

MAFLACRAFT, NEW MATERIALIST LEGAL HISTORY, AND MODERN UNKNOWING

ANAT ROSENBERG

Institute of Advanced Legal Studies

University of London

anat.rosenberg@sas.ac.uk

ABSTRACT

This essay examines the contributions of Deborah Puccio-Den's *Mafiacraft* as a legal history, and highlights the innovations it offers to legal studies, particularly the application of New Materialism to legal analysis. I discuss Puccio-Den's rejection of a teleological understanding of the emergence of the legal theory of mafia; her New-Materialist account of the process of naming the mafia; the role of performance and visibility as materialist elements in the mafia's legal history; the materiality of the legal interpretation that established the mafia; and the materiality of legal normativity, which shares much with the mafia itself. I conclude by reflecting on the phenomenon of unknowing in late modernity, that is, the active rejection of knowledge, on which Puccio-Den's study sheds light.

KEYWORDS

Legal history, New Materialism, law and materiality, modernity, legal naming, Naming Blaming Claiming, legal interpretation, normativity.

1. NEW-MATERIALIST LEGAL HISTORY

Mafiacraft is a remarkable study, which traces the historical process by which the mafia became a legal fact, so that the association and its members could be identified and tried in courts of law. As Puccio-Den puts it, "[t]he real and urgent problem about the mafia was how to address it from a legal point of view..." (240). She takes us through the moves that began with a legal silence and unknowing of the mafia, and the various iterations that finally allowed Italian law to know and punish the association and its members. The methodology introduces what Puccio-Den describes as "temporalities in structures" (242), which show that ontologies, and specifically those concerning the existence of the mafia, are not fixed but rather produced in history.

Puccio-Den describes her study as an ethnography. Of course it is that, as well as a work of social criticism, but in what follows I focus on its contributions as a legal history, to highlight the innovations it offers to legal studies. I argue that *Mafiacraft*

introduces material-turn thinking into legal analysis. By “material turn” – or New Materialism – I mean very generally theories that have been challenging Western legal modernity’s commitment to dualism. Modern legal thought regularly separates object from subject, matter from mind, nature from culture, body from idea. It also accepts dualistic hierarchies whereby the mind, the human subject, the idea, and culture, are privileged over matter, nature, object, and body. This perspective has encouraged a strong constructivist strain that, since the cultural turn, has accorded a pride of place to meaning, language and discourse as determinant forces in the social order.

The title “material turn” or New Materialism, as well as a variety of related titles, would appear to privilege the material, but theories belonging in this paradigmatic shift in fact recommend relinquishing dualism, rather than simply reversing the hierarchies. It has promoted theories of nonhuman, hybrid and distributed agencies. A basic tenet here is an ontological and therefore also methodological equivalence, or at least an a priori *possibility* of equivalence, between a variety of agents, including for legal purposes, an ontological equivalence between legal and other actors. From this perspective, legal action is examined within a network or assemblage of actors such that law’s power to organize social relations depends on a network, and human agency is neither exclusive nor privileged. Indeed, law itself is seen from this perspective as an unstable object created through the entangled performances of a variety of actors.¹

New Materialism is theoretically and methodologically challenging for legal scholarship, despite its presence in the human sciences for some decades. The following subsections briefly address its implications as developed in *Mafiacraft*. Specifically, I highlight Puccio-Den’s rejection of a teleological understanding of the emergence of the legal theory of mafia; the book’s New-Materialist account of the process of naming the mafia; the role of performance and visibility as materialist elements in the mafia’s legal history; the materiality of the legal interpretation that established the mafia; and the materiality of legal normativity, which shares much with the mafia itself.

¹ For some discussions of New Materialist legal scholarship see for example Hyo Yoon Kang & Sara Kendall, “Legal Materiality,” in *The Oxford Handbook of Law and Humanities*, Simon Stern, Maksymilian Del Mar & Bernadette Meyler eds. (Oxford University Press, 2019); Tom Johnson, “Legal History and the Material Turn,” in *The Oxford Handbook of Legal History*, Markus D. Dubber & Christopher Tomlins, eds. (Oxford University Press, 2018); Alex Faulkner, Bettina Lange & Christopher Lawless, “Material Worlds: Intersections of Law, Science, Technology, and Society,” 39 *Journal of Law & Society* 1 (2012); Irus Braverman, “Lively Legalities,” in *Animals, Biopolitics, Law: Lively Legalities*, Irus Braverman ed. (Abingdon, Oxon; New York: Routledge, 2016).

