what we know as the law is what it is. One of the principal reasons for that is the invention and use of writing and what was developed after it: printing and electronic textual communication. These three technologies, and each subsequent one requires an increasingly extensive material infrastructure to function, explain many of the law's specifics.

Contemporary law has been so developed in terms of its size and complexity because it has been liberated from the limitations of human memorisation capacities

(e.g., [11: 38]). Instead of being contained in the minds of people and passed on orally—as in the pre-written law tradition—and, in consequence, being small and uncomplicated, law became relatively independent from humans, which benefits them. Broadly speaking, writing the law down allows its immensity and high levels of abstraction, but no one has to keep the law in their minds anymore.

Documentary materiality is indispensable not only due to the limited capacities of human minds, but also for the sake of ensuring the proper dissemination of the law throughout society, which is the necessary but not sufficient condition for its effectiveness (e.g., [114: 25, 47: 56, 1: ix, 32, 73]). In order to reasonably say that some actor followed a specific rule or not, and that the rule therefore proved to be effective or not in terms of behaviour guidance, that actor first had to somehow become acquainted with it. Material carriers of regulatory content are thus necessary not only for the content's mere existence but also for its effectiveness. This point is even more crucial when one recognises that law's (degree of) effectiveness is often considered a defining, essential feature of the law: without effectiveness, law ceases to exist as law. Moreover, the law actually working in practice being necessary to the existence of the law itself is not only connected with some specific ideas within general reflection on law, such as the Social Efficacy Thesis,[18] but also with much more general principles that are not restricted to particular jurisprudential currents. The most notable of these is the *desuetudo* derogation principle (according to which law's existence is in its practice, for instance, in the application of the law) (e.g., [55: 302]). Given the significance of this particular thread, it is taken up again below in the third and final line of this critique of IMT.

Meanwhile, returning to the issue of materiality's role for the law, even the latter's inseparability from the former, next to already mentioned significance for law's development, its increase in size and complexity, independence from the limitations and imperfections of human memory, and conditioning social knowledge of law, and, thus, its effectiveness, one should acknowledge other similar issues. For instance, law became itself because it was separated from other social normative orders, such as morality, custom or religion. The crucial part in that separation was played by the mere documentary materiality of writing it down (e.g., [11: 34]). While, in the oral law tradition, it was difficult to state clearly and confidently whether a particular rule in pre-writing society was legal, moral or even religious, as soon as the law started to be materialised in its texts, its identity and distinguishability became incomparably clearer.

Such clarity was possible not only due to writing the law down, but also due to the systematisation potential made possible by pouring thoughts onto paper (e.g., [11: 32]). Writing allowed and still allows seeing specific parts of the law much

[18] More generally on that thesis, see [115]. When it comes to the presence of such an idea in the discussion commented on in the paper, consider, for instance, several statements by Crowe: "a putative member of an artifact kind K that is not constitutively capable of performing the K-function is no K at all" [27: 177] and "the function of law is to serve as a deontic marker by creating a sense of social obligation […] A law that is incapable of creating a sense of obligation, due to either its form or its content, therefore fails as law" [27: 180]. In the face of such arguments (taking into account the issue of law's "form"), it becomes perfectly understandable why Crowe does not appear to explicitly follow IMT.

more clearly and, in effect, one can identify some inconsistencies among rules and therefore design their entire sets so they are coherent. In comparison, when the law is kept in minds only, it is much more difficult to make a full-fledged system out of it. A certain objectivisation of the law, with the help of even such rudimentary material objects as paper, allowing one to literally look at it and not only subjectively recall it in one's mind, is needed for law's systemicity. Needless to say, systemicity is one of the most important of law's traits that make it clearly different from other kinds of rules in human societies.

