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Law's Justice: A Law and Humanities Perspective

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Editorial

Law's Justice: A Law and Humanities Perspective

The relaunch of *No Foundations: An Interdisciplinary Journal of Law and Justice* is devoted to rethinking the possibility of law's justice. We have chosen to approach this question from a law and humanities perspective, mainly for two reasons. The first is that this interdisciplinary movement, presently gaining momentum in Europe, reconceptualizes law in a way that opens it up inherently to dialogues across disciplines, sharing our view that law cannot be fully understood as an autonomous field. The second is that this approach does not shy away from the discussion on law's (in)justice, and brings it to the fore of every legal debate, far too long relegated with the argument that justice does not belong properly to law, but to other branches or fields of knowledge. For our relaunch issue we are very proud to present contributions from eight outstanding international scholars working on this tradition, which combines the study of law with other literary and humanistic texts and approaches.

James Boyd White, a pioneer in this interdisciplinary endeavour, begins in autobiographical fashion to explain what led him to explore the connection between law and literature in a way that has often seemed to an outsider as a bit puzzling, even idiosyncratic. Arguing that such a questioner often misunderstands not only literature, but law too, White elaborates on the idea that the law is not a static or timeless system, working out the implications of its premises in abstract or purely logical ways, but a way of functioning in a world dominated by time, seizing the ever-passing moment of the present as the place to link past and future. Thus, if one is to think about the relation between law and justice it is important to recognize that the law is not an abstract system or scheme of rules, or a set of institutional arrangements, but an inherently unstable structure of thought and expression, built upon a distinct set of dynamic and dialogic tensions. These include, to name but a few: tensions between ordinary language and legal language; between legal language and the specialized discourses of other fields; between language itself and the mute world that lies beneath it; between conflicting but justifiable ways of giving meaning to the rules and principles of law; between substantive and procedural lines of

thought; between the past, the present, and the future. None of these tensions can be resolved by resort to a rule or other directive, but must be addressed anew in each case, by the exercise of an art that is defined by these tensions themselves. As a result, doing justice in the law consists not merely in the elaboration of general principles, but the art by which the tensions characteristic of law are intelligently and sensitively addressed.

White's argument has wide implications for legal education, because the teaching of law as mechanical, impersonal, essentially bureaucratic in nature works by narrowing rather than broadening the human capacity for understanding and critical judgment. In White's view, legal education ought to shift the focus from the study of law as a system to the understanding of what happens when that system meets the world, for it is at the moment of this encounter that law becomes most fully alive. In the hands of the lawyer, judge, or teacher, the law is not a closed or total system of significances, but is systematically opened up to new possibilities, not only enabling creativity, but requiring it. Most fundamentally, this encounter contains within it the seeds of resistance to the forces of empire and mindless submission, for every case is an opportunity for the introduction into the world of power of an unrecognized voice, language, or claim.

White's opening essay draws with deceptive simplicity a picture of law that could not be further apart from the models of law that have dominated academic circles over the last two centuries. One might say that White writes from an internal perspective, though not from that of the Hartian official who assures the continuity of the legal order, but as someone who aims at the heart of legal practice as it is lived and experienced by individuals and practitioners. What White describes is an ideal of what law can be when it reaches its potential; an image, as it were, by which we can shape our efforts as do our respective tasks as lawyers, judges, or teachers. Seemingly missing in White is the position of the jurist, perhaps a distinctly European figure, of the academic law professor who studies law as a 'detached observer'. In 'Configuring Justice' Jeanne Gaakeer, both a professor of jurisprudence in Rotterdam and a sitting Justice of the Appellate Court in The Hague, denies the possibility of such a 'view from nowhere'. Opposing her view to the legal-scientific model, she defends the model of *jurisprudentia*, which denies the possibility of general theoretical accounts of law (as *scientia*), because there is no such thing as a neutral or objective scientific position from which to observe or to take theoretical standpoints, and because practising law and the reflection of it (the internal and external perspectives) are both to be understood in, and from, particular historical, moral, and cultural contexts.

Further, Gaakeer argues that law as an academic discipline belongs to the humanities, given its historical development since the eleventh-century discovery of the Justinian Code, and its language-oriented practice. In order to build her argument, and wishing also to dispel the misconception about civil-law reasoning as mere syllogistic rule-application that is deductive in nature (moving from abstract codified legal norms to a decision in a specific case), she turns to Paul Ricoeur's work in search of what the *studia humanitatis* can contribute to legal practice. In

particular, Gaakeer focuses on the development of professional qualities of *phronesis* or practical wisdom; the elaboration of metaphor or the ability to see resemblances in spite of differences; narrative intelligence or the ability to plot and recognize plots and compose justifications (as well as to detect cognitive biases); and discernment of the equitable, all of which are fundamental attributes of deciding cases with justice. Gaakeer's essay is thus an example of how humanities-oriented interdisciplinary research can move beyond the mere academic into the realm of *praxis*, for she considers that only through law in practice can we learn to speak of justice, and decide that justice is done not in the abstract, but in the concrete way an actual case might be resolved.

If Gaakeer exemplifies the hermeneutic-philosophical tradition in this volume, François Ost exemplifies the law-in-literature approach. Ost makes a brief journey through different works of world-literature to inquire how it reveals the relationship with justice and its administration. For this purpose, he designs a double-entry table according to two different axes: the first, vertical, axis follows the known distinction between private and public justice; the second, horizontal, axis distinguishes between two ends of the act of judging, short-term and long-term ends, which following Paul Ricoeur he calls 'distribution' (*répartition*) and 'participation' (*participation*). In this way, while the short-term end of justice is meant merely to distribute the share belonging to each, the long-term function of justice aims at the restoration of social peace, and makes us take part in the good-in-common.

This double-entry table serves as grid for analysing literary works in which one or both ends of judging are present or absent in ways that enable one to illustrate, modify, or subvert the theoretical model. In this light, Ost categorizes works by Aeschylus, Shakespeare, Racine, Melville, Tolstoy, Dostoyevsky, La Fontaine, Von Kleist, Wiechert, Hawthorne, Kafka, Mauriac, Dürrenmatt, Kundera, Nothomb, or Sade, focusing particularly on unconventional typologies of judging such as forgiveness, oblivion, the justice one procures for oneself, and the flawed model in which none of the functions is present. In his analysis, literature provides archetypical stories that form the ideals, fears, warnings, and utopias at the core of the human imagination, significantly complicating the always-too-reductionist theoretical models of justice.

But why is that people appeal to law when they seek justice, even after legal positivism has asserted that there is no necessary connection between the two? Marianne Constable wonders about the continued appeal to law's justice in a world that, after Nietzsche, has lost its old faith in any kind of 'foundations'. For Constable, the question in the contemporary scene is no longer whether we must reject justice as a false ideal, or whether we can think about law without reproducing old metaphysical truths. Rather, it is how to speak of both law and justice without falling under the sway of a socio-legal worldview that would treat all law and its justice in the terms of empirical, calculating, instrumental strategies and techniques. According to Constable, understanding claims of justice, as well as the reality of law itself, solely in terms of social power and empirical impact neglects important

insights that the humanities bring to bear on law and language, for, if the will of society recognizes no limits to the power to command or to determine the world, then any possible distinctiveness of both law and justice is lost.

Constable argues that law and justice are a matter of language, but not in any logically necessary or universal sense, but in what she calls a 'grammatically imperfect' sense—the manner in which the subject of a sentence acts continuously, incompletely, and in an ongoing manner that can be interrupted. Just as words are unable to capture a world that is perpetually in flux, claims Constable, so too with law: we share an imperfect and incompletely articulable understanding of law as our way of living. In this way, 'law' refers not only to particular acts and events—marriages, contracts, wills, sentences, regulations—but also to the imperfect and incompletely articulated and articulable knowledge of how to speak and act with one another required for these legal/social acts and events to occur and be perfected. Constable concludes that identifying law with language this way leads to thinking about membership and belonging less in terms of state citizenship, national identity, and moral or religious community, than as matters of the common though imperfect and possibly overlapping tongues through which persons understand one another.

