

The Colour of Law : Law Is Constituted from the Colour of Right

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Article abstract

This article shows that the doctrinal category “colour of right” opens a valuable entree to law. Despite the limited spread of its statutory mentions, the surface of the colour, jurisprudence shows that in its depth or saturation it is genetically originary : colour is not reducible to other normativity such as morality, and not reducible to other rationality such as utility. Colour of right takes on the hue of marginality, then, as a phenomenon that is not legal, but defines law by standing outside of it ; colour is contrary to fact, and is never asserted in the form of a claim. The result is that the institution of law can increase its intensity autonomously, due to its detachment from sources other than its own appearance.

The Colour of Law : Law Is Constituted from the Colour of Right

Christopher B. GRAY*

This article shows that the doctrinal category “colour of right” opens a valuable entree to law. Despite the limited spread of its statutory mentions, the surface of the colour, jurisprudence shows that in its depth or saturation it is genetically originary: colour is not reducible to other normativity such as morality, and not reducible to other rationality such as utility. Colour of right takes on the hue of marginality, then, as a phenomenon that is not legal, but defines law by standing outside of it; colour is contrary to fact, and is never asserted in the form of a claim. The result is that the institution of law can increase its intensity autonomously, due to its detachment from sources other than its own appearance.

La présente étude montre que l'expression « apparence de droit » offre un accès privilégié au droit. Bien que cette expression n'ait, dans la loi, qu'une portée restreinte, ce qui est la surface de l'apparence, la jurisprudence révèle, dans la profondeur de l'apparence, son origine spécifique, soit que l'apparence ne peut être réduite aux autres modes de normativité, tels que la morale, ni aux autres modes de rationalité, tels que l'utile. Ainsi, l'apparence de droit se révèle un phénomène marginal, non juridique, mais qui constitue de l'extérieur le monde juridique; l'apparence est contraire au fait, et sa véracité n'est pas plaidée. Il s'ensuit que le droit peut accroître son intensité de manière autonome, puisqu'il se détache de ses sources, autres que sa propre apparence.

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While “Scent of a Woman” does not deliver us the whole woman, in the film of that name, “Touch of Evil” provides none of the evil reality, no more than do “a taste of heaven” nor “a sound of angels” in theirs¹. These used to be called category mistakes; now the figures are seen to deliver what is not otherwise available. “The colour of right” is another tropic diction that turns attention onto a constitutive access, this time to law, in a way that canonical discourse cannot do.

Law is concerned with colour; think of the body of laws and decisions on racial discrimination, and on commercial advertisements. Law is also constituted by colour; it is the “colour of law” which gives law its character. This study is a reflection whose intent is to show that the identity of law arises in terms of its absence, what it is not, as much as by reason of its presence, or what it is. To this extent the study can be said to pursue a semiotic method. Its conclusion may not be useable in legal practice; but not every recognition about law is a tool for it.

This conclusion is shown by focusing in Part One on the surface of colour, that is, its scant presence in statutory texts, especially criminal statutes, and even in doctrinal texts. This shows that colour gains purchase in the law not as an empirical positivity, but as a constructed principle. In Part Two the construction of colour is shown to be not a gratuitous postulation or a pragmatic fiction, but an acknowledgement that colour of right is

1. *Scent of a Woman*, 1992, DVD (United States, Universal Pictures, 2005); *Touch of Evil*, 1958, DVD (United States, Universal Studios, 2004).

deeply originary to law, both historically and in terms of law's principles. The law is saturated at its origins as colour, if we allow the metaphor to remain active. Colour is originary in law because colour is irreducible to both (A) normative and (B) speculative principles, the morality or the rationality apart from law. In Part Three, the hue of law's own institutions, most promisingly justification and excuse, do not exhaust colour's significance. Colour of right (A) remains irreducible to them, too, but undergirds them. Colour of right (B) posits not the way these things are, but the way they are not, yet appear to be, being claimed not as existing law, but only as the absence of law, yet with legal effect. Colour can do its work, then, (C) not by a claim of right, but by claiming the absence of law, and the presence of colour as the appearance of law. This is the marginality given to law by colour, that is, a phenomenon that is not legal, but defines law by standing outside of it. Part Four brings these arguments to this conclusion: law can have reality only because its positive surface is saturated by the colour of originary principles that are irreducible to other principles, and that give law the hue of marginality as its mode of being.

1 The Surface of Colour

Colour of right is a claim that a person is not liable to penalties for his action which, though wrongful, was done in the honest but mistaken belief in a state of fact that, if true, would have made the action not wrongful². In *DeMarco*, holding a car beyond its rental is not fraud since the lessee thought the lessor would not mind³. In *Johnson*, upon which *DeMarco* relies, this definition is applied to damaging a fence because it is in one's right of way; it is sufficient to remove the action's criminal character, although not the civil liability for it⁴. Colour diction comes into civilian discourse in *Chaput* where colour in this sense would immunize a public officer's wrongful act, although it would do so only for an act not wholly wide of his public duties⁵. One affirms the right, admits that it is not fully present in his action, but insists that the sort of reality it has there is enough to protect him from the law's penalties.

Colour of right is not a foreign diction imposed upon law, but is frequent in its discourse. Even if problematic there, its affiliated usages are

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2. John B. SAUNDERS (ed.), *Words and Phrases Legally Defined*, 3rd ed., vol. 1, London, Butterworths, 1988: "Colour of Right", relying on *R. v. DeMarco* (1973), 22 C.R. (N.S.) 258 (Ont. C.A.), itself upon *R. v. Johnson* (1904), 7 O.L.R. 525 (C.A.), looking to *R. v. Fetzer* (1900), [1901] 19 N.Z.L.R. 438 (C.A.).
 3. *R. v. DeMarco*, *supra*, note 2.
 4. *R. v. Johnson*, *supra*, note 2.
 5. *Chaput c. Romain*, [1955] S.C.R. 834 (on appeal from Quebec).

not. Thus, the colour of law tends to be said of situations where a person acts with what seems like the backing of legal right. There is a colour of office when the person seems to act with the authority attached to a job, particularly a public employment. It is colourability when the lawmaker itself seems to act within the jurisdiction constitutionally assigned to it. And it is colour of right when any person seems to act without legal blame; this is the dictum most used, and most in focus here. The emphasis upon “seeming” is captured in the French term for colour of right, “l’apparence de droit.”