Carriers—indispensable to content's being, making contents somewhat independent of human mind and memory, and significantly increasing reflexivity during the contents' production—also have an important stabilising function (e.g., [11: 42]). To recognise this, consider once again the oral law tradition. Without any record external to human mind and memory, oral law can undergo various changes that can be largely unnoticed, while written law, due to its material carriers, is much more stable, durable and immunised against mental imperfections. One might recall that one of the earliest instances of written law was literally carved in stone, the archetype of stability. Merely hearing the specific rule being passed on orally renders it possible to immediately obtain additional information on its sense and underlying reasons. One might even attempt some negotiation with whoever speaks the rule to somehow amend or bend it. At the moment of writing the rule that was previously orally communicated, all of this becomes impossible. Therefore, law's move from orality to writing effectively illustrates the McLuhanian statement that "the medium is the message."

This sense of documentary materiality is also largely responsible for several of law's other traits. For instance, it has been said that ideas concerning law's certainty or equality before the law could have been developed due to law's materiality-driven objectivisation, going beyond the subjectivity and mentality of oral law tradition (e.g., [11: 34–35]). Naturally, writing the law down can also be considered from the perspective of specifically negative traits of the law, such as its noticeable alienation from the surrounding social context and sensitivities (e.g., [11: 37]). Law often appears and even actually is detached from ordinary people's way of thinking and acting because of the brevity and abstractness made possible by the move from orality to writing and all that came after it.

Of course, there are many other examples of the extent to which even such basic material nonhuman carriers as printed paper have contributed to the manner in which the law is as it is. However, already the most basic illustrations, such as those provided above, are enough to question IMT's empirical adequacy. It is practically implausible not only due to the highly specific scenarios it provokes involving extraordinary memory and the reduction of law's complexity, but also due to much more fundamental truth, already discussed in the first line of critique: content is entangled in and dependent on the carrier to such an extent that the idea of content beyond the carrier is a practical misconception. However, IMT is grounded in such an idea, hypostatising analytical distinction, and, in effect, undermining its empirical accuracy even when, as disclosed above, there are well-founded analyses proving that law cannot be adequately accounted for by referring exclusively to what people

have in their minds. Law is something more than "bare" human beings, their interpersonal relations, and the contents of consciousness, as argued by IMT.

3.3 Tensions

IMT's empirical adequacy problem, in the sense just presented, proves also to be troublesome for IMT's proponents themselves because the immaterialisation of the law is difficult to convincingly combine with interest in many other general, even classical, jurisprudential issues. There are many tensions between IMT and other threads in general reflection on law that are problematic to reconcile. In other words, if someone adopts IMT, it will be difficult for them to address several other of law's issues and traits while still upholding IMT. This third and final critique of IMT is naturally troublesome itself. In the end, there is a plethora of jurisprudential threads that can and likely should be analysed from the perspective of IMT and the question of whether they are reconcilable or not. However, given the fact that the analysis presented here is the first to actually focus on IMT and treat it as a subject worthy of dedicated inquiry, IMT-other jurisprudential issues tensions are presented on the basis of three examples of some of the most basic problems raised in discussion on the law. One of the examples concerns the law's effectiveness, a thread that has been previously alluded to.

First, consider the issue of changing the law. How can law be changed when one assumes the validity of IMT? The implied idea of changing law through changing people's way of thinking—because law is considered an intangible, mental, semantic being—seems not only extremely demanding for those who would like to conduct a law's reform in massive, diverse, and divided contemporary societies, but also conflicts with noticeable practice. Often irrespective of people's consciousnesses and attitudes, law is indeed effectively changed by legislatures and can still prove able to realise its goals afterwards. Needless to say, this is possible due to law's documentary materiality: the fact that it is in writing.