Rebecca Johnson's article picks up on this thread. Through an exploration of Canada's colonial past in regard to the Ihalmiut community, Johnson addresses the challenges (and possibilities) of justice in the context of the intercultural encounter between settler and indigenous legal orders. Johnson takes up the famous case of *R v. Kikkik* of 1958—a case that involved Kikkik's stabbing to death of her brother-in-law who had killed her husband and threatened her life; her 45 KM march through the freezing cold with her three children to reach the nearest trading post; her desperate abandonment of two of them in the snow; and the trial and subsequent acquittal of Kikkik on double charges of murder and criminal negligence of the death of one of the children—in order to ask what might be learned about law and justice by exploring the different ways this story has been told. Drawing inspiration from James Clifford's work on juxtaposition and Mikhail Bakhtin's insight that meaning emerges most richly through encounters and intersections, Johnson approaches the case through different genres—the trial transcripts, a novel, a group of sculptures, and a film—and asks what each brings into focus or else leaves out. Johnson shows that each genre provides a different lens to observe the 'same reality', and these affect the kind of judgments being made and the justice being administered.

Johnson's article raises additional questions concerning interdisciplinary research itself and the responsibility of the critic to respect the particular idiom of the genre under study. Thus, whereas the trial focuses exclusively on issues of guilt and innocence on an individual level, the book enlarges the scope to include the governmental action of relocation of the Ihalmuit. In turn, the 'pensiveness' or arrested movement of the sculptures pushes Johnson to reflect on their conditions of production as an instance of North/South encounter, and the film version brings about various forms of acknowledging the past (performances of apologies, signs of gratitude, acts of witnessing) and claiming responsibility for it. As Johnson argues,

all these dimensions of justice are matters not easily captured within the boundaries of the law, but are no less pressing in the context of the larger project of theorizing the meaning and the demands of justice.

But what does this theorization entail? Our next two essays connect justice with the idea of limits—boundary setting, limitation of excess, and measure. M. Paola Mittica argues in 'The Heart of Law' that measure, a space of boundaries that cannot be predetermined but without which human coexistence would be impossible, is an essential component of the social and political bond, as measure defines the boundaries of behaviour that regulates the irreducible difference among humans. According to Mittica, the continuity between law and justice—and their common rootedness in the complex space of the boundaries imposed by otherness—cannot be captured by modern Western legal science, nor by the reflection that has accompanied the evolution of positive law. Instead, Mittica invites us to look elsewhere in our culture in the hope of identifying elements to think about measure, and to bring the debate on law's justice from the abstract plane of theory to that of human and social experience. She approaches this question with the help of the *Odyssey*, not as an attempt to pursue the chimera of an original *jus*, but in the belief that human communities are constitutively narrative and these narratives are normative in that they help to structure daily life on a symbolic and emotional level. In this light, the purpose of the Homeric poems is not so much to preserve and transmit the contents of an oral tradition, but to constitute an 'anthropological grammar' that is inherently juridical in its capacity constantly to offer formulas on the basis of which to achieve a balance in social coexistence.

In his contribution, Gary Watt also takes on the issue of excess in the context of property rights. In an attempt to mitigate two common forms of excess—excessive obedience to law and excessive obedience to extra-legal moral absolutes—Watt argues for less absolute virtues of 'internal integrity' and 'equity'. As defined by Watt, integrity is the morally neutral quality of integrating a thing to itself, whereas equity demands opening it up to its context and surroundings. Although legal scholars and judges often seek integrity as the sole virtue worth pursuing by the legal system, Watt argues that integrity can be harmful if pursued to extremes, and this is what makes it necessary to temper it with equity. Nevertheless, the practice of equity does not constitute an unmitigated virtue and, contrary to the Aristotelian concept of *epieikeia*, ought not to be conceptualized as striving towards a new ideal (i.e., 'the golden mean').

In Watt's view internal integrity has no free-standing merit and does not deserve its name unless it is pursued with regard for equity and, vice versa, equity has no merit unless pursued with regard for internal integrity. Therefore, the relationship between internal integrity and equity is one of agonist tension. Watt argues that it is precisely this dramatic struggle that is at stake in hard or difficult cases, and that theatre and other creative arts have as much potential to show us about how we might better exercise our judgement in these legal situations, which he illustrates with various examples of English law. According to Watt, the main problem is to

decide to what extent equity can operate to challenge the internal integrity of a rule, without supplanting law with morality. Watt finds a promising avenue in the concept of 'unconscionability', which intervenes when a party abuses a right or a rule in a way that is inappropriate in the particular context of a practice. Unlike the categorical role of morality, unconscionability helps us to avoid the worst errors without ever claiming to constitute an ideal, which helps law and lawyers to improve and 'get better' in practice.

Ari Hirvonen gives a fitting closure to the journal's invitation to rethink the possibility of law's justice from a law and humanities perspective. In 'The Ethics of Testimony', Hirvonen reads the fascinating life-story of French philosopher Sarah Kofman, author of numerous books on philosophy, psychoanalysis, deconstruction, art, and literature and whose father, a rabbi, was killed at Auschwitz. Hirvonen argues that even though Kofman, unlike her friend Jacques Derrida, never wrote explicitly about the relationship between law and justice, the latter is always present in her writing. Hirvonen connects this 'justice that speaks without speaking' to Kofman's laughter and tears and to what these testify, and traces both in Kofman's autobiographical writings. Hirvonen's task is doubly complicated by the fact that Kofman decried the genre of autobiography in general as '*mensongère*', written as 'retroactive illusions for the aim of idealization'. However, following in the footsteps of Nietzsche's *Ecce Homo* and E.T.A. Hoffman's *The Life and Opinions of Tomcat Murr*, Hirvonen argues that Kofman's texts no longer represent the authoritative voice of the narrator recounting a unified story, but rather comes closer to the experience of her father's absence itself that speaks through her body. In this reading, the body is the embodiment of a trauma that cannot be expressed in words, but that must be testified to and repeated, not as melancholia, but as an ethical demand not to forget.

Finally, Hirvonen considers the possibility of a new humanism after Auschwitz. Departing from the earlier European tradition, Kofman announces the possibility of a new kind of humanism, in light of Robert Antelme and Maurice Blanchot, where humanism is not to be understood as a coherent system of universal moral norms, but as the responsibility of being human in the face of irreducible otherness. This humanism seeks not to create the human 'we' that reduces differences in the name of universality, though it does not preclude imagining and creating communities on the basis of, and respectful of, difference. Indeed, Hirvonen reclaims the urgency of the European Union to think of itself differently as a non-essentialist community in order to create relationships that would be more inclusive and just at this particular historical juncture.

Mónica López Lerma and Julen Etxabe
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Justice in Tension: An Expression of Law and the Legal Mind

James Boyd White*

I have spent a lot of energy in the course of my career trying to connect the western literary and humanistic tradition with the teaching and study of law. To some people this work has naturally seemed a bit puzzling, even idiosyncratic. 'What can literature possibly have to do with law?' is a question I have been asked over and over. From my point of view, such a questioner often misunderstands what literature is, and can do—maybe seeing it only as a form of aesthetic consumption, not as *about* anything important except the pleasure it gives—and much of my writing has been aimed at correcting this kind of misjudgment. But I think such a questioner also often misunderstands what law is, and can do, or at least understands these things differently from the way I do, and it is mainly law that I wish to talk about in this article. My idea is to render more explicit than I have done so far the vision of law itself out of which I have been functioning, and at the same time to suggest something about the nature of justice.