In each dictum, of colour or colourability, what seems to be legally right, is questioned. None of these phrases is used when the situation is unproblematic; each usage occurs only when the legality of the action is questioned. If the officer’s, the legislature’s or the citizen’s action is unproblematic, none of these dicta are used; one does not act with colour of law, office or right when one acts in an unquestionably legitimate manner. Only when some take the actor’s doings to be illegitimate, are they spoken of in terms of their colour.

It is not just that an authorization is disputed, however. That would be the usual situation in which a legal entitlement is simply affirmed by one party, and denied by another. In a situation of colour, on the other hand, both admit that the situation looks right; and that if it were, then the action would be unproblematic.

Even further, however, what they agree in using the dictum “colour of right” is that, even if the situation has no justification on its own, the colour may nonetheless be sufficient to legitimate it. The colour itself may be enough to establish, not the reality but the legitimacy, not the right but the rightness, at least the not-wrongness of the action.

The public inquiry into colourability in administrative and constitutional law reinforces the search for essence, for here the query is always whether the purportedly colourable use of power has as its “pith and substance” a matter within the lawmaker’s proper authority. In *Coquitlam* it is not colourable to hike a gravel pit permit fee as an indirect tax, since the fee is part of and ancillary to the real purpose, namely, a code for the complete regulation of that industry⁶. But there is use of power in private relationships in similar ways. In the case of *Lacroix* it is not colourable to extend a building contract past its termination date, by supplying a few tailend services much later, in order to bring oneself within the delays for

6. *Corp. of District of Coquitlam v. LaFarge Concrete Ltd.* (1972), [1973] 1 W.W.R. 681 (B.C.C.A.).

obtaining the privileged debt of a mechanics lien on a bankrupt⁷. Colourability is shared in such caselaw across many jurisdictions.

The usage most relevant to this study, however, is not in the law between private parties, any more than administrative law, but in the criminal law. In Canadian criminal statutes, colour of right has a role in offences against property, namely in *theft* and in willful destruction. In theft, the offence is committed by one who “fraudulently and *without colour of right* takes/ prend frauduleusement et *sans apparence de droit*” with intent to deprive the owner⁸. Of willful destruction and *mischiefs*, as in arson, interference and cruelty to animals, no one shall be convicted where she proves that she acted “with legal justification or excuse and *with colour of right/ une justification ou une excuse légale et avec apparence de droit*”⁹.

Under this code, “*forcible detainer* [is committed] when, being in actual possession of real property *without colour of right*”, a person detains it in a way likely to breach public peace; but this is an offence only against someone entitled by law to possess it¹⁰. Actual possession differs from “peaceable” possession; a person commits *forcible entry* if another holds the real property peaceably as well as actually/ “effective et paisible”¹¹. Whether the possession is peaceable, or is “actual [...] *without colour of right/ effective sans apparence de droit*”, is a question of law, not a question of fact¹².

The code’s editors take this colour of right to be explicated by the sections concerning *self-defence*, since the *Criminal Code*’s editors index the self-defence sections under that rubric, even though the term itself is not used in those sections¹³. Thus, self-defence requires that the harm caused while defending oneself “is justified if (a) he causes it under reasonable apprehension/ des motifs raisonnables” of the harm and “(b) he believes, on reasonable grounds/ des motifs raisonnables” that he needs to¹⁴.

Connecting those two groups is defence of *personal property* whose peaceable possession with “a claim of right/ d’un droit invoqué” entitles one by law to use force to hold onto it even against someone who is entitled by law to possess it (“qui légalement a droit”), whereas against such a person

7. *Lacroix v. Yoos* (1952), 5 W.W.R. (N.S.) 79 (Sask. C.A.).

8. *Criminal Code*, R.S.C. 1985, c. C-46, s. 322 (1).

9. *Id.*, s. 429-446.

10. *Id.*, s. 72 (2).

11. *Id.*, s. 72 (1).

12. *Id.*, s. 72 (3).

13. *Id.*, as indexed in the Thomson Carswell edition under sections 34 to 42.

14. *Id.*, s. 34 (2) (a) and (b).

it cannot be held by one in peaceable possession but who “does not claim it as of right/ ne le réclame pas de droit”¹⁵. Finally, peaceable possession of a dwelling house or other realty is sufficient by itself to justify preventing just anyone from entering, and the one who resists this prevention of entry commits an assault¹⁶. But if the person entering it has lawful authority to possess it, then someone else possessing it peaceably but not “under a claim of right/ en vertu d’un droit invoqué” has neither justification nor provocation for assaulting the person entering the house peaceably by day¹⁷. That same peaceable possessor, however, if he is resisting the lawful possessor’s entry, is deemed to be provoked, as long as he is possessing under a claim of right. We will end later with a reason why the name ‘colour of right’ is not used here, despite the editors’ indexing it in, namely, that here it must be a right that is in question and that is claimed, whereas in colour of right there is no claim to have right, only at most an affirmation of colour.

2 Originary Colour

2.1 Genetic Normativity

Noticeably, the diction on colour thus far has used the British spelling, not the American, and has used only sources other than American. This is because there is next to nothing in American law on colour of right nor, all the more, on the genesis of law from colour of right¹⁸. American law assimilates colour of right to colour of office, of authority or of title. American law as republican is a more statutory common law, and focuses on entitlements more visible in statute than in judicial common law. More ultimately, however, the inheritance of common law from an era of pleading on writs is far less present in American law, whereas in commonwealth law the writs “rule us from their grave”. Because the medieval need to bring one’s pleading within preformed proceedings did not allow for the frank denial of an adversary’s claim of right, particularly when oaths were deemed incontrovertible, the plaintiff could only be heard by alleging initially that his adversary did have an entitlement, even though one did not think he had, but that one’s own title had greater weight than the adversary’s mere

15. *Id.*, s. 39 (1) and (2).

16. *Id.*, s. 41 (1) and (2).

17. *Id.*, s. 42 (1)-(3).

18. The phrase is nearly absent from the following American doctrinal sources: Francis J. LUDS and Harold J. GILBERT, *Corpus Juris Secundum*, vol. 15, Brooklyn, American Law Book Co., 1967; *Corpus Juris Secundum – 1999 General Index*, West Group, 1999; *West’s Encyclopedia of American Law*, vol. 3, St. Paul, West Pub., 1998; Bryan A. GARNER (ed.), *Black’s Law Dictionary*, 7th ed., St. Paul, West Group, 1999.

colour of right. This is how colour comes into the law, simultaneous with a common law, commencing with thirteenth century litigation on uses¹⁹. For the same reason, civilian law is hardly constituted by colour²⁰.