Second, just like law changes or is changed, so it often remains the same, and even persists. How can law do that when one assumes IMT's contention that the law is in the minds of people, an inherently dynamic environment? The utter mentality of law implied by IMT is at least controversial from the perspective of the undeniable fact that law often manages to remain stable and unchanged over considerable stretches of time. However, as already mentioned in the second line of critique regarding materiality-enabled stability, this fact becomes quite simple to address as soon as one acknowledges the legal weight of writing and printing or, to be clearer, their indispensability for the law as we know it.[19]

Third, the law can change or remain the same. However, in the meantime, if it actually has been created purposefully, it should be effective in reaching its intended aims. Of course, there were, are and most likely still will be discussions concerning

[19] In short, "the problem of the persistence of the law: the fact that the validity and normativity of a law tends to extend beyond the tenure of the authority that created it" [38: 103] becomes less of a problem when the law is written.

law's function or functions. However, for the specific sake of examining IMT more closely, one should consider just one rather uncontroversial main function: behaviour guidance. How can law be effective when one assumes IMT is valid? For the law to actually be successful in this respect—to cause people to act in conformity with itself—first it "must provide enough information to inform subjects of what law requires of them" [63: 173]. This point itself should not raise any doubts because it is simply a rephrasing of the previous statement that the necessary but not sufficient condition for the law to be effective in a behavioural sense is knowledge of the law—becoming acquainted with its rules. IMT significantly disturbs it because how is the law itself supposed to do all that Himma describes—to inform addressees of what is required of them in the attempt to effectively influence their behaviours—if law is said to be purely immaterial and mental? An exclusively intangible, semantic law—the content alone, beyond any carrier—is inherently impossible to pass on due to there being no information without a medium. In consequence, the law is also inherently incapable of being effective in the considerably most important sense: behaviour guidance.

In light of the above, IMT renders the law as "a strange kind of artifact" [123: 217] indeed. Its assumed mentality is difficult to combine with many other similarly crucial traits or intended tasks. To recognise this, one should think again about the effectiveness issue. Law that is so radically ontologically truncated that it is regarded as purely intangible, even to such an extent that physical documents of legal acts are ignored, proves unable to independently accomplish even that which the proponents and sympathisers of IMT regard as the law's defining conditions. It is worth recalling the popular assumption that, for the law to be the law, it has to be effective, or the *desuetudo* derogation principle, and the issue of knowledge of the law being a necessary yet not sufficient condition for the law's behavioural effectiveness. IMT makes the law unable to be effective in this specific sense.[20]

Such inherent behavioural ineffectiveness of immaterial, mental law can be regarded as paradoxical because, in strictly psychological terms, law, understood in accordance with IMT, is already effective.[21] By IMT's account, the law is already the subject of wide acceptance and recognition in a given population. However, IMT does not explain how such psychological success happened or continues to happen, maintaining itself in human societies often marked with changes of opinions and conflicts. Nevertheless, the idea of reaching wide acceptance in a society said to

[20] This remark resonates well with a more general point of Kendy Hess and associates [62: 3]: "The question of materiality may seem trivial after the questions of moral agency and responsibility that have dominated the literature to this point, but it is essential: an entity lacking material existence cannot act in the material world. Without a justified claim to material existence, further claims of intentionality, agency, obligation, and responsibility become purely academic, if not completely incoherent."

[21] The distinction between behavioural and psychological effectiveness of law is used by Jerzy Wróblewski. The former refers to a situation when the particular rule is actually followed by an individual. The latter refers to a situation somewhat preceding the act of rule compliance, that is, the rule affecting the broadly understood way of thinking of an individual, for instance, recognizing specific action scenarios as complying or transgressing the rule in question. Obviously, this also implies that, for an individual, this rule is actually a rule. For a full account of Wróblewski's approach to effectiveness, see [127]. For a more recent use of this approach, see [112: 20].

constitute the law without any nonhuman materiality is either strictly limited (to small and simple societies with an oral law tradition and under the assumption that the air in which the sound waves caused by the human speech propagate is not a material medium) or simply untenable (with respect to large and immensely complex societies).