1.1 *An Effort, Not a Telos*

New Materialist thought encourages us to see any object, whether ideational or physical, as an astounding feat that requires multiple actors. An influential example from my own field of the history of capitalism, is Michel Callon's theory of markets. Callon sees any transaction, say my choice of shampoo in a supermarket, as a singular occurrence. Rather than assume that commodification is unstoppable while resistance to markets is difficult – an assumption animating much of the scholarship about capitalism, he insists that commodification is difficult and that exchange requires huge efforts that need to be traced.² The same assumption animates *Mafiacraft*. Puccio-Den provides a history of efforts to *make* the mafia. Despite the death, destruction, and pain it spread, there was nothing inevitable in naming and making it what it is today: a criminal association of terror.

As Puccio-Den argues, the extended process by which the mafia became a fact representable and triable in law, and identified with extreme violence against the state, was a series of small changes produced in the course of multiple clashes (198). She warns us against relying on the lazy assumption that values changed in Italian society and therefore the mafia was finally convicted. The method instead takes us through the mutations of human and nonhuman actors who came together to make this fact. Not only were the process material, but the results too were embodied, as changing perceptions and attitudes to the mafia cost the lives of anti-mafia activists and legal professionals. Matters of the imagination are *actual matter*: bodies are on the line.

In offering a careful history of the small and uncertain movements by which the mafia became a legal fact, the book provides a model for legal historians who wish to treat ideas and values as material occurrences and trace their movements.

1.2 *Naming and Matter*

Puccio-Den is interested in naming, as she explains: “The purpose of this book is to describe the successful process of ‘naming the mafia’ by giving this ‘floating’ concept a fixed content.... From 1982 onward, the word ‘mafia’...was stabilized by the law” (17). The approach to naming she takes is important in its departure from classical theory. Let us briefly recall the problem of naming as conceptualized in sociolegal theory. The groundbreaking article of William Felstiner, Richard Abel and Austin Sarat, published in 1980, introduced the following argument into the sociology of law: To understand how disputes emerge, studying litigation in courts and official legal institutions is insufficient, because disputes are social constructs. In other words, the distinction between law and society has been a source of blindness

² Michel Callon and Martha Poon, *Markets in the Making: Rethinking Competition, Goods, and Innovation* (New York: Zone Books, 2021).

in the study of disputes. For a dispute to emerge, the first thing that must occur is naming, whereby a particular experience is acknowledged as violating certain norms and therefore injurious. Next is blaming, at which stage the injury is attributed to the fault of another individual or social entity. Now we have a grievance, an attribution of responsibility. Next appears claiming, when a remedy is demanded from the responsible party. If the party rejects the claim, we have a dispute, which might turn into litigation and become institutionalized, but that is a very late stage in the overall transformation. This became known as the NBC model: Naming, Blaming, Claiming. NBC suggested that while western society, and the U.S. in particular, might seem litigious, and the rates of crime and litigation might appear high, the reality may actually be that too few wrongs are perceived, pursued and remedied. People have a capacity to tolerate substantial distress and injustice, which may be a failure to perceive that they have been injured.³

At first sight, *Mafiacraft* belongs in this tradition, most importantly in its tendency to undermine the distinction between law and society. Puccio-Den moves elegantly between judicial and cultural occurrences, including graphic, literary, and moral processes of naming, all of which are studied on a single plane as an assemblage that made the mafia. However, unlike classical sociolegal theory, the method does not separate meaning from matter, which allows *Mafiacraft* to provide a legal history of naming of a different order.

The NBC model was informed by the cultural turn and its social-constructivist assumptions that separate mind from matter and privilege the former. It began with individuals and focused on their subjectivity, as the authors stated: “the study of transformations must focus on the minds of respondents, their attitudes, feelings, objectives, and motives” (652). Materiality was not denied, for the model conceptualized subjectivity in terms of experience and access to resources, but NBC centralized constructivism as a causal force. By contrast, Puccio-Den emphasizes what the mafia is *made of*. As she puts it, *Mafiacraft* shows how “moral stances, cognitive categories and political emotions are embodied in things and objects without which they could not *exist*” (19). The naming of the mafia, its theorization as a criminal association and the attributions of responsibility to mafiosi did not float in the air, they were substantiated in the bodies of tens of thousands of demonstrators and the objects of demonstration. Anti-mafia materiality was matched by the material practices of the mafia itself, surrounded by silence. Where witchcraft – which Puccio-Den draws on to develop her concept of mafiacraft – is the exercise of power through words, the mafia is silent. To name the silence demanded a direct connection with action: the process of naming moved to deadly weapons and deeds,

³ Felstiner, William L.F., Richard L. Abel, and Austin Sarat. “The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .” *Law & Society Review* 15, no. 3/4 (1980): 631. <https://doi.org/10.2307/3053505>.

skipping words. In Puccio-Den's words, "Mafiosi kill, defraud, attack, whitewash, pollute, alter, corrupt, ruin...in other words, they are inscribed in the real..." (13).