But the genesis of law from colour is, more than historical, also principiative; it is a matter of principle and not just of fact. How originary is colour of right? Perhaps the originating of law out of its colour is instead its genesis out of some other normativity, perhaps even some other normative system. The obvious candidate is morality. Is every instance of colour of right actually supplying for the lack of a legal norm by adopting a moral norm already in place? Is it substituting moral justifiability for legal unjustifiability, simply a legal reception of that foreign moral norm as legal? That is not so, for caselaw is firm that a moral defence is insufficient to provide the colour of right that constitutes a legal defence. Instead, it is law of which there must be colour, not a colour of morality; in fact, the moral right may be not only a colour but a reality, and that will still lie at the origin of nothing legal.

This is what the caselaw shows, as well²¹. The right in colour of right is legal right, not moral right; thinking one has a moral right is insufficient. In *Cinq-Mars* a plausible moral right to destroy a business partner's promissory note, instead of using the courts for recovery, does not amount to a colour of right²². In *Hardimon* it is only a genuine belief in a legal right to take that might give a defense of colour, but not the belief in a moral right to take²³. In *Polchies* when a band chief knew that he had no legal entitlement to money from a land claim, the fact that he felt entitled is insufficient

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19. Daniel GREENBERG (ed.), *Stroud's Judicial Dictionary of Words and Phrases*, 7th ed., vol. 1, London, Sweet & Maxwell, 2006; John BURKE (ed.), *Jowitt's Dictionary of English Law*, 2nd ed., vol. 1, London, Sweet & Maxwell, 1977; David HAY (ed.), *Words and Phrases Legally Defined: Supplement 1999*, 3rd ed., London, Butterworths, 1999; Hardinge Stanley GIFFARD, 1st Earl of Halsbury, *The Laws of England: being a complete statement of the whole law of England*, London, Butterworths, 1907-1917. See also: Christopher B. GRAY, "Ockham on Trusts", *Franciscan Studies*, vol. 46, 1986, p. 141-159.
 20. For civilian law, see: *Chaput v. Romain*, *supra*, note 5; Hubert REID, *Dictionnaire de droit québécois et canadien*, 3rd ed., Montreal, Wilson & Lafleur, 2004; Paul-André CRÉPEAU *et al.*, *Dictionnaire de droit privé et lexiques bilingues*, 2nd ed., Cowansville, Éditions Yvon Blais, 1991; Sébastien BIGOT DE LA TOUANNE, *Guide juridique Dalloz*, Paris, Jurisprudence générale Dalloz, 2007.
 21. Note that jurisprudence is not examined here to analyze and criticize in depth the current state of the law, but only to show what is the state of the law sufficiently to derive this study's conclusions.
 22. *R. v. Cinq-Mars* (1989), 51 C.C.C. (3d) 248 (Qc. C.A.).
 23. *R. v. Hardimon* (1979), 31 N.S.R. (2d) 232 (C.A.).

for a defense to taking the money by a colour of right²⁴. But colour of morality threatens to intrude upon it. In *Harding* there is no colour of right to block access to hospitals to prevent abortions, despite an honest belief in one's right to protect fetuses²⁵. It is the "haziness" that keeps morality from serving as a colour of right; in *Gamey*, a defense of colour of right cannot be sustained by "a hazy belief in a moral right"²⁶. The morality of "you ripped me off" is too ambiguous and lacks the essential particularity needed for colour of right in *Sherman*²⁷.

The statutory conjunction of colour of right with fraud in the definition of theft clarifies the irrelevance of moral norm. Pairing with fraud in the code's articles makes what is colourable to be what is "not real", what is a "delusive appearance"²⁸. *Niagara Falls* in civil context provides the phrase "fraud vitiates everything" when calling it merely colorable to pay a company by notes directed to it, when they form part of its capital for incorporation²⁹. The taking or conversion in theft needs be done in a special way, to amount to more than a civil offence. *Cameron*, widely cited for its levels of comity, allows that a statement of belief in the claim to colour of right by a lot owner to hold car keys until paid an extra fee might amount to reasonable doubt of his intent; the offense must be done "fraudulently and without colour of right"³⁰. Fraud is irrelevant on one hand, for that "and" is to be read as an "or" is settled in caselaw: Creaghan need not show both fraud and the lack of a colour of right for defense from a charge of theft for taking keys and breaking an ignition when believing himself in danger. These are disjunctive, and either will suffice³¹. To show there was fraud, it would not be enough to show there is no colour of right. On the other hand, fraud is relevant because to show fraud would disable any showing that there was a colour of right.

Their connection is also shown by their covariability. As the notion of fraud changes, so does the notion of colour of right. So a direction to the

24. *R. v. Polchies* (1985), [1986] 3 C.N.L.R. 136 (N.B.C.A.).

25. *R. v. Harding* (1991), 115 A.R. 58 (C.A.).

26. *R. v. Gamey* (1993), 80 C.C.C. (3d) 117, 127 (Man. C.A.).

27. *R. v. Sherman* (1979), 47 C.C.C. (2d) 521 (B.C.C.A.).

28. Rae M. BLACKBURN and Cheryl FINCH (eds.), *Words and Phrases Judicially Defined in Canadian Courts and Tribunals*, vol. 2, Scarborough, Carswell, 1993; John D. GARDINER and Karen M. GENDRIN (eds.), *Words and Phrases, Legal Maxims*, Canada, 33rd Canadian Supplement, Carswell Thompson, 1999; John D. YOGIS (ed.), *Canadian Law Dictionary*, 3rd ed., Hauppauge, Baron's Educational Series, 1995; Daphne A. DUKELOW, *The Dictionary of Canadian Law*, 3rd ed., Scarborough, Carswell, 2004.

29. *Niagara Falls Road Company v. Benson* (1852); 8 U.C.Q.B. 307, 310 (QL).

30. *R. v. Cameron* (1990), 25 M.V.R. (2d) 245, 247 (Ont. J. Ct. (Gen. Div.)).

31. *R. v. Creaghan* (1982), 1 C.C.C. (3d) 449 (Ont. C.A.).

jury on a failure of fiduciary obligation must alter the notion of fraud from what it means in theft; and by the same token, the disjoined notion of no colour of right must be revised in the instruction, as well.