3.4 Potential Defence

Before proceeding to address the sources of IMT, consider a hypothetical defence of it from the critique proposed above: IMT does not completely exclude materiality but it merely argues that the law is immaterial and some explicitly tangible objects are necessary for the law to exist.[22] However, this distinction between a main object and the other objects necessary to it is only superficially convincing. One might imagine a negative situation in which some objects that can be deemed as only necessary for the law experience a serious dysfunction, such as Burazin's and Thomasson's destruction of documents with legal acts. As stated previously, the law, as understood in mental, semantic terms, most definitely cannot remain the same in such a situation. There cannot be content without any carrier. Of course, human memory can potentially substitute for writing, but, because of memory's imperfections (it distorts and eventually fades) and the limitations of its capacity, it will not be able to keep the law unchanged in comparison to those immense material records. In other words, one can make a distinction between the main object and some other objects necessary to it, but this distinction seems to work well in ordinary circumstances, when nothing wrong or abnormal occurs. However, imagining that something does go wrong among the objects deemed only existentially necessary to law disrupts the distinction between the object (law) and its (proper) ontological parts and objects necessary for the law to exist. The distinction ceases being clear and stable. What, how, and in what boundary conditions is a part of law? What, how, and in what boundary conditions is existentially necessary for law?

A response to this might be that the distinction as such is not problematic here, but the exact object to which it is applied, law, causes problems. However, even if we take something much more "concentrated in time and space," such as human beings considered as living organisms, this distinction is far from being clear and easily applicable. Is oxygen an ontological part of human being or "merely" something "beyond" it that is still existentially necessary for it?[23]

The most fundamental task for the mentioned idea of defending IMT, that of establishing the catalogue of entities upon which the main object—the law—is existentially dependent, is therefore profoundly demanding and difficult. Additionally, the above remarks argue that this task can even undermine the very original position

[22] As suggested earlier, Burazin's take on the legal system and documents with legal texts in [21] can be regarded as such a defence. Moreover, this idea is implied by Ehrenberg [38: 172], where he refers to "other associated artifacts" and their continuing existence, even after the institution's vanishing, but also much earlier and more explicitly by Thomasson [118: 605].

[23] Similarly, but in a different context, [4: 59].

on ontology of the main object. Investigation of the objects supposed to be necessary for the law may lead to the conclusion that they are in fact an indispensable part of this main object. This is not the only problem with attempting to justify the idea of immaterial, mental, semantic law with the help of diverse other objects, material ones included, that are said to be necessary for law. In the end, in light of such an argument, law seems to be utterly dependent on various other entities, even to the point of actually not being able to do much as the law itself. This observation recalls then the problem mentioned in the third line of critique concerning how the law can be effective if one adopts IMT.

The briefly mentioned potential defence of IMT has even more issues to address. For instance, if the law, as an intangible being, is dependent on other entities of diverse characteristics (whether material or not), then this actually forces one to address in detail the hierarchies (which is more fundamental?) and time sequences (which is prior to which?) in the law and everything necessary to it. The task of convincingly establishing such hierarchies and sequences can be quite thankless, because, among other problems, it can take the direction of a chicken-and-egg-type problem.

4 Explaining the Immateriality Thesis

If the interrelated lines of the above critique are well-founded, potential defence actually unconvincing, and, in effect, IMT is at least dubious, if not outright rejectable, then the question arises: where does it come from? What are the reasons that can potentially explain IMT and its introduction?

In relation to several deep, fundamental reasons, it appears justified to state that a clear focus on semanticity can be connected with classically understood analytical philosophy[24] and the neglect, or even ignorance, of materiality is not surprising from the perspective of general antirealist commitment.[25] In turn, in reference to the more specific background of discussions on social ontology and the ontology of law, IMT seems to be the product of two simultaneous regularities. On the one hand, it draws inspiration from mostly Searlean and Searlean-inspired way of conducting research in social ontology, which focuses almost exclusively on human-centred, interpersonal phenomena. Even if it considers materiality, it treats it as a largely passive matrix to impose human meanings on, as illustrated with the concept of brute fact [109, 110].[26] On the other hand, IMT's rendition of law as mental, semantic

[24] This point resonates well with analytical legal philosophy's diagnosis as having a tendency of treating law as a set of linguistic entities, as proposed by Riccardo Guastini [58].