What I shall say, in a phrase, is that law is not at heart an abstract system or scheme of rules, as we often think of it; nor is it a set of institutional arrangements that can be adequately described in a language of social science; rather, it is an inherently unstable structure of thought and expression, built upon a distinct set of dynamic and dialogic tensions. It is not a set of rules at all, but a form of life. It is a process by which the old is made new, over and over again. If one is to talk about justice in the law, it must be in the light of this reality.

I think I can best give content to this perhaps puzzling summary by explaining where the view I describe comes from. This will require me to be a bit autobiographical, but I hope you can see that here my real subject is not me, but the law.

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1. Law as an activity of mind and language

I came to law from the study of English literature and Classics, especially ancient Greek. In both of these fields my focus was on language, most obviously so with respect to Greek. In working on Greek I naturally asked questions like the following: How was this language put together? What were its key terms of value, of social and natural description, of psychology, and what did they mean? What were its principles of grammar and syntax, governing the way in which sentences could be composed? What were the forms of thought and imagination that this language invited and made possible? What, in short, could be said and done in this language that could not be said and done in English? (*Do you see that the same questions could be asked of the law?*)

The activity of translation, in which I was constantly engaged, captures the essence of the problem I was facing: How much, or how little of what Homer does in the *Iliad*, say, can be brought into English? When we try to bring this poem into English, how do we distort or damage the original? How do we add to it? I could see that I simply had to learn to read Homer in his language if I were to begin to understand what he said and did. As I did that, what did I begin to see or experience? Certainly not what might be called an art-object, as some might think, offering itself to our aesthetic delectation, as a fine wine offers itself to our palate. The *Iliad* is beautiful, but it is also hideous, and it certainly is not about beauty as an aesthetic ideal. The same I think is true as a general matter of virtually any imaginative literature worth reading.

What the *Iliad* offered, as I saw it, was an engagement with what seemed like everything: the way a culture (in this case the heroic culture it describes and celebrates) is formed and works; the nature of cultural imperatives, and the way they can lead us into war and murder; the way an individual, necessarily formed in large part by his culture, can find himself almost by accident, as Achilles does, suddenly on the edge of that culture, in a position from which it can be seen and in some sense criticized and resisted; the character of human life itself, bounded as it is by death; and the achievement of art, by which this universal fact of human mortality can to some extent be defeated. As the French philosopher Simone Weil says, the *Iliad* is a poem of force: showing us that the roots of war lie in the ideologies by which we dehumanize each other—a dehumanization the poem itself heroically reverses, in seeing, and bringing the audience to see, against the force of the military culture itself, the common humanity of Greek and Trojan (Weil 1940-1941). So for me the *Iliad* was not literature as aesthetic consumption or display, but a powerful form of thought and education about the most important things in human life.

What I say of the *Iliad* was true in a general way of the best of the other books I read[1]: they offered engagement with human thought of the deepest and best

1 The *Aeneid*, for example, about the immense value and terrible cost of the Roman Empire; Jane Austen's novels, about the art of judging others accurately and comprehensively by what they say (especially difficult when they speak in formal contexts, where pretense and evasion are so easy to achieve); Thoreau's *Walden*,

kind about the most important matters in our individual and collective lives. In the work I admired—from Virgil to Shakespeare to Jane Austen to Robert Frost—I found people talking as well as they could about what was most important to them, constantly confronting their own limits of perspective, of knowledge, of mind—and the limits of their language too. Reading these texts in this way was for me a school for thinking well, reading well, writing well, and always about what mattered most in human life.[2] (*Can you imagine that one might say the same thing about law?*).

I went to graduate school in English literature, hoping to make a life out of this kind of engagement with the writing I loved, but I was disappointed, in part because to me this profession felt disconnected from what I thought of as the real world, and for that reason was, I thought, unable to respond deeply and well to the texts to which it was supposed to be devoted. I may have been wrong, but this is what I felt, and I left for law school.

In law school I felt that I came back to my own mind, and to a life I recognized. I was learning law, a new language, a language in which to think about and debate many of the most important questions of our shared existence. It was like learning Greek, except that I was learning it for use in the world, rather than as a way of engaging with literary and philosophic texts. This was not for me an academic or purely intellectual activity, but training in a profession that I intended to practice. I thought of this future most readily in rather small-town terms: I could imagine a client coming in off the street with a problem—a sense of threat or frustration or loss—that he or she could not handle without help. Law was the language into which this problem would have to be translated: it was the language I would use to define the problem and to make sense of it, and of its larger context too. It would ultimately be a language of power, producing a result authorized and enforced by the government.

The questions for me were these. What is this language of the law, and how does it work? What can be said and done in this language that cannot be done in ordinary English? How, in particular, does law work as a process of translation: with what losses, what gains, what distortions?[3] What will it mean to me to give myself the mind and character of a lawyer?

As I imagined it, in practice I would be talking about what really mattered, in competition (and cooperation) with others who were doing likewise, before judges who were also talking about what really mattered. For what we were talking about was important not only to our clients, which it surely was—would they be compensated

about the relation between the individual mind and the natural world, the whole universe of energy and life in which we live; and so on and on, throughout the world that the writers of the western tradition had created.

2 To take Jane Austen's novels as an example, she helps us deal with the fact that we live in a world of false speech of many kinds: sentimental, authoritarian, ideological, racist, dominated by hype and buzzwords and salespitches, by the beating of war drums. How are we to make our way in such a universe? This is what Austen tries to teach us, by exposing falsity and emptiness, manipulation and brutality, for what they are, and offering us forms of thought and speech that are genuine, powerful, and true. Her books offer an education in the difference between false and true, living and dead, in both thought and speech.

3 I was later to pursue at some length the idea that law was a form of translation, in White 1990.

for their injury, or hold on to their land, or lose their inheritance?—but to the world: and this not so much because the outcome of the particular case mattered, but because it always matters very much to the world how such cases are debated and resolved. Every case performs an answer to the question: What are our institutions of justice? How well—how justly—do they work? How should they work? Nothing is more important to a healthy community than justice, but one must always keep in mind the complex process by which we seek to attain it.

I saw the law as a wonderful system in which power worked through conversation, through open argument and persuasion. In principle at least, everyone got his or her opportunity to present the case in the best way possible, and to answer what was said on the other side. In a legal hearing one could say whatever it was necessary or crucial to say about this injury, this divorce, this failed agreement, this event in the real world.[4] To engage in this complex activity it was crucial that I should be able to learn and speak and use the language of the law well, and in two senses: that I should be an effective counselor and advocate; and that in doing so I should conceive of myself as doing something of value not only to my client but to the world: contributing to the maintenance of our institutions of justice, indeed contributing to the realization of justice itself.

Of course, as in all language use, all translations, I could see that the conversation of the law would always be imperfect: there would always be something left out, something out of tune, something stuck in, always a deep imperfection. Sometimes I thought that the legal language I was given to use was itself hopelessly dead and inadequate. Even where it did seem to have wonderful resources, these were not always taken advantage of by lawyers and judges—who sometimes spoke in the dead ways familiar to all of us, full of clichés and empty formulas. But both things—the inherent failings of the language and our failings in our use of it—seemed to me to present challenges for a life of value, the aim of which was to define and express meaning: the meaning of the experience of our clients; the meaning of the collection of authoritative texts and traditions and understandings that are the embodiment of the law; the meaning of the institutions of thought and argument in which these questions were presented and addressed.[5]

When I went into law practice the view I describe was confirmed: the heart of my work was reading and writing, not in a trivial or mechanical sense, not as the exercise of skill alone, but as the fullest and most important expression of a mind

4 If a case was to be settled by negotiation, the hearing still remained the model of legal expression, because at every stage the lawyers were imagining that the case would proceed to trial and thinking ahead of time of the arguments that would be made both ways. Even in drafting documents the same was true: the lawyers were always testing what they were writing by imagining a dispute in court.