The irrelevance of moral right, and the insecurity about the distinction, occurs on the opposite side as well, where the doctrinal requirement that there must be some sort of practice in order for there reasonably to be a colour of right is varied by the inability to draw an "exact dividing line between" religion, ethics and codes of manners in *Perepolkin's* attempt to draw a colour of right from religion³². The same is illustrated by courts' refusal to accept a standard practice, e.g., realtors' taking commission out of customers' deposits in *Speigal*³³, or a hotelier's taking salary from the hotel's receipts in *Tremblay*, as providing any colour of right³⁴. However, commercial practice can defend from theft, as Bélanger's retention of a final refused deposit³⁵. Other practice will sometimes suffice for colour of right: in *Hammond* retaining some of an employee's security deposit for loss³⁶, in *Chorneyko* a hostess' offering complimentary drinks thinking it a common practice³⁷, in *Legge* taking wood which others were in the habit of taking³⁸. Going against the rules of the firm certainly will, however, deprive one of the defence of colour of right by practice, as in *Clarke* sending goods without an invoice³⁹. Sometimes professional advice suffices for it: a solicitor's in *Medwedowski*, or a tribal chief's in *Myshrall*⁴⁰.

Where the interface of morality and law becomes pointed is in the requirement for intent to deprive or convert, in order for the offence of theft to occur. Two repeating kinds of instance show this: of joke; and of waste. This is because of the conjunction with fraud; for an action is not fraudulent merely because it is unauthorized, but only because it is dishonest and morally wrong; unless the act has these, it is merely illegal, as stated in *Cooper*⁴¹. This requirement is then passed on to colour of right. Because practical jokes lack fraudulent intent, they may have colour of right. Such was Smith's taking a clock after saying it was a joke, or Hand-

32. *Perepolkin et ux. v. Superintendent of Child Welfare (No. 2)* (1957), 27 C.R. 95, par. 31 (B.C.C.A.).

33. *R. v. Speigal* (1932), 41 O.W.N. 335 (C.A.).

34. *Tremblay v. R.* (1936), 60 B.R. 306, 65 C.C.C. 387 (Qc. K.B.).

35. *R. c. Bélanger* (1948), [1949] R.L. 112 (Qc. Ct. Sess. Peace).

36. *Hammond c. R.* (1931), 50 B.R. 131, 55 C.C.C. 301 (Qc. K.B.).

37. *R. v. Chorneyko* (1985), 45 Sask. R. 15 (Q.B.).

38. *R. v. Legge* (1985), 54 Nfld. & P.E.I.R. 314 (Nfld. Dist. Ct.).

39. *R. v. Clarke* (1901), 3 O.L.R. 176 (C.A.).

40. *R. v. Medwedowski and Boyman*, [1953] O.W.N. 510 (C.A.); *R. v. Myshrall* (1993), 146 N.B.R. (2d) 345 (Q.B.).

41. *Cooper v. R.* (1949), 23 M.P.R. 398 (N.S.S.C.).

field's moving an election banner to an opponent's platform⁴². Similarly there is room to doubt that intent is fraudulent, when DeWit takes a TV to emphasize security⁴³ or Dalzell shoplifts in order to test security for an M.A. thesis on protection systems; this may not be "a dishonest state of mind, leading to a dishonest intention to 'appropriate'"⁴⁴. But a joke can be fraud, and *thus* be without colour of right, Paris' taking a chair on a stag bet with intent to deprive or Duggan's while making no mistake about who was its owner⁴⁵.

Taking materials because they are scrap, salvage or unused, on the other hand, seldom is enough to provide colour of right, for the intent to deprive an owner is there, even though it might be thought that the owner doesn't mind and would consent to the taking of wood that stood long neglected in *Higginbotham*, or of a saxophone from the scrap in *Dubitski*; absolute discharge may be the judicial response to this event, not colour of right⁴⁶. But thinking another does not want the object may sometimes defend its taking, as Thanos' taking coins from a fountain does, as much as being convinced of one's ownership of it, which successfully defends by colour in *Wright*, who removes electrical fixtures at the foreclosure on his house⁴⁷.

Besides its pairing with fraud in the statute, caselaw strongly suggests the content of colour by giving it other conjuncts and disjuncts. The conjunction in criminal statute has some instances where the defence is refused because not both colour of right and legal justification or excuse are present; but the issue has been settled that the two are disjunct, and either one will serve as the defence. In deciding in *Pena* that the reverse onus is unconstitutional, to require proof of colour of right that a property owner's agreement was relied upon to hold native ceremonies on that property⁴⁸, the British Columbia Supreme Court followed the *Williams* and *Creaghan* decisions that having to show colour of right does not require showing a

42. *R. v. Smith* (1989), 74 Nfld. & P.E.I.R. 280 (Nfld. S.C. (T.D.)); *Handfield v. R.* (1953), 17 C.R. 343 (B.R. on appeal).

43. *R. v. DeWit and Sierens* (1981), 10 Man. R. (2d) 8 (Prov. Ct. (Crim. Div.)).

44. *R. v. Dalzell* (1983), 54 N.S.R. (2d) 239, par. 54 (N.S. County Ct.), aff'd (1983) 57 N.S.R. (2d) 148 (C.A.).

45. *Paris c. R.* (1971), 15 C.R. (N.S.) 111 (Qc. C.A.); *R. v. Duggan* (1975), 38 C.R. (N.S.) 25 (N.S. County Ct.).

46. *R. v. Higginbotham* (1988), 71 Nfld. & P.E.I.R. 180 (P.E.I. (T.D.)); *R. v. Dubitski* (1982), 66 C.C.C. (2d) 477 (B.C.C.A.).

47. *R. v. Thanos*, [1975] W.W.D. 9 (B.C. Pr. Ct.); *R. v. Wright* (1985), 41 Alta. L.R. (2d) 361 (Q.B.).