[25] Its most clear expression in IMT discussions can be found in [19: 112–113].

[26] Taking the opportunity, IMT's homogenisation of law—law is semanticity and that is it—fits the explicitly reductionist approach of Searle [110: 6–7], who states clearly that "institutional structures are based on exactly one principle. The enormous complexities of human society are different surface manifestations of an underlying commonality." However, the question remains: is such a reductionism, practically a mono-causal explanation, adequate for something that is rather complicated? In the end, "[s]ocial facts are [rather] incredibly complex and multi-layered things, fraught with antinomies and contradic-

content existing beyond material nonhuman carriers can be regarded as a result of not clearly acknowledging the possibility of law having a complex, multi-level and multi-part, heterogenous ontology[27] and research on materiality in the humanities and social sciences. One might argue, given the vastness of this research, also in relation to the law, suggested at the very beginning of the paper, it would be rather difficult to take it all into consideration. Nevertheless, the theory of communication and various communication models already have a considerable history at this point and, from their inception, have essentially argued against the idea of the actual existence of information outside any medium. IMT does not recognise this. Instead, it adopts and is based on the highly questionable idea of content's independence from a carrier. In sum, IMT seems to be a consequence of a highly specific, perhaps even narrow, selection of inspirations and grounds for itself, even to the point of bringing to mind the contemporary criticism of analytical legal theory and philosophy as not entering into any meaningful dialogue with anyone other than itself (e.g., [50: 60, 95]).

In addition to such a way of addressing the questions that open this section, IMT can be explained in what appears to be a more meaningful manner by re-examining IMT and all that was said about it above, and not by engaging in a sort of meta commentary about its plausible sources and inspirations from various disciplines and discourses. Having said that, IMT originates from overattachment to a general analytical distinction between content and carrier, to the point of hypostatising it and counterfactually admitting the real existence of content beyond any carrier.[28] As stated earlier, this specific decision, clearly apparent in various conceptualisations of IMT, is responsible for its empirical adequacy problems and tensions with other crucial issues for the law, which are difficult to reconcile with IMT.

Moreover, IMT can be seen as a result of the kind of ambition that drove a plethora of previous ontological investigations, and not only those related to the law. This is the ambition of finding the most essential conceptualisation of some being, in this case, the law—addressing only the question "what is the law?" and thus avoiding questions such as "how is the law's existence possible and maintained?" and "under what circumstances can law function and to what extent?" Even though one can analytically distinguish between the issues of "what…?," "how…?" and "under

Footnote 26 (continued)
tions, and while they may appear to be the result of situational action and collective intentionality, a valid ontology must account for their determination from afar and below" [72: 4].

[27] Against the background of one of the more fundamental distinctions for Polish general reflection on law—between homogeneous and heterogenous, complex ontologies of law (see the brief overview in [108]), IMT proposes a strictly homogenous ontology of law as something, after all, reducible to mental, semantic constructs. For more on the original considerations of the opposition in question, see, for instance, [90, 128]. For more contemporary commentaries, see [67, 79]. Despite the possibilities the heterogenous approaches offer, contemporarily there still appears to be a specific scepticism about them, as seen, for instance, in [52: 21–22]. However, see also [52: 59], in which the authors somewhat admit the adequacy of heterogenous ontologies of law by saying that "law is probably an object composed of many elements (of single type or many types)."

[28] In a somewhat similar, if more general, manner ontologies that consider law as "a set of abstract entities" are deemed as "unrealistic" in [59: 103].

what circumstances…?" it may be questionable whether such a distinction is real—whether, in terms of practical engagement with a given object such as the law, these issues are separable from each other in an unambiguous manner. IMT is based on the strong, if primarily implicit, conviction that they are. However, the possibility of such separability should not be merely assumed but carefully analysed as a subject in its own right, as potential defence considered above illustrates.