5 I have spoken of the life of the lawyer as one of writing, but it was of course one of reading as well. One had to learn how to read texts written in other times and places, on other occasions, by other people, and bring them intelligently and coherently into the present, so that they might speak to the difficulty or dispute we were facing. This kind of reading, like the writing, was an ideal task that could never be performed perfectly, requiring imagination, learning, and intelligence, all of the highest order. And even with all the talents in the world, the coherence would still be imperfect, the argument flawed, the understanding incomplete—a fact that for me opened up a future full of interest and value.

engaged in the world. It was hard to do it well, impossible to do it perfectly. My view of law was internal, from the inside, from the point of view of someone actually doing it. The law can of course be looked at from the outside too, by sociologists and political scientists and anthropologists and others, and they are entitled to look at it differently: as a social or political process, or as a structure of rules reflecting certain policies. But the way they look will define what they see, and it will not be the law as I know it. They will not be doing law, but something else entirely.

I saw law, as I continue to see it, as an activity of mind and language: a kind of translation, a way of claiming meaning for experience and making that meaning real. It is not a system of rules, as I said earlier, but a structure of thought and expression built upon a set of inherently unstable, dynamic, and dialogic tensions. In this it is like a poem. So for me law was a language that one could learn, well or badly, a structured activity of mind one could perform well or badly. One could use this language to carry on conversations in the world, conversations that produced results in the form of judicial decisions, settlement agreements, contracts, and the like; results that mattered, sometimes acutely to actual people, especially the clients; and results that mattered in another way to the whole polity, for one question always present in the conversation was what justice should require, what the law should be. The object of our work was to reconstitute the material of the past to claim new meaning in the present and future.

2. Tensions in legal thought and expression

Exactly what are the tensions of which I speak, and how do they work? How are they to be addressed? What does it mean that the law is built upon them? These are my next questions. I should tell you at the outset that much of what I am going to say about them may seem very basic. Indeed it *is* basic. At one time perhaps we could even have taken much of what I am going to say for granted. This set of perceptions might not have been wholly conscious, but I think it was there in the legal culture when I was young, and did not need stating.

2.1 Between legal language and ordinary language

It may help us uncover some of the tensions upon which legal discourse is built if we think of a day in the life of the kind of lawyer I was preparing to become, starting with the moment when the client comes into our office seeking our help. This client—whether a person or corporation or government body—will have a story to tell and a language in which to tell it. Perhaps he will tell us about domestic violence that he or his children have suffered; perhaps about an idea that he and two others have for forming a corporation that will create and sell computer software; perhaps about the bank's threat to foreclose the mortgage on his house.

The problem can be mundane and ordinary, or sophisticated and rare, but in any case our client will have his own sense of what is wrong, of what he wants, and of his own incapacity to get it on his own. He will turn to us, after all, only when he

sees that he needs help. His story will be cast in his ordinary language, the way he usually thinks and speaks. Our job is to listen to him talk in his language, and then to ask questions that will prompt him to say more. For our knowledge of the law should enable us raise issues that he will not have thought of, and in this way encourage a fuller statement of his story in the language of the law.

When is his story complete? When do we have everything we need to know? A very good question. The sea of possibly relevant facts is infinite, and there is no clear way of knowing when we have enough. In such conversations there is a circular dependence between facts and law: the facts determine what law is relevant, the law determines what facts are relevant.[6] In principle we could go on forever, but we stop when we think we have enough to enable us to develop his case. No rules could tell us when we have reached this point; our sense of completeness is a judgment we gradually make, as we go back and forth between our client's story and what we know of the law. It rests upon our educated intuition.

Our second task will be to translate what we have been told by our client into legal language. This requires us to go from his or her language to the law and back again, over and over, checking both his story and our translation of it. As with all translations, this process is inherently imperfect and distorting. It cannot be done to a formula or rule, but requires the exercise of an art. Sometimes the gap between our languages seems on the surface rather small, for example at closing argument, when we are speaking to the jury and doing so in a language as close to ordinary English as we can manage.[7] Sometimes the gap is enormous. When our client hears us make an argument about choice of law—maintaining, for example, that Nebraska law should apply, not Iowa law, or federal law rather than state law—she may not see any connection at all with the problem she brought to us. But the choice of law problem, if it is a real one, is one of the ways the law gives meaning to her case. It may even be that what this case will ultimately stand for in the law is a new and persuasive approach to choice of law, something she may not care about at all.

Our first tension in the law, then, is the one between ordinary and legal language, and between the perspectives they imply as well. The lawyer has to speak both languages; he or she has to translate, as well as possible, both ways, into the law and out of it, a process that is at every stage defective or imperfect. Sometimes the defect will be fatal: we will simply not be able to say in the language we are given what we think should be said about this case.[8] This tension can be found not only

6 I owe this observation to Professor Albert Sacks, who made this illuminating comment in a classroom more than 45 years ago.

7 This appearance can be illusory. Beneath the surface of the ordinary English spoken by lawyers one can often discern important legal judgments and arguments.

8 In such a case we are effectively silenced. I discovered this when I represented a young man who refused induction into the armed services on the ground that the compulsory medical treatment he would receive in the service would violate his religious beliefs. He was not a draft dodger, but a kind of misfit in the law. I imagined myself making a grand argument to the jury, urging them to do justice to his case, then realized that under the relevant statute the only question before the jury would be whether he had refused induction. The issue of the propriety of his classification was for the court, who was in fact required to affirm if it was supported by any basis in fact. It would have been possible to make arguments that he was protected by the

in interviews with the client, but throughout the process, and in many forms: in the lawyer's examination or cross-examination of lay witnesses, for example; in her closing argument to the jury, who are of course untrained in the law; and even in her arguments with the opposing counsel and to the judge, for it is common there to resort to ordinary life and language for images with which to make a point. Everyone wants to be able to say in ordinary terms what she is saying in legal terms, and vice versa.

This tension is made more difficult by the existence of a related one, between language of any kind at all and the mute world of inexpressible experience. In an important sense the client's story can never fully be told even in ordinary English. There is always a level of experience that cannot be adequately expressed in any language: what a broken arm actually feels like, for example, or the helpless rage and agony of seeing your children hurt by your spouse, or the mute sense of outrage or betrayal at a business partner's disloyalty. Everything that we say, in any language, floats as it were on a sea of inexpressible experience. So we face not only a tension between legal and other forms of language and expression, but a tension between the world of words and the world of mute experience that underlies it. These tensions are inherently unstable, never fully resolvable. Responding to them is not matter of logic, or ends-means rationality, or conceptual analysis, but requires an art, an art of language and judgment.

2.2 Between law and other specialized languages

The tension between legal and ordinary speech is an instance of a larger tension, our second, arising from the fact that legal discourse is itself built upon many different voices, many different languages. It speaks not with one voice but with many voices, and its meaning to a large degree lies in the music that is made among them. Thus in my country, for example, we have the official voices of the legislature, the trial judge, the constitution, the Supreme Court, each speaking in its own way to the others, and to the public too.

We have witnesses, expert and inexpert, each speaking from his or her point of view in the world. The voice of the person who saw the robbery, of the policeman who investigated it, of the technician who tested the blood, of the robbery victim himself; the voice of the defendant, of the psychiatrist testifying on the question of his sanity, of the witness who claims he saw the victim begin the fracas by attacking the defendant; all these are different voices, speaking in different languages. Suppose for example that our case is a medical malpractice case, in which each side plans to call two expert witnesses—a heart surgeon, say, and an engineer who knows about mechanical heart valves. To prepare our own witnesses for direct and cross-

first amendment guarantee of the free exercise of religion, but under the law at the time these arguments would have gone nowhere. He was ultimately acquitted , however, because the lawyer to whom I gave the case when I left practice discovered, as I had not, that the draft board had discussed his case over the phone, and he persuaded the judge that this was not a 'meeting' of the board as required by law. For more about this case see my *The Legal Imagination* 1973, 187-195.

examination, and to cross-examine the opposition witnesses, we shall need to learn something of the languages of the doctor and engineer. We must be prepared to translate, that is, not only between ordinary language and legal language, but between both of these languages and a range of specialized languages.[9] This activity of translation is both necessary and inherently imperfect, and what it requires in us is the exercise of an art.