48. *R. v. Pena* (1997), 45 C.R.R. (2d) 134 (B.C.S.C.).

justification or excuse in addition⁴⁹. They continue to be paired, however, as does colour of right and excuse such that in *Stewart* if it is permitted not to charge a jury as to the one, then neither is it as to the other⁵⁰. Besides equivalence to the civilian “appearance” in the criminal statute, civil law jurisprudence pairs colour of right and logic as to whether a deportation order has either, in *Pitchie*⁵¹. “Colour or show of reason” regarding land title is what is called for in *Davidson*⁵²; an opinion of right is what is found missing in *Laroche* when a manager directs staff simply to leave cheques when removing city monies⁵³. Colour of right or claim is said in *Modern Construction* to establish “a mechanic’s lien” by working crown land adjacent to the employer’s as does the criminal statute⁵⁴. That colour of right has degrees of attainment is shown by requiring “serious colour of right” in *Guimond*⁵⁵. None of these correlatives in the civil cases, however, displaces the originality of colour of right. It remains the original reference point.

2.2 Rational Irreducibility

The originary character of a moment of law is shown not only by its genetic features, looking backwards, but also by its nonreductive ones, looking forwards to fulfilments, its irreducibility. Thus, colour of right is no more reducible to the rationality of law than to its morality. Rational foresight is not belief in the colour, but is belief in the right; belief in the right gives the colour to the action.

Whether the mistake need only be honest or bona fide, and not reasonable, is a recurring debate. The dominant position here formulated in *Cameron* is that the mistake need only be honest or bona fide, and not reasonable⁵⁶. In earlier cases the requirement for reasonability is stronger: that there be fair and reasonable grounds, amounting to justification or excuse, to keep the money from a broken vending machine in *Jean*⁵⁷, or

49. *R. v. Williams* (1981), 64 C.C.C. (2d) 514 (B.C.S.C.); *R. v. Creaghan*, *supra*, note 31.

50. *R. v. Stewart* (1930), 2 M.P.R. 400 (N.B.S.C. App. Div.).

51. *Pitchie v. Canada (Minister of Immigration and Citizenship)*, [1994] R.J.Q. 2265 (C.S.); *Pitchie v. Canada (Minister of Employment and Immigration)* (13 November 1996), Montreal 500-09-001281-948 (C.A.).

52. *R. v. Davidson* (1880), 45 U.C.Q.B. 91, 93 (Ont.).

53. *R. v. Laroche*, [1964] S.C.R. 667 (on appeal from Ontario).

54. *Modern Construction Ltd. v. Maritime Rock Products Ltd.*, [1963] S.C.R. 347 (on appeal from Nova Scotia).

55. *Guimond v. Quebec (Attorney General)*, [1996] 3 S.C.R. 347.

56. *R. v. Cameron*, *supra*, note 30, described in: R.M. BLACKBURN and C. FINCH (eds.), *supra*, note 28, p. 2-339.

57. *R. v. Jean* (1967), [1968] 2 C.C.C. (N.S.) 204 (Qc. C.A.).

to lock out a subsequent lessee in *Gabrielli*⁵⁸; that it be reasonable to err that one is allowed to castrate a neighbour's intrusive dog in *Kokatt*⁵⁹; that the mistake not regard what one knew or ought to have known as when Watier destroyed a mining dam that infringed on his property⁶⁰. All of these grounds proved insufficient. At the opposite end of the spectrum are requirements only that the mistake be not patently unreasonable, in Bourdin's claim that his compensation board failed to state accurately his pay as a gas station attendant⁶¹. Within "a reasonable doubt" is required for Marion's assurance that he could use an access road to property in the interior⁶². It must relate to the circumstances, though be taken from the accused's perspective in *Howson*⁶³.

The mediating position is that some "air of reality" is needed to possess stolen share documents, in *Macciocchi*⁶⁴. For Innu in *Roche* to expect arrest for occupying an abandoned airbase is the very opposition of the "air of reality" expected from a belief in colour of right⁶⁵; the same is said in *Penashue*⁶⁶. "[S]ome colour or show of reason" is needed to give jurisdiction for a land title in *Davidson*⁶⁷. This does look to the reasonability of thinking wrongly about right, but only so far as it forms part of the evidence as to whether it is beyond reasonable doubt that the accused did not make that mistake. If the court is not convinced that he did not make the mistake, however unreasonable that mistake may have been, the accused has the benefit of the defence.

Evidence must be brought to bear upon the colour, that is, the belief in the right, in order to show that its absence is beyond reasonable doubt. Mere assertion will not confirm it, unless the evidence against oneself is equally of one's own making, as in *Fusell*, whose claim of colour for injuring a dog was connected to her claim that the dog was after her pigs⁶⁸. One's own previous conduct may disconfirm it. Dubois had past homo-

58. *R. v. Gabrielli and Little* (1985), 63 N.B.R. (2d) 207 (Q.B. (T.D.)).

59. *R. v. Kokatt*, [1944] 1 W.W.R. 158 (Sask. Police Ct.).

60. *R. v. Watier* (1910), 15 W.L.R. 427 (Y. Police Ct.).

61. *Bourdin v. British Columbia (Workers' Compensation Board)* (1988), 25 B.C.L.R. (2d) 292 (C.A.).

62. *Marion v. Goldberg* (5 June 1998), *Pembroke* 96/106, 96/390, 96/392, [1998] O.J. No. 2317 (Ont. Ct. J. (Prov. Div.)) (QL).

63. *R. v. Howson*, [1966] 2 O.R. 63 (C.A.).

64. *R. v. Macciocchi* (7 July 1997), *Toronto* C18267, [1997] O.J. No. 2805, par. 5 (Ont. C.A.) (QL).

65. *R. v. Roche* (1990), 90 Nfld. & P.E.I.R. 199, par. 25 (Nfld. Prov. Ct.).

66. *R. v. Penashue* (1991), 90 Nfld. & P.E.I.R. 207 (Nfld. Prov. Ct.).

67. *R. v. Davidson*, *supra*, note 52.

68. *R. v. Fusell* (1920), 13 Sask. L.R. 154 (K.B. (Chambers)).

sexual conduct, so it could not be concluded that the victim's solicitation of him led him to believe in his right to attack the victim, nor to plead a colour of right⁶⁹. In *Howson*, for an accused to have taken possession of an employer's electronic equipment in the past, disallows a colour of right to be doing so now⁷⁰. The preceding occurrences may also confirm the bona fides, for in *Mohammed* a colour of right was allowed for throwing a rock at a car thought to be departing with evidence of a preceding assault⁷¹.