IMT appears to be a consequence of not only treating the content-carrier pair and the triad of questions "what…?," "how…?" and "under what…?" as real, and not merely analytical, distinctions. The questions issue connects particularly well with the previously mentioned distinction between product and production, which, as revealed above, appears more-or-less explicitly present in IMT-endorsing writings. Moreover, when considered as an underlying idea, this distinction actually explains IMT to a significant extent. The law, the product, is an intangible, mental, semantic entity. It comes into existence due to various processes and objects, several of which are unquestionably material. However, once completed, the law is what it is—immaterial, even though that which produced it is tangible.

Whereas, with respect to some kinds of objects, the product-production distinction is most definitely adequate—a given entity, once produced, is entirely liberated from the production preceding it—it may raise serious and justified doubts when applied to the law. Perhaps the law is so specific that one cannot say that some law is completely finished and thus cut off from its production process. Instead, law can be seen as, and perhaps really is, in a constant process of creation and it is never actually finished. There are at least two reasons that justify this contention, and, in effect, place in doubt the belief underlying IMT that law is a product separated from its production.

First, legal acts appear to be constantly connected with all the institutions that participated in introducing them into the legal system. For instance, if procedural errors in the work of these institutions are discovered, even after the legal act in question has been issued, then that act and its validity will also be undermined, even to the point of undoing everything the act has effectuated.[29] However, the production of law, even in the sense of a particular legal act, is not limited merely to parliamentary voting and signing the document. The legal act, as with basically any form of communication, is not infused with a finished and unchangeable sense. On the contrary, even originalist approaches to legal interpretation actually admit that even the already issued and valid—one might even say finished—legal acts are constantly changing due to variations in how they are understood. To acknowledge this, it suffices to take into account judges, practicing lawyers and academic legal scholars, whose work largely involves preparing material documents with proposals and justifications regarding various interpretations of the valid, completed law. If then, drawing from Arthur Kaufmann, "the law does not exist before interpretation" ([113:

[29] The Polish constitutional crisis that began in 2015 provides many examples of the parliamentary and judicial procedural defects that precede issuing a decision (whether a legal act or a judgement) that can be then used as grounds to invalidate it or, at least, raise doubts as to a decision's validity, even though it could be regarded as a finished product, see, for example [107].

196], referring to [70: 122]), and the work of interpretation is essentially perpetual, it is just another reason to seriously doubt the adequacy of the idea of immaterial, semantic law—product—divorced from its production.

Moreover, this status of being constantly in the process of creation should be addressed in detail by all those who would like to adhere to IMT. Ultimately, IMT's account of law as minds-dependent involves such issues as acceptance, and even before that, memory. In practice, one cannot say that something has been memorised once and for all by some population's members and is the subject of their utter and complete acceptance. Both memory and acceptance require constant work to be maintained. Something, once memorised, will begin to fade unless one repeats it, even with the help of something so mundane as handwritten notes. Something once accepted, particularly if it concerns rules on how to behave, also needs repeated effort that often entails different forms of materiality, to uphold the conviction of the rightness of what has been agreed upon. Otherwise, it will cease to exist and most likely be replaced by something else. In effect, despite focusing on the product part of product-production distinction, IMT repeatedly, and paradoxically for itself, invokes phenomena that are in the constant process of their own creation, in which materiality also takes part.

In sum, IMT is explainable by several distinctions that are more-or-less explicitly addressed by IMT itself and, crucially, strict focus on just one part of these distinctions. Regarding the content-carrier distinction, the content is prioritised to the point of counterfactually assuming the existence of content beyond any carrier. Concerning the questions of "what is the law?," "how is the law's existence possible and maintained?" and "under what circumstances can law function and to what extent?" the attention is devoted to the first one, as if the issues of "what…?," "how…?" and "under what circumstances…?" could be easily separated from each other in the case of law. Regarding the product-production distinction, the focus is placed on the idea of law as a finished product, detached from its production process, whereas there are several sound reasons to argue that law is in constant creation.[30]