It is sometimes thought that the law is a single language, a set of nested commands running from the general to the particular, all in the same voice of absolute authority, but as we see here such a view makes little sense. The lawyer or judge must be an artist in translation, prepared to translate between the world of mute experience and the world of words; between ordinary language and legal language; and between both of these and specialized languages as well. Perhaps we do not teach translation of this kind in law school but we certainly should.

2.3 Between the opposing lawyers

There is a third tension, very different in kind, which is also fundamental to the legal process: the tension that exists between the lawyers on opposing sides of the case. This tension is plain: we want our client to win, he wants his to win, and each of us will do all we properly can to make that happen. Thus at trial each lawyer will stretch every nerve to present the material of the law, and the facts, in such a way as to fit with the fundamental claims of his client. One is the voice of condemnation or attack, the other of excuse or defense. We are deeply opposed, for each of us is straining to create a sense of the case, and the law, that will lead the judge or jury to decide our way. This is a power struggle in the law, and it creates a tension, that is by nature both dynamic and dialogic.

Yet there is something odd here: while we and the lawyer on the other side are obviously opposed to each other, we are also in fact cooperating. We agree in a general way, for example, both about the materials of our argument and the way it should proceed. While we are strenuously disagreeing, that is, we are equally strenuously affirming a great deal: the language, the conventions of discourse, the principles or understandings by which we carry on our argument, and certain conclusions too, on questions both of law and fact. We contest what we can, but we accept what we cannot, and this becomes, for the moment at least, a firm foundation for further thought on both sides. We thus affirm the very constraints of the law within which we find that we, despite our strongest efforts, must operate.

When our joint performance works well—as it of course does not always do—it subjects the material of the law, and the facts too, to the most intense and searching scrutiny. Instead of seeking the single meaning of the statutes, of the judicial opinions,

9 An obvious difficulty is that we cannot really learn the language of doctor or engineer with the kind of completeness and depth that only those professionals can have. How then do we do face this impossible task? Partly, we are schooled by our own witnesses, and by other advisers as well; partly, we read in the field in question to learn its language as well as we can; partly, we test, over and over, what the expert says by translating it into ordinary language that we can understand.

of the regulations, and of other materials of authority, we two lawyers together are demonstrating the range of possible meanings that these texts may be given, and using all our powers to do so. In our hands, that is, the law is not a closed system of significances, but is systematically opened up to new possibilities—opened up, in fact, as far as we can do it. That is one of the points of our work.

This tension between competing voices and perspectives gives a special kind of life to the law. As I just said, it creates a space for newness and creativity in reading the texts of the law, which might otherwise be read in dead and mechanical ways. It is also a way of being grown-up: learning to live in a world in which people think differently from each other and to respect the judgments of those with whom we disagree. This very process, rhetorical and adversary in nature, creates a related tension, an internal one, moral or ethical in nature, within each of the lawyers. Is what she is doing justifiable, or even respectable?

We are making arguments for our client, on the law and the facts; but suppose we do not think that what we are arguing for is right and just? Suppose we think that the other side should win? Or, perhaps more likely, suppose we do not allow ourselves to think at all about the right result, about what justice requires, but only about what arguments will work? What have we become? This problem can be swept under the rug by claiming that the adversarial system works to produce justice, so that even if we are not arguing justly, the system will be just—if not in this particular case, most of the time. But that claim rests on an unprovable optimism, and in any event does not address the most important ethical issue, which is who are we becoming when we engage in the activity I describe. Are we just mouthpieces who will say anything to win, whether or not we mean it? Or can we see ourselves as doing something we can truly respect?

A book could be written about this issue,[10] but I hope that you can already see that here is another tension, deep within the lawyer himself or herself. It is unavoidable by a conscientious person. It is not susceptible of systemic resolution, by resort to a slogan or a rule or a phrase, but must be addressed over and over in the life of the lawyer, in the deep particulars of every argument he or she makes.

2.4 Between competing but plausible readings of the law

If we imagine ourselves for a moment as a judge, faced with the decision of a case argued before us, we can see that the tension between the lawyers creates, or ought to create, a parallel tension in our own mind, as the two opposing voices are present and alive within us. If we start to think one way, we should find ourselves checked by the other. The elaboration by the lawyers of arguments on both sides is a way of resisting the judge's impulse to decide too quickly, encouraging her to keep her mind open until she has heard it all, thought through it all—indeed helping her to think it through. The two sets of arguments, in making explicit the range of possible choices

10 For my own efforts at dealing with this problem, see chapter four of *When Words Lose Their Meaning* (White 1984), and chapter nine of *Heracles' Bow* (White1985).

open to the judge, make clear that the judge will have to make her choice and accept responsibility for it—not push the decision off on a statute or other text read in a conclusory or unthinking way.

This argumentative process makes plain that the image of the law as a set of clear (and perhaps even self-applying) rules cannot survive a moment's scrutiny. Under the pressure provided by the lawyers' arguments, the scope of judicial choice becomes wide, much wider than one would at first expect. This fact creates a tension right at the heart of the judicial judgment, a tension between rational but opposed conclusions. This is our fourth tension.

If a statute says that 'trucks' must travel in the right lane, or that imported 'toys' pay only half the usual customs duty, or that a warrantless arrest may only be made upon 'probable cause to believe the suspect has committed a felony' we have a general idea what is meant to happen, but we also know that elaborate arguments can go about the meaning of the words, *truck*, *toy*, *probable cause*, *felony*, and even *commit* (does it include aiding and abetting another, or being an accessory after the fact?). Legal categories, whether legislative or judicial in origin, thus invariably carry a substantial range of reasonable possibilities for their meaning, sometimes a very wide range. Among these possibilities the judge will have to choose. How is she to do this?

A great deal has been written on this question, with answers ranging at least across the following spectrum: (1) the uncertainty of meaning creates in her a discretionary power to do whatever she wants; (2) she is to be guided in the exercise of her discretion by her sense of the intention of the rule-maker; (3) she is to be guided by appropriate general principles of moral and political philosophy; (4) she is to be guided by natural law; (5) she is to be guided by analogy to other legal examples; (6) she is to resolve the ambiguity against the drafter of the document, since he or she is responsible for it; and so on.

I will not join in the debate as to which of these, or others, should guide her decision. It is enough for present purposes that it is clear that in her basic task of legal decision the judge inhabits a zone marked by a strong tension between alternative ways of thinking, a tension that is, like the other ones I have described, dynamic, dialogic, and inherently unstable. The resolution of this tension, like the other ones, cannot be achieved simply by reference to a rule or practice or phrase or idea, but must be achieved afresh, in every case, by an art of judgment. This very fact gives life to the law, and offers a richer definition of justice than one that looks simply to rules and outcomes.

As the judge faces this problem, she also faces her own version of what I called before the tension between the world of language and the world of inexpressible experience. This tension arises within her the moment she asks herself how and why the case should be decided. Here is what I mean. A part of her mind will think in terms of legal arguments of the kind we have been discussing, testing them against each other for their force and power. But beneath that layer of the mind is another, an intuitive center, educated by experience and reflection, that is really seeking the

right and just decision. The judge knows that her written opinion can never express or justify what the center of herself is doing, the secret spring of judgment at her core.[11] This tension cannot be resolved in any *a priori* way by a rule or principle, but must, like the others mentioned, be lived through in detail and addressed anew every time.