Two instances of apparent reasonability recur, which must be rebutted in order to disprove one's colour of right; one occurs where a practice, custom or habit makes an accused think it is alright, and another where some authority does. From merely the weak suggestion that "others did it" in *Legge* and *Pike*, through merely "manners" in *Perepolkin*, to the occupational habits of waitressing in *Chorneyko*, towing in *Nash* and *Investissements Contempra*, realty in *Speigal*, up to the rules of a people in *Tremblay*, *Clark* and *Pratt*: a practice may be sufficient, or not so, to give evidence of belief in colour of right⁷². The same is true for assurance by an authority: a railway agent in *Canadian Pacific Railway*, a mayor in *Laroche*, the government in *First Nation*, a police superior in *Church of Scientology*, or a band chief in *Medwedowsky* and in *McElhiney*⁷³. The reasonability of the belief is objective enough to be evidenced; but that evidence is irrelevant evidence except so far as it bears upon the honesty or bona fides of the belief, or simply the real holding of that belief.

Nonetheless, while colour is not reducible to the rationality of right, it is not simply alien to it, but is covariable with it. Colour of right differs depending whence the right comes, and what it is. Thus in labour law when,

69. *R. v. Dubois* (1987), 83 A.R. 161 (C.A.).

70. *R. v. Howson*, *supra*, note 63.

71. *R. v. Mohammed* (26 September 1995), Calgary 50035740P10101, [1995] A.W.L.D. 990 (Alta. Prov. Ct. (Crim. Div.)).

72. Since only the names of various practices leading to a claim of right are illustrated by these cases, and not a point of law here, no further discussion of them is provided in the text. *R. v. Legge*, *supra*, note 38; *Pike v. R.* (1930), 48 B.R. 239, 54 C.C.C. 375 (Qc. K.B.); *Perepolkin et ux. v. Superintendent of Child Welfare (No. 2)*, *supra*, note 32; *R. v. Chorneyko*, *supra*, note 37; *R. v. Nash* (1990), 28 M.V.R. (2d) 131 (Ont. Ct. J. (Gen. Div.)); *R. c. Investissements Contempra Ltée*, [1988] R.J.Q. 1147 (Mun. Ct.); *R. v. Speigal*, *supra*, note 33; *Tremblay v. R.*, *supra*, note 34; *R. v. Clarke*, *supra*, note 39; *R. v. Pratt and Stevenson*, [1990] 3 C.N.L.R. 120 (Sask. Prov. Ct.).

73. *Canadian Pacific Railway v. Lechtzier* (1903), 14 Man. R. 566 (K.B.); *R. v. Laroche*, *supra*, note 53; *First Nation of Nacho Nyak Dun v. Furniss* (24 April 1997), Whitehorse 96/A0059, [1998] 2 C.N.L.R. 17, 10 C.P.C. (4th) 45 (Y.T.S.C.); *R. v. Church of Scientology of Toronto* (1991), 9 C.R.R. (2d) 196 (Ont. Ct. J. (Gen. Div.)); *R. v. Medwedowsky and Boyman*, *supra*, note 40; *McElhiney v. Wawanesa Mutual Insurance Company* (1981), [1982] I.L.R. 1-1476 (Ont. C.A.).

under an employer's policies, workmen's tools must be kept on site, the colour of right for having them elsewhere which would suffice to relieve a man from the mens rea of theft does not suffice to keep him from being fired under labour law where no mens rea is required for this offence. This is the situation in the cases of *Stelco, Iron Ore*, and *British Columbia Telephone*⁷⁴. Colour of right differs between different crimes, as well; for fraud, unlike larceny, giving over property with consent may not be fraudulent and without colour of right if the owner is capable of consenting, as is decided in *Lake*⁷⁵. Taking for theft, "with the full appreciation it was wrong", is not the taking involved in breach of trust, so the latter may allow colour of right in *Nakonechny*⁷⁶. Again, colour of right may defend from fraud, while not defending from theft of monies in *Petricia*⁷⁷. Colour of right for the mischief of retaining towed cars is what the accused must prove, while lack of colour of right in theft is what the crown must prove, in *Investissements Contempra*⁷⁸.

3 Essential Marginality

3.1 Legal Irreducibility

The reason that colour of right can point to the essence of law by genetic, irreducible "reduction", is that it is marginal. This means that colour appears and is effective only in its disappearing; it resists being constituted as a state of fact that, if considered the essence of law, would exhaust the content of law and, by purporting to be the essence of law, would disqualify itself as a plausible candidate for what can generate that essence.

Colour is a recessive presence in law, first, because it is not firmly one of the legal institutions of excuse or justification, though paired with them in statutes and caselaw. Colour of right is no justification. It gives one no right to engage in the activity which the colour covers. It is not a state of right which the law approves, as for example is self-defence. One cannot seek out nor plan for the situation of colour. The law expects one to bring

74. *Re Stelco Inc. and U.S.W.A.*, Local 8782 (1995), 50 L.A.C. (4th) 120 (Ont. Lab. Arb. B.); *Re Iron Ore Co. of Canada and U.S.W.A.*, Local 5795 (1992), 25 L.A.C. (4th) 289 (Nfld. Lab. Arb. B.); *British Columbia Telephone Co. v. T.W.U.*, [1979] 2 W.L.A.C. 115 (B.C. Lab. Arb. B.).

75. *R. v. Lake*, [1953] O.R. 1009 (C.A.).

76. *R. v. Nakonechny* (1980), 3 Sask. R. 209, par. 9 and 14 (C.A.).

77. *R. v. Petricia*, [1974] 4 W.W.R. 425 (B.C.C.A.).

78. *R. c. Investissements Contempra Ltée*, [1991] R.J.Q. 2519 (C.A.), from *R. v. Investissements Contempra Ltée*, *supra*, note 72.

oneself beyond the status of mere colour, and to get into the right. Self-defence is lawful, the colour of right is not.

In one of the clearest disjuncts between colour and justification, justification allows acquittal since, therein, neither the actus nor the mens that is required is to be found, the act because it is approved by law, and the attitude because without act it is irrelevant; on the other hand, colour involves no mens but still an actus, once its conditions are inferred from the circumstances, in *Penashue* and in *Steward*⁷⁹. This surprising wording from *Penashue*, as if judicial conclusions were ever automatic, regards the administrative decision that, to block deportation from Canada for arson, a claim of right will suffice, without needing a legal justification, due to the Canadian Criminal Code's requirement for willfulness in arson; this is contrasted with the American offence of arson for which negligence suffices and which, to block deportation, would call for a legal justification beyond a claim of right.