All these decisions underlying IMT seem to be connected with an even deeper, more fundamental assumption concerning the law and its ontology. Specifically, implied in the various expressions of IMT there is a strong conviction of the appropriateness of ontological purification, reducing law to the kind of entity that consists of one class of beings; for instance, immaterial, semantic constructs. As stated earlier, in accordance with IMT, the law is these mental beings and that is all. However, perhaps the law is not ontologically pure, simple, or, to recall the previously mentioned opposition of homogeneous and heterogenous ontologies of law, homogeneous. Ultimately, the inseparability of the content from the carrier is already an argument in favour of the standpoint that the law is ontologically impure and complex as its being involves different entities with different characteristics. Law is certainly of the mental and the semantic—of meanings and senses—but it is also of the different

[30] From this perspective, James MacLean [80: 173], if he had written his study today and known of IMT, might have had IMT in mind when he wrote: "traditional thinking about law, even more contemporary theories of law […] approach the idea of law and legal institutional change from the point of view of stability rather than continuing change […] seen as the normal state and not just a special case or deviation from the stable and routine."

material media that carry what might appear for some purely immaterial and existentially independent of any carrier. Acknowledging this would mean moving from the idea of law's ontological homogeneity to heterogeneity.

However, it should be stressed that heterogeneity can be understood in much broader terms than the inseparability of content and carrier. Perhaps law is actually more than a conjunction of that what is written in various documents and these documents themselves. Contemporary Global Northern law seems to be many things, such as actions (not only of legislators, judges and officials but also of ordinary people) (e.g., [78]); texts of legal acts and media for those texts (for reasons that should be clear at this point); infrastructure that upholds that media (the internet, servers, software, and electric power networks)[31]; interpretations (particularly if everything that is in legal acts is to be subjected to interpretative work) (e.g., [56]); social networks (through which the contents of legal acts are passed on next to their official publications) (e.g., [114: 30]); institutions and buildings (law has to be applied by someone somewhere) (e.g., [86]); outfits and symbols for specific officials (in some countries, one cannot actually be the judge in a courtroom without a robe and similar accoutrements) (e.g., [98]); and a wide array of technological inventions from rather crude yet still law-enforcing hostile architecture, such as anti-homeless benches (e.g., [99]), to more complex equipment such as ignition interlock devices (e.g., [57]).[32]

In light of these possibilities, the conclusion that IMT is a result of overly purifying, reducing and homogenising the ontology of the law should be clearer.

5 Towards (Re-)Materialisation of the Law

Given the above problems and controversies, IMT, as it is currently understood, should be rejected. This obviously implies the need to develop an ontology of law that would consider the law in a significantly non-reductionist manner and, among other features, take materiality seriously.

As suggested above, such an enterprise can be realised in various ways. There is the rather conservative possibility of not complicating the law's ontology too much and, for instance, essentially adhere to semanticity, though not consider it immaterially, as if semantic content could exist beyond any carrier, but stress content's practical inseparability from carrier.[33] However, one can also follow the other suggestion made above of considering the law as a much more complex entity consisting of

[31] Consider, for instance, the blackout event analysed by Jane Bennett [8: 20–38].

[32] This highly selective enumeration is already sufficient to show that there appears to be much more to consider than (more subjective and mental) "acceptance" and (more objective and material) "texts" models for the ontology of law, see [100]. Incidentally, it is interesting that, despite a recognition of problems with these two possibilites, Roversi still proposes his idea of the ontology of legal institutions that appears to follow the "acceptance" option much more than any other possible altenative.

[33] It would resemble then, to a certain extent, Maurizio Ferraris' ontological project of documentality, in which he [43: 32] argues, for instance, that "[s]ociety cannot do without inscriptions and recordings, archives and documents […] Moreover, without recording there would not and could not be legal institutions, obligations, guarantees, and rights." However, the documentality position also seems to be ulti-

many different things that are usually described as mental, material, natural, artificial, or social.