2.5 Between substance and procedure

One of the deepest—and to the lay person, most mystifying—characteristics of legal thought is that the lawyers and judges seem to think about two different kinds of questions at once—what we call 'substantive' questions and 'procedural' ones—working as it were in two channels simultaneously. Thus whenever the lawyers argue about a substantive question, such as the meaning of a statutory or constitutional provision, they are likely at the same time to argue about a procedural question: the requirements for a judgment on the pleadings, for example, or for summary judgment, or for a directed verdict. This second channel, which I am calling 'procedural,' is by no means limited to technical matters of judicial procedure, but includes argument of a much more general kind, which might be called 'institutional.'

Suppose the substantive question is whether one may dump industrial waste water in the river; or whether a school on an Indian reservation may begin its days with the recitation of a sentence that sums up the traditional wisdom of the tribe; or whether one may have a loud party to celebrate one's child's graduation from school, even though the neighbors object. The lawyer or judge facing such substantive questions will at the same time face a set of institutional questions: Who is empowered to decide this question in the first instance, and why? What procedures should this actor be compelled to follow, and why? To what review is the first actor's judgment to be subjected, and why? Or, to reverse the point of view, to what degree of deference is it to be entitled, and why?

Suppose for example in the water discharge case that there is a municipal ordinance on the subject. Here the lawyers will ask not only what I have been calling the substantive question—whether the ordinance should be interpreted to prohibit this discharge—but at the same time a set of institutional questions: whether the city council was authorized to pass such an ordinance by the relevant statute; if so, whether it followed the requisite procedures; if so, whether this ordinance, even if authorized by statute, meets the requirements of the state or federal constitution. In fact much of what we mean by constitutional law is institutional in just this way, determining what agency should have the power to decide what questions, under what procedures, and subject to what review.

The mind of the lawyer and judge mysteriously works in both tracks at once, and there is a deep tension between them. Sometimes, indeed, the two lines of

11 The opinion therefore, however honestly written, has some of the characteristics of a false pretense: This is why I decided the case as I did, the opinion says; but the judge knows that the true springs of decision are deep within her, and can never be fully known or explained.

thought intertwine in such a way as to make them one. We just cannot think of one without the other. What happens in one line of thought affects the other. It is like seeing that the smooth and rough sides of a piece of cloth each require and imply the other. There is no way to draft a set of rules for resolving this tension. It must be addressed by an art of language and judgment.

2.6 Between law and justice

A sixth tension, still different from the others, exists at the heart of legal thought, between the twin demands of law and justice. For in our system the lawyer and judge alike must ask not only, 'What does the law require?' but 'What does justice require?'

It is a convention of the law I know—I have never seen plainly stated but seems to me undeniable—that in every case the lawyer on each side must maintain that the result he or she is arguing for is both required by the law and itself fundamentally just (White 2002). An argument that claimed that the law required the outcome, but admitted that the result was unjust, would be profoundly incomplete. No lawyer would want to be in the position of making such a case. Likewise incomplete would be the sister argument which claimed that justice required the result that was being argued for, but admitted that the law was against it. Nor would a judge happily admit either that her judgment was unjust or that it was against the law.

In this sense law is a system that combines the principles of both natural and positive law. It is like a chariot being drawn by two horses: they often pull in opposed directions, but unruly and uncooperative as they may be, together they take the chariot in a direction that is much better than that towards which either of the horses alone is pulling it. The immense and deep tension between these two claims means that the lawyer or judge must often labor to harmonize them, sometimes to the breaking point. But it also gives both lawyer and judge an opportunity to create something new and alive: not merely the logical working out of rules or premises, but a deep engagement both with the texts of the past and the facts of the present, and what they mean. It is one aspect of the lawyer's great task, which is to bring into one field of vision the ideal and the real.[12]

Another way to put this point is to say that both abstract conversations about the nature of justice and particular conversations about the requirements of the law seem empty or incomplete when compared with the kind of conversation that takes

12 Consider, for example, the fact that we talk to the judge not as the bundle of prejudices and beliefs and commitments and character traits that form part of his or her character, but as an ideal judge, one who is always seeking to do justice under the law. Likewise, we idealize the legislature, interpreting its words as if they came from a wise and good person, when of course the truth is more complex. We idealize our client too in the way we talk about him, presenting him in the best light possible. In this sense we are engaged in work that is explicitly aspirational in character. At the same time we are required to be realists, about all these actors and about the process too, recognizing that the legislature is a political body, that the judge is biased for us or against us, that our client has all the usual faults of humanity: he may lie to us, or not pay the fine, or our bill; he may skip town.

place in the law, in which both topics are pursued at once, and together. Conversation about law requires the consideration of justice; conversation about justice requires the consideration of law. The relation between them is itself dynamic and unstable. It can never be a perfect match.

2.7 Between the past and present – and the future too

Finally let me suggest one more tension, a temporal one: between the past and the present, and between both of them and the future.[13] The task of the lawyer and judge is to bring the materials of the past—sometimes recent past, sometimes remote past—to bear on the problems of the present, and in so doing to make something new for the future. The law is thus not a static or timeless system, working out the implications of its premises in abstract or purely logical ways, but a way of functioning in a world dominated by time, seizing the ever-passing moment of the present as the place to join past and future. It is a way of defining experience; learning from experience; shaping experience.

This tension is present in all legal argument, but most of all in the special form we call the judicial opinion. This text brings together all that the parties have been able to invoke from the past, and issues the authoritative judgment that speaks to the future. It does not just state or define a rule, but issues a judgment, which it explains, and explains in ways that go beyond the language of the rule itself.

3. The writing life of the lawyer and judge

I am saying, then, that legal thought is not the top-down elaboration of the meaning of a set of rules by a process of logic or end-means rationality; nor is it a pattern of conduct that can be adequately represented and understood in the language of social science; rather, it is an activity of mind and language, one that is deeply marked by a set of structural tensions (or clusters of tensions):

— between ordinary language and legal language (indeed between language itself, of any kind, and the mute world that lies beneath it);
— between a multiplicity of voices, speaking from different positions within the legal order, or outside of it, in a variety of specialized and expert languages;
— between the two lawyers, each of whom seems to resist the other at every point, though in another way they are cooperating deeply; and within each lawyer, whenever she asks what it means for herself and the world that she is acting as she is;
— between many conflicting but justifiable ways of giving meaning to the

13 Here are two others one could add to the list: the tension between narrative and theory in the mind of the lawyer or judge (for these modes of thought work in very different ways); and the tension between the particular and the general, a feature also of poetry and other forms of literature. For further discussion see White 1973, 858-926, 624-686. One might also consider the tensions that the legislator must face as he or she gives shape to a statute, discussed in the same book, 195-242.

rules and principles of law, among which the judge will have to choose; and also between what might be called the reasoning and intuitive capacities of the judge herself;
— between substantive and procedural (or institutional) lines of thought, a tension that runs throughout the law;
— between the imperatives of law and justice; and
— between the past and the present, the present and the future, for law lives in time and out of shared experience.

Each of these tensions is, as I have said, inherently unstable, that is, not resolvable by reference to fixed rules, principles, or conventions; each is dynamic, not static, thus moving us in new directions that we cannot always anticipate; each is dialogic, not monologic, thus acting with the force of competing voices at work in the world or in the self. These tensions interact, to create fault lines that run through every act of full legal analysis. Their management is essential to the work of lawyer or judge.

3.1 The law is not the rules

What happens if we start to think of law in this way? Let me suggest, to start with, that it makes simply impossible the view that the law is a system or scheme of rules that are in practice applied more or less rationally to produce a set of intended or desired results.