The naming of the mafia is located in New Materialist thought, where ideas and matter are inseparable, and where the law that speaks about the mafia is both actor and product of a network in which bodies, objects, ideas, and people work together.

1.3 Performance and Visuality

Mafiacraft explores the performative culture of anti-mafia justice. This culture bore religious elements, spread geographically, and underwrote an emerging national consciousness (107-8). What is particularly interesting for legal scholarship is the performance of a "culture of lawfulness" (64) that occurred in theatres, exhibitions, musical events, literary festivals, and scientific events in support of an unstable paradigm of justice. My favourite example is the "lawfulness train" that Puccio-Den discusses, which socializes thousands of students to Judge Falcone's anti-mafia legacy, every year on the anniversary of his assassination. (I could not locate an image, but I found one of the legality boat from 2014 - cfr. Figure 1⁴. The sensual elements of colour, size, crowding – with its sounds, smells, tactility, and energy, are key to the performance of legality.



Figure 1: La Nave della Legalità (The Legality Boat). 22.05.2014

⁴ For a discussion see for example: Katia Amore, "The Legality Boat to Remember Anti-mafia Judge Falcone," Italy Magazine, May 23, 2014, <https://www.italymagazine.com/featured-story/legality-boat-remember-anti-mafia-judge-falcone> .

From a legal perspective, we are provided with a study of the efforts that must go into law-abiding as a collective identity. The liberal rule of law is a difficult project demanding concerted efforts from actors, including many who are rarely studied as legal actors, yet *Mafiacraft* implies that “law” cannot otherwise exist

Visuality is a particularly important sensual experience in *Mafiacraft*'s study of rule-of-law culture. Visual legal studies can be considered part of the material turn to the extent that visibility is not reduced to representation, and that its sensual and material presence is given its due. Puccio-Den demonstrates this approach as she shows how photographing the mafia assumed a performative force and established an ontological experience against the performative force of silence. As she argues, photography is not simply referential but an enlarging of the field of vision and perception (70). In the book's exploration photography's role in making the mafia, we again see how the legal approach to the mafia developed within a network. Photographers provided an interpretive framework that attributed to the mafia social injustices much broader than crime. Social degradation, inequality and squalor made Italians see the mafia as a system of governance. Moreover, photography was as dangerous as the legal theorization of the mafia. As some photographers resisted forces of unknowing, they met death and the destruction of their life projects.

The sensual experience of photographs on the one hand, and punishment of the body of photographers as well judges on the other, speak from two ends to the same knowledge project informed by visibility.

1.4 Decoding Through Matter

Judge Falcone's method of prosecuting the mafia was based on the evidential paradigm that Carlo Ginzburg discussed in his *Clues* essay.⁵ As Puccio-Den explains, Falcone treated everything as a message, and wanted the code to interpret the messages, which the pentiti Buscetta provided him (131-3). The witness did not provide simply information but rather an interpretive key. This in turn led to a mapping that brought together teams of lawyers and legal files previously divided by provinces (133).

We see here once again the great efforts that a legal fact requires. More critically, we see the materiality of law. An interpretive key is the most ideational concept of legal hermeneutics, yet it is shown in *Mafiacraft* to be a material thing, or more precisely an assemblage. This perspective aligns with the influential work of media and legal theorist Cornelia Visman on legal files as the material substance of law. Visman asked how come legal scholars never developed a theory of their tools – the files (by which she meant any official documentation). Why is it that the status of files and their ability to establish truth are put to the test when they become evidence, but not in the day-to-day functioning of law? She examined files as the basis

⁵ Carlo Ginzburg, “Clues: Roots of a Scientific Paradigm,” *Theory and Society* 7 (1979): 273–88.

of legal authority and action. Rather than a history of ideas, ideologies, or textual content, she pointed to the file as a critical legal technology, turning to it to understand the development of fundamental concepts such as the state, truth, and the subject.⁶ Methodologically, when files become objects of interest, we can see the agency of non-human things and recognize their influence. Puccio-Den continues in this vein as she turns to the material machinations that established the mafia.

1.5 Alternative or Shared Normativities?

When Puccio-Den explains the process of attributing responsibility to mafiosi, she brings into focus the clash of normative orders between the mafia and the state's legal system. Here the book addresses the difficulty of a criminal law premised on individualist assumptions, when it faces an association that operates by erasing individuality.