Just as law would be rendered as a complicated being, so the preparation of such an ontology of law will be difficult and controversial in its own right. Next to the fundamental task in construction of such an ontology of approximating the components of the law, there is the question of whether they should be considered in accordance with some hierarchy in terms of their importance to the law or treated equally in a non-hierarchical manner.[34] Moreover, there is the issue of practically blurring boundaries between what, in more typical standpoints on law and its ontology, is called law and non-law. Of course, this is not the place to provide a complete account of all predictable problems.

Instead, this paper ends with a sort of provocation to consider an ontology that would render law significantly more complex, nonreducible, and heterogeneous as worthy of pursuit. For instance, perhaps such heterogenisation of the law is actually necessary for the sake of the empirical adequacy of the law's ontology. In other words, it should be carefully considered that the law is a multi-part, complicated entity and the ontologies of it that are prepared by legal scholars, philosophers or social scientists should aim at doing justice to its actual characteristics rather than oversimplifying it. Next to empirical adequacy, there is also the issue of practicality. If the law is more complex than IMT implies, and law's ontologies start taking that into account, they will ultimately allow to recognise many more possibilities to improve the law. Instead of restricting the possibilities of changing the law to changes in the contents of human consciousness, as in IMT's case, other avenues will likely open. What is even more intriguing at this point is that these other, wider possibilities are actually taken up in practice, but often seem to go unrecognised by those working on law's ontology.

Practice demonstrates that one can specifically change a given law, not with direct institutionalised semantic change, but with something even more explicitly material than amending a written legal act, such as increasing the number of

Footnote 33 (continued)
mately reductionist as it explicitly privileges inscription in the explanations it provides and, in effect, does not take into account other phenomena that may also be of crucial importance for the addressed issues. For a full account of documentality, see [42].

[34] To put it differently, the question is whether to attempt a flat ontology of law. Flat ontologies are ontologies that do not prioritise any kind of being over anything else, but treat everything, whether human, nonhuman, inanimate, animate, real, fictional, natural, artificial as ontologically equal, see, for instance, [41: Sect. 3.3 and 3.3.3]. As their historical example one can consider Gabriel Tarde's version of monadology (see [117]). When it comes to contemporary flat ontologies, there is, for instance, the actor-network theory (e.g., [73]), object-oriented ontology (e.g., [60]), assemblage theory (e.g., [31]), or agential realism (e.g., [6]). These and other flat ontologies are an important part of the contemporary investigations in the humanities and social sciences on materiality, mentioned earlier. It would be up to further careful investigation whether various typologies of social ontologies and ontologies of law, see, for example, [91: 146, 3: 57, 103], are capacious enough to take into account flat ontologies and their possibilities.

CCTV cameras.[35] These material devices allow the recording and identifying of those who break a legal rule and, ultimately, render this rule considerably more serious and important than before the cameras' installation, when the rule's meaning was undermined due to being commonly ignored as practically unenforceable. Of course, those sympathising with the general idea of IMT will probably respond to this example by saying that their point is still valid—the law is an immaterial, semantic being and its change (in meaning) provoked by some technological intervention does not invalidate IMT. However, that change of the legal rule happened only because CCTV cameras increased the rule's enforceability. In short, without these devices, there would be no change. Therefore, dynamics of that which can be considered strictly semantic turns out, alongside the previously mentioned content-carrier and content-referent issues, to be inseparably intertwined with something explicitly material. Particularly in reference to the briefly addressed controversy concerning content's in/dependence from/on the referent, it is unclear whether IMT can address such practically employed possibilities of influencing the law without provoking any additional doubts against itself.

One point is certain, though. The strictly homogeneous, slimmed-down ontology of law proposed by IMT also implies many fewer ideas regarding how to improve the law than there actually are or could be in use. Contemporary societies do not need their objective opportunities to act and improve to be obscured. Instead, they need to be as fully aware of such prospects as possible.

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Conflict of interest The author declares that he has no conflict of interest.

[35] There are practically countless studies on CCTV, its legitimacy, regulation, effectiveness and implications. For a recent interesting empirical study that to a certain extent validates the general example in the main text, see [83].

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