This is a view that law students often bring to law school with them. They expect that we shall teach them a set of rules. These are the rules they will apply as lawyers, and knowledge of them is what sets them apart from the non-lawyer, to whom they are unknown. A large part of a good legal education is disabusing them of this view. There are many reasons that such an image is attractive to the student. It explains the kind of knowledge that the lawyer has, and justifies his role (and his fees). It is also in principle simple, even easy: if all I have to do is memorize a set of rules, even if there are a lot of them, I am confident that I can do it. The work may be dull but it won't be hard. It won't ask of me what I cannot already do; it will not ask me to change and grow. So it is natural for the student to say: 'I want the law to be a set of rules!'[14]

But I think the view of law as rules is also at work in the kind of scholarship and teaching that takes as its subject the question, not how lawyers think and should think, but what the rules should be. We see this view at work in policy studies generally, in 'law and economics' in particular, in much jurisprudence, and indeed wherever the tendency to abstract or theoretical thinking has taken hold, whether in

14 It was once common for law teachers to think that one of the structural tensions in the classroom was over this issue, as, against resistance, we insisted that we were doing something other than teaching rules, namely how lawyers think, and think well. In teaching criminal law, for example, I handed out the first day a page which had on it all the rules we would learn that term. I told the students that they could memorize them in an hour at most. What this meant was that whatever the rest of the course was about, it was not learning the rules.

the analysis of legislative or judicial problems.

3.2 The law is not policy

The question of policy is of course a legitimate one, and lawyers, economists, social scientists, moral philosophers, ordinary people, and lots of others too, can properly speak to it. But it is not the essential question for either lawyer or judge, who is instead repeatedly asked to deal with the particulars of a case, whether as adviser, advocate, or decider, and to do so in light of the whole structure of arguably relevant and authoritative legal rules, principles, conventions, precedents, understandings, indeed in light of the whole legal world and culture. This structure, as I have been trying to show, is not a coherent conceptual system but a dramatic and rhetorical process marked by a series of deep and inherently unstable tensions that cannot be reduced to or governed by a system of rules or other directives.[15]

Rules of the standard legislative (or judicial) form do exist, and they serve to guide general expectations and behavior. They are important and can be talked about in such terms. But this is not the level at which the judge or lawyer works, for they are normally called upon only when there is a problem or difficulty, a moment at which the rules collide with reality, or each other, and do not work in the easy way they are thought to do. To put it in a phrase, the judge and lawyer deal not with the 'rules' as such, as a discrete conceptual system, but with what happens when that abstract language, and the rest of the authoritative language of the law, meets the world.

3.3 The law is a set of possibilities for original thought and expression

The way in which lawyer and judge think about the moment at which the language of the law meets the world is to engage in a complex process of thought that is built upon and marked by tensions of the sort I have summarized.[16] These cannot be resolved by reference to any set of directives or guides, but must be addressed afresh whenever the lawyer or judge goes to work, and always in light of the particulars of the case in which they are presented. The lawyer and judge do not operate simply at the level of high generality that the rules mark out, nor simply at the level of particularity established by the facts of the case, but always in an uneasy tension between these two levels of thought. They are in this like poets, who also face the tension between particular and general in all that they do.[17]

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15 For a similar argument from a different point of view see Simpson 1973.

16 This is true of the teacher as well, of course. When I think of my own decision to teach law rather than practice it, and of the claim, by some, that this is a retreat to the Ivory Tower from the Real World, I want to say that teaching, properly done, is itself a form of practice, a way of facing the set of tensions I describe here. To do this one must regard the cases not simply as instances of theoretical questions or the application of rules, but as pieces of the whole process of legal argument and thought, as I have sketched it here, from the interview with the client right through to the appeal of an adverse judgment.

17 Sir Philip Sidney said that philosophy deals with mere abstractions, history with mere particulars; the poet alone 'doth perform both' (Sidney 1595). In law as in poetry, the life and quality of one's work inhere

In saying all this, let me stress, I am trying to define what I see to be the possibilities of life in the law. Of course these possibilities are not attained automatically, and never fully or perfectly, and sometimes they are corrupted. Often lawyers are judges are thoughtless, crude, unimaginative, inarticulate, and dull. Indeed such things are sometimes true of us all. But not always, in every way. My effort here is to offer an image of the activity of law by which we can shape our efforts as we practice or teach it, an image, over the horizon, as it were, which we can keep before us as we do our work: a sense of how things might be if only we could make them so.

The law does not work its way to predetermined conclusions through a process of iron logic, but almost the opposite: it is a set of possibilities for original thought and expression. It is not a totalitarian system, closed and unlistening, but an open system, like a language, not only making creativity possible, but requiring it. The process in which we are engaged is an art of testing and invention. Every case, every legal conversation, is an opportunity to exercise the lawyer's complex art of mind and imagination. This art is what we teach, what we practice, and what we cherish.[18]

3.4 The law is an art of mind and language

In calling what the lawyer and judge engage in an *art*, I have in mind the thought that all art—whether music or painting or architecture or poetry or drama—proceeds by way of tension and resolution: a conflict is stated or hinted at or felt; the tension between opposing elements is developed and expanded; and at the end a resolution is reached—but never a final resolution, only a momentary one. When one poem or sonata is finished, another is to be begun, and so it is with legal argument and legal judgment. The aim of the lawyer, as for the poet, to quote Robert Frost, is to end 'in a clarification of life—not necessarily a great clarification, such as sects and cults are founded on, but in a momentary stay against confusion' (Frost 1995). The tensions I have been defining are not, then, as some might say, simply 'noise in the system,' but the life of the law itself.

If I am right, what I am saying here has real consequences: for the sort of education that we offer, which should invite the student to engage in the art I describe, not to learn law as a set of rules; for the ethical and intellectual possibilities of the lawyer's life, which can be seen to be far more interesting, challenging, and ethically alive, than the view of the lawyer as rule-applier; for the expectations that judges can bring to their work and for the ways in which we can evaluate what they do—not simply by political agreement or disagreement with the outcome, but by judging their work as performances of an art, the art of reconciling the ideal and the real.

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in the way in which constraints are faced, tensions addressed and elaborated, complexities recognized. This must be done every time afresh. Think of the way a poem is built: it is a structure of meaning in which many dimensions, each one built on tensions of its own—image, story, meter, rhyme, sentence shape, and so on—interact to create a living whole. Legal work is like that.

18 The voice that says, 'I have a theory that answers this and all such questions,' is not the voice of lawyer or judge. Those actors must speak in much more complex, tentative, exploratory ways, sensitive, like the poet, to the constant tensions between various lines of thought and meaning.

This vision of the law goes back to the roots of legal thought in the West, in the study and practice of the art of rhetoric. At its heart it is a vision of law as an art, an art of language and judgment, an art of the maintenance and repair of human community. In my view it is necessary to have such a vision if, in our practice and teaching and judging, the law is to fulfill its nature and its promise.

I have been resisting an image of law as rules and policy, but behind those things is a deeper vision which I also resist: a vision of law as abstract, mechanical, impersonal, essentially bureaucratic in nature, narrowing rather than broadening the human capacity for experience, understanding, and empathy. To focus on the law as a system, and not on what happens when that system meets the world—and the people of the world—is to strip it of its difficulty, its life, its meaning, and its value. For it is at this moment, when the law meets the world—in the work of lawyer, judge, or teacher—that it becomes most fully alive. This moment contains within it the seeds of resistance to the forces of mindless empire and control, for every case is an opportunity for newness of thought, for creativity and surprise, for the introduction into the world of power an unrecognized voice, language, or claim. This is also the moment at which conversation about justice becomes connected with the particulars that give it depth and meaning. For in the moment of speech, or writing, there is always the possibility that one can bring the world into new life—and justice.

4. Justice

So far in this article I have talked mainly about law. I want now to say something about what this view of law means for our understanding of justice and for the ways we try to make justice real in the world. First let me suggest that we can think and talk about justice in two different ways: as an abstract matter, as philosophers typically do, or as an institutional matter, as lawyers typically do.