The problem of individual versus collective action and motivation is well rehearsed in legal scholarship, but here too Puccio-Den departs from the trodden path. The most familiar complaint about collective phenomena is that law has difficulty comprehending them. The problem implicates collective crime as well as collective victimhood. *Mafiacraft* discusses these questions, but it actually begins with the association itself, and its *own* mode of existence. It shows us that the mafia itself had difficulty comprehending individual phenomena (148). On Puccio-Den's account, mafia honor is a collective material experience premised on shared substances: blood, sperm, speech – literally breath, and money. As she argues, everyone's body must be sealed for the collective substance of honor to be maintained (160).

As Puccio-Den shows, Italian law did not simply replace mafia justice with a wholly different idea of the individual responsibility of mafiosi, but instead relied on mafia modes of existence and turned them to account. We see here a process of transformative translation, which relied on the mafia's idea of the collective body. In this process, the principle of collective responsibility allowed Falcone to put the Cosa Nostra on trial as an association. In the trial, the word of honor of mafiosi came to have probative value (167). *Mafiacraft* therefore argues that the ability of state law to replace the mafia in dispute resolution was *not* a modernization process, but rather a continuation of traditional conceptions of justice, in which the language of honor received a legal incarnation, and the legal and mafia systems revealed structural equivalences (188-190). We learn that to remove an evil you need to share something with it.

I would also add another common ground between the mafia and law, namely, indeterminacy. Puccio-Den discusses multiple levels of indeterminacy of the mafia,

⁶ Cornelia Vismann and Geoffrey Winthrop-Young, *Files: Law and Media Technology* (Stanford: Stanford University Press, 2008).

which are all part of the problem of fixing meaning at the centre of *Mafiacraft*. Now, law too is indeterminate, a menacing quality for a system intended to shape social life. This quality has been theorized in Critical Legal Studies, which explain legal consciousness as a device for mediating the contradiction between the human need for fusion and for individuality. The contradiction does not disappear, but rather mediated differently in history.⁷ That is precisely the problem which the mafia trials created, as the tension between individual and collective being came to the fore. In other words, when the law put the mafia on trial, it was facing its own demons.

Thus, from a legal perspective, *Mafiacraft* recommends humility from lawyers and legal scholars. The new model of justice, in which the mafia lost its legitimacy as a political model and its denunciation became the new normal, requires an ability to acknowledge similarities between the law and the mafia.

The affinities in normativities ties into a central argument of *Mafiacraft*, namely, that the mafia cannot be separated from the state. Mafia silence is a political action according to Puccio-Den, not a popular culture. As she puts it, “the mafia...is not an expression of local culture subdued by the state but rather a political configuration in which the state is actively involved...” (13). The argument of mafia as politics is set up against the prevalent anthropological view of the mafia as culture. However, here Puccio-Den may be arguing too strongly, for *Mafiacraft*’s materialist approach in fact does not support a strict separation between politics and culture as it repeatedly undermines separations of fields, ontologies, and levels of analysis. We can therefore safely agree that the mafia was and is politics, as well as an everyday presence that occurs on cultural levels no less.

2 UNKNOWNING

Mafiacraft’s methodological and conceptual contributions to legal history provide a New Materialist account of knowledge formation. In conclusion, I would like to emphasize a fascinating aspect of this account, namely, that it sheds light on the phenomenon of *unknowing* in late modernity, that is, the active rejection of knowledge. The silence of and about the mafia, and the immense efforts to talk *to* and *about* this silence, reveal multiple actors who needed to *unknow* the mafia and worked hard to that end, protecting an ontology in which the mafia did not exist. The dynamics of unknowing are particularly important in the late modern environment, in which knowledge is continuously pursued and produced. To preserve an ontological non-object (“there is no such thing as the mafia”) was an act of force. To know against this force took courage; it was painful, dangerous, and anarchic.

As unknowing was superseded by an ontology of the mafia, and silence by speech and proof, responsibilization occurred, and intimidation no longer stopped people

⁷ Robert W Gordon, “Critical Legal Histories” (1984) 36:1 Stan L Rev 57 at 114

from resisting the mafia, it would seem that the mafia's conditions of possibility disappeared. In other words, if the mafia is matter made of intimation, subjugation and *omertá*, and depends on unknowing, then by definition it ceases to exist when they are not effective, or at least, it changes its mode of existence. Indeed, in conclusion Puccio-Den argues that the anti-mafia wording processes make the mafia exist and paradoxically also dissolve its power to exist (239). How, then, do we theorize it anew? What modes of unknowing, if any, are relevant in our current state, and how do we begin their undoing? Puccio-Den's study provokes the question, perhaps the first condition of any such search.