There is an inclination to continue considering that, if colour of right is to be any sort of defence, it must be some kind of justification or excuse. In *Pimmett*, cutting an unused phonepole has colour of right because the phone company no longer had a right to use it, and because "without colour of right" was included in the charge itself; without these two features it is unlikely that the colour of right would be either a justification or an excuse, a diction which assimilates them together⁸⁰. Again in *Etherington* shooting the dog was deprived of a defence of colour of right because it did not have the conditions for justification and excuse, namely, that the dog was a present danger⁸¹. In further conjunctions, transactions become "colourable and a mere sham" in *North Bay Supply*⁸², and in criminal law merely "colourable" in *McCarthy*⁸³, or in private law of lease "colour and pretence" in *Ontario Loan*⁸⁴.

But neither is colour an excuse. It is like excuses insofar as both are reasons for not holding someone liable for a failure to meet one's legal obligations. Like duress and insanity, the colour of right renders one unable to carry out legal obligations. As well, one need not be fully impaired from doing so, but have only "normative impossibility", that is, a degree

79. *R. v. Penashue*, *supra*, note 66; *Steward v. Canada (Minister of Employment and Immigration)*, [1988] 3 F.C. 487, 84 N.R. 236 (F.C.A.).

80. *R. v. Pimmett*, [1931] O.R. 705, 705-706 (A.D.).

81. *R. v. Etherington*, [1963] 2 C.C.C. (N.S.) 230 (Ont. Magis. Ct.).

82. *Re North Bay Supply Co.* (1905), 6 O.W.R. 85, 86 (H.C.).

83. *R. v. McCarthy*, [1938] O.W.N. 227, 228, 70 C.C.C. 401 (C.A.).

84. *Hobbs, Osborne & Hobbs v. Ontario Loan & Debenture Co.* (1890), 18 S.C.R. 483, 493 (on appeal from Ontario).

of difficulty in fulfilling obligations beyond which it is not thought politic to hold a person to task. This may be on the humane basis that our shared humanity keeps compliance within the boundaries of what law could be meant to do; it may be on the calculative basis that such strictness makes compliance impossible, deprives the law of respect, and so encourages lawbreaking.

The most likely excusing defence to which colour of right could be assimilated would be honest mistake of fact. Most other excuses provide a defence by recognizing some impairment in the appreciative capacities of the agent. Both in colour and in mistake, on the other hand, the agent is seeing just what he should be seeing, what is there to be seen; it is just that the cues as to what is the state of affairs are misleading, and so have misled. In both, as well, the misconception must be honest and in good faith, rather than by willful blindness. This is all that is meant by saying that the misconception must be reasonable, in mistake if not in colour; the defence does not cease to be subjective, nor is it made objective and its liability more strict, as it would by saying that the grounds of misconception must be reasonable, that they must be such as a reasonable person might make. In both, further, the misconceived facts must be such that, had they been the case, then the action would not have been legally improper. This is all that is meant by saying that the misconception must be legal, and not only moral.

But even with this similarity, colour of right retains its uniqueness, and is not reducible to a defence of excuse, even the excuse of mistake of fact. For it does remain on the margins of law in this respect: that what the agent is mistaken about is his legal entitlement. In mistake of fact, what the agent is mistaken about is the surrounding facts of the situation; in colour of right, the agent is mistaken as to his legal standing. Of course, that matter of law is never absolute and independent of fact. But what the facts trigger in colour of right is an incorrect appreciation of a normative matter, not an error about the sort of situation which one is facing. As well, not simply ignorance of the law suffices, but some belief of entitlement contrary to the law is needed. Affirmative belief is enough to block criminal liability, even though not enough to answer a civil action for damaging a fence in one's right of way, in *Johnson*⁸⁵.

85. *R. v. Johnson*, *supra*, note 2; see its later relevance in note 2 above, and its reliance on *R. v. Fetzer*, *supra*, note 2. *Fetzer* is examined in "Colour of Right – *R. v. Fetzer*", (1956-1958) 2 *V.U.W.L.R.* 257; and again by Warren J. BROOKBANKS, "Colour of Right and Offences of Dishonesty", (1987) 11 *Crim. L.J.* 153.

One contention over colour of right is whether the honest mistake must concern only the facts, or can also concern the law. The repeated contention was that only error as to facts will suffice; error as to law is insufficient, because one is deemed to know the law, a fiction against which difficulty in finding out the law will seldom prevail. But there is authority to claim that error either of fact or of law will do, where for example the objectionable use of land regards a disputed parcel of it, in *Pena*; or in *Chapdelaine*, a civil case of a bank manager's deposit of a cheque to be cashed into an account in deficit, an error of law comparable to one of fact⁸⁶. The current informally codified position is that error on either suffices, in *Cameron*⁸⁷.

So strong is the tendency to make fact the object of the error in colour of right, instead of law as the object, that if one initially pleads that the facts were not as required—that he did not shoot the cattle in *Stewart*, that he did not shoot but robbed the victims from whom collateral was taken in *MacGregor*—for the actus to occur, then one cannot go back later and say that even though those were the facts he did not honestly know that they were⁸⁸. Fraud must be considered and the court is at fault if it does not consider that; and, since fraud involves taking with intent without colour of right, this reintroduces the need to consider the colour even proprio motu, as well, as stated in *Mackenzie*⁸⁹. That is also the opinion in *Charlebois* for the mischief of moving a road sign⁹⁰. The wording of the charge may itself, however, introduce a defence of colour of right even when none is otherwise available, as does the charge against Pimmett for cutting a phone pole; or the statute may do so, as it does in Kozak's case for defrauding his insurers⁹¹.

3.2 Contrariety to Fact

On either of these disputes, however, what is agreed is that a mere mistake, subjective or objective, of fact or of law, must be such that if it were true it would have made one's act not wrongful. This contrary-to-fact conditional does not put a premium upon predictability in some factual

86. *R. v. Pena*, 148 D.L.R. (4th) 372, [1997] B.C.J. No. 1395 (QL) (B.C.S.C.); *Chapdelaine c. Bérubé*, [1985] C.S. 980.

87. *R. v. Cameron*, *supra*, note 30, cited by R.M. BLACKBURN and C. FINCH (eds.), *supra*, note 28, p. 2-339.

88. *R. v. Stewart*, *supra*, note 50; *R. v. MacGregor* (1981), 64 C.C.C. (2d) 353 (Ont. C.A.).

89. *R. v. Mackenzie*, [1971] 2 O.R. 1 (C.A.).