We talk about justice *abstractly* when we think about what the world should be like as though we could make it whatever we wanted, writing on a clean slate. Thus we might say that in a just country there would be universal education and health care, no death penalty for crimes, public support for the arts, and women's control over their bodies. These are not self-evident truths, however, and someone might say in response that in a just country education and health care and the arts would all be governed by the market, which is the most efficient and hence just allocator of human goods, that the death penalty would be used in cases of murder, and that women's control of their bodies would never include the killing of a human fetus.

These are familiar positions, both ways, and as a matter of social fact, highly arguable. When we talk in an abstract way about which of these positions, or what combination of them, is just or unjust, we are free to use every resource at our disposal, from self-evidence, to social theory, to religious truth, to public opinion. But we have to recognize that, whatever we believe, others might come to an opposite conclusion. There is no arbiter, no one who can tell us that this is truly just, that truly unjust. We are debating competing conceptions of social justice.

When we talk about justice as an *institutional* matter, by contrast, we are by definition no longer writing on a clean slate. We recognize that power and authority are already distributed among many actors, present and past, each of whom has his or her own zone of authority. If made within their jurisdiction, their judgments are entitled to some degree of respect even if we disagree with them—the precise degree of respect being an important question both of law and justice. In talking about what is just or unjust for a particular actor to do in this larger context, no one can simply claim the right to make the world be whatever seems right to him or her, without regard to what others think and say. Others have spoken, or will speak, with some degree of authority, and respect must be given to their judgments.

Thus what is seen as a single question in the conversation about abstract justice—e.g., is the death penalty unjust?—in an institutional context becomes many questions. For example, in my country we could ask: How, if at all, does the Constitution speak to the death penalty, either in the Eighth Amendment (prohibiting cruel and unusual punishment), in the due process or equal protection clauses, or elsewhere? Even to think about this question requires one to read, understand, and judge not only the text of the Constitution but many cases decided under it, both by state and federal judges. We should also ask: Is there a federal statute that could be read to speak to the issue, or a provision of state law, whether legislative, judicial, or constitutional? How are these texts to be read, alone and with each other? Each of these actors may have spoken to the matter and it is a real and vital question, a question indeed of justice, how far each judgment is to be respected, and why.

In evaluating what official speakers have to say, we will want to turn to certain unofficial speakers as well: sociologists who have studied how the death penalty works, perhaps with special attention to racial discrimination; psychologists who can talk about the experience of execution, for the executed and executors alike; philosophers who explain why or why not such execution violates the Kantian categorical imperative; literary critics, who can explicate the ways in which language, and law, can respect the fundamental humanity of people or dehumanize them; and so on.

As I said earlier, one of the tensions in the law is that between its own form of discourse and others. One judgment we would need to make in deciding how just the law was being would focus on exactly that relationship: Were the legal speakers unduly deferential (or unduly dismissive) of nonlegal sources of authority? All of these investigations take place in the context I have described above, namely a legal system defined by its tensions—tensions that must be addressed and thought about, not simply swept away. To work well with the tensions I describe is itself to achieve an important kind of justice; this kind of justice is no less important than abstract justice; indeed if abstract justice it is to become real, and not merely abstract, it must itself be wisely, justly, and artfully located in the context of these tensions. It is not too much to say that in this process lies the only hope for justice in the law.

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Configuring Justice

Jeanne Gaakeer*

Research on a variety of literary-linguistic connections of law and the humanities has these past few decades greatly augmented the scope of legal theory. Nevertheless I would argue that when as jurists we turn to the humanities to further our interdisciplinary legal projects, we need to reconsider the alliance of theory and practice in law and hence its importance for jurisprudence. Why? Lest we run the risk that, as has been the case so far, legal practice remains unresponsive to what interdisciplinary studies have to offer, and, when it comes to legal education, that courses of the 'Law and' kind are dismissed by students as irrelevant because they supposedly lack a focus on the students' development of professional skills. Put cynically, as did US Supreme Court Chief Justice John G. Roberts jr. in a speech at the US Fourth Circuit Judicial Conference, June 2011, 'Pick up a copy of any law review that you see and the first article is likely to be, you know, the influence of Immanuel Kant on evidentiary approaches in 18th-century Bulgaria, which I'm sure was of great interest to the academic that wrote it, but isn't much help to the bar' (Roberts 2011). Such dismissal of interdisciplinary work not only forces us to reflect on whether or not we have so far created new academic ghettos but, more importantly, it reminds us that the *quid-juris* question that is at the heart of legal doctrine and jurisprudence traditionally conceived remains important when it comes to investigating the possibilities of the humanities' contribution on the methodological plane.

On the view that it is only through law in practice that we can learn to speak of justice, or rather, that while we may discuss issues of justice in the abstract, it is only in the way in which actual legal issues are resolved that we can at all decide that justice is being done, this speaks, on the one hand, for attention to how legal and social relations are established by means of our discourse on legal meaning and justice. On the other hand, this connection of law in practice and justice also ties in with the subject of the methodology of the legal perception of the particular case at

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hand, not in the least because the view of law as a normative set of propositions that are 'out there' in an unadulterated form ready for our application is unfortunately still in need of further refutation. As Richard Posner also emphasizes, the law student 'must be disabused of the notion that "the law" is a set of propositions written down in a book and legal training consists simply of learning how to find the correct place in the book' (Posner 2008, 252).

It is the latter topic that prompts my contribution. Serving also as a judge in a continental European civil-law setting, I often perceive in my academic, interdisciplinary contacts that there are misconceptions about legal reasoning, in the sense that civil-law reasoning is supposedly a mere syllogistic rule-application and as such deductive in nature, moving from abstract codified legal norms to the decision in a specific case, and in contradistinction to common-law reasoning. The expectation raised by such conception of rule application seems to be that of an unproblematic existence and use of abstract norms, and that is oversimplified to say the least. If we start categorizing what is to count as knowledge in the field of law and start from the premise that law is a domain of rules, and rules only, that simplification can in turn contribute to the marginalization of interdisciplinary ventures based on it. Furthermore, it reaffirms a false opposition between common-law and civil-law thought when it comes to the act of judging, in that it proclaims for civil law a formalist hermeneutics of more or less self-applying rules, of 'outside-in' legal reasoning as Ronald Dworkin calls it, i.e. from the abstract to the concrete, rather than 'inside-out' reasoning (Dworkin 2006, 54) with a focus on the judicial effort of connecting what are deemed the relevant facts of the case and the legal norms.[1]

It is on this plane that the humanities can both help elucidate the problems connected to such misunderstanding and contribute to its possible solution. That is why I turn to continental-European philosophical hermeneutics, especially as developed by Paul Ricoeur. My aim is to draw a sketch of what the *studia humanitatis* can contribute to legal practice by bringing to the fore the resources that can contribute to the judge's development of her professional quality of *phronēsis*, i.e. prudence or practical wisdom, with judicial ethos and *habitus* included. The view behind this enterprise is that despite their differences most legal systems share core values such as judicial impartiality, consistency and integrity which, not incidentally, are considered virtues in the Aristotelian sense. Methodological reflections on the subjects of the finding or constitution of 'the facts', the judicial justification of deliberative choices made, and the way in which law establishes relations are therefore shared tasks.[2] What is more, I aim this sketch also to serve as an example of how humanities-

1 See also Gaakeer 2012b, the text accompanying notes 13 and 49 discussing Greta Olson's view that 'legal reasoning proceeds through a process of deduction from abstract norms of codified law to the particular case at hand' (Olson 2010, 352) and Helle Porsdam's comparable view that, 'Civil law starts with certain abstract rules, that is, which judges must then apply in concrete cases' (Porsdam 2009, 174).

2 The topic has been with me ever since I fully understood Ricoeur's importance for my judicial work