90. *R. v. Charlebois* (1994), 156 N.B.R. (2d) 75 (Q.B. (T.D.)).

91. *R. v. Pimmett*, *supra*, note 80; *R. v. Kozak*, (1947), 88 C.C.C. 350, [1947] 2 D.L.R. 858 (B.C.C.A.).

sense, for it is the legal standing that is sought by the defendant. He does not achieve that legal standing. Yet standing outside the law is protected by law ; one is protected for leaping ahead of oneself into a legal condition one does not obtain, and for remaining in the unjustified condition from which he acts.

3.3 Nonpositionality

While one may benefit from colour of right, colour of right is not an entitlement which can easily be claimed. Even though in order to benefit from colour one must allege it, having colour of right is not an entitlement such that one can seek it out beforehand, and seek to stand in it. The attempt to conduce it, impairs its achievement.

In the statutes colour of right is seldom an achievement which one can be found to have ; rather, it is more often something which a claimant can at best be found not to be without. One is “not without colour of right”. Lacking it, one is not in the right ; but having it does not put one into the right whose colour his action has. The colour is what the claimant’s action has ; it does not have the right.

Colour of right is non-positional, unthematized ; if not so, it ceases to be. One poses the right, not the colour ; right is what is thematized, not the colour. Thus the very last thing one should have expected when he acted with the colour of right he now pleads, is that he would have been arrested. The Innu in *Roche* did expect that when occupying the former airbase, and so are deprived of colour of right⁹². The finder of the blank money order in *Nelson*, who could have checked the address, would have expected to be pursued for depositing this payment for a boat sale to his company’s account⁹³. One acts out of a sense of right, and so cannot expect to be arrested for acting that way. The defence must also not be contradicted by alternate defences. If one pleads first an alibi, as MacGregor did that he did not go to shoot the victim, or that he did not do the act, as Stewart said he did not shoot the wandering cattle, then returning to say that if he was there or did do it, then he thought he was right, would be considered inconsistent with the bona fides of the plea⁹⁴. It is one point in law when the authenticity of the agent is reflected in the authenticity of the proceedings.

The criminal law is not the only place we meet colour, to be sure. But of the usages of ‘colour’, only ‘colour of right’ pretends to have the

92. *R. v. Roche*, *supra*, note 65.

93. *R. v. Nelson* (1997), 120 C.C.C. (3d) 1 (Ont. C.A.).

94. *R. v. MacGregor*, *supra*, note 88 ; *R. v. Stewart*, *supra*, note 50.

legitimizing force of law. The others are straightforwardly delegitimizing usages, which involve an illegality. An officer's acting with colour of office is how to delegitimize that action, not to legitimate it; so much the more is this so of a non-officer acting with such colour. In turn, to say a legislature is acting 'colourably' is in effect to say that it is acting *ultra vires*, and that its action has no legal force. While these dicta may also originate a legal normativity, it is the negative normativity of prohibition that brings about law as a set of exclusory norms, and not law as a mode of right-seeking. These other normativities direct toward non-action, rather than supporting, confirming and originating action.

That is the distant use of the Latin term 'color' in its first meaning as deception, and that is its earliest usage in legal scholarship. The diction always includes the amplifying adjective 'mere colour' or the amplifying conjunct 'mere appearance or colour', the same 'appearance' which is its civilian usage⁹⁵. They are unlike, however, in that appearance does not generate reality, while colour does generate the normativity which takes on legal force⁹⁶.

Colour is nearly always contrasted with something else in law, and the something else is what is favoured while the colour is denigrated, blackened out as legal non-being. Well there may be something legal, and legally legitimated and legitimating; but colour is not it, colour is only its absence. The difference is that the usage 'colour of right' adds more than that denial of legality; this usage suggests that the essence of law is passing into being at this point, instead of merely passing in the opposite direction, passing into non-law.

4 Colour of Right and the Essence of Law

Colour's surface in the law forces study to delve into its saturation at origin, and there to discover that its hue is marginal. Probably because of the uneasiness over the marginality of colour, the phrases formulating colour of right into provisions on self-defence are absent and on defence of property have generally been replaced with specification of its elements. Nonetheless, these dicta do not quite add up to the colour of right. In these, reasonableness has been made an explicit part of the legal defence and, secondly, the mistake has been made explicitly one of law and not of fact. As a result, this has not simply codified caselaw on colour of right, but has changed the claim into something else, wary of the irreducibility to legal origins which colour of right embodies.

95. See *supra*, note 20.

96. D. GREENBERG (ed.), *supra*, note 19.

The canonical presentation of colour of right is said to depend on or to reflect the right, to be only the appearance of the right, in such a way that the right comes first, and the colour is what remains of it when the right is not fully presented. This is, as it were, starting with the presence of right, and working one's way out of it, toward its opposite, or at least its absence.

But this is not what is happening in cases that use a discourse on colour of right. Since its colour may stand on its own, the better way to state the process is as the right being formed from its colour, after that colour. The colour of right, the appearance of being some legitimate claim, precedes; and thereafter, from this instance, is generated the legal norm, the generalized rule which can thereafter be set over against the colour, even so as to disavow the colour's legitimacy, to remove legal justification from the actions whose colour was of right.

If that is so, the origins of law's normativity—that is to say, of law—are to be discovered in its appearance, an appearance which precedes the reality, but in which the essential features of the reality are already present, while pointing toward their completion or perfection in some future achievement. It also means that the initial modal character of law is set in terms of rights, not of obligations as the achieved institutions of law make it sometimes seem.

No one today, if anyone ever did, stands at the temporal commencement of legal order, at its emergence from some mythic state of nature or original position, in order to watch the origin of legal right by its magical transmutation out of moral right or out of social expectation or out of no right of any sort. But no one needs to be there, for colour of right enters daily practice, however unusually, in a way that hardly another legal phenomenon does, in order to keep pointing toward the essence of law and the constitution of right. It is not only haphazard planks on the ship of state, singular instances of normative novelty, that are repaired as it goes along the high seas, and is reconstituted, but it is the essence of law and its continuing way of originally being constituted that is recognized in its colour of right.

Colour of right operates as a ground zero in constituting legal right, and constituted authority. This observation doesn't say the essence of law is generated solely at this one point, in its colour. Several other points of origin, perhaps many, may be either independently or conjointly originative for law as normative beneficial public dicta. But its colour is one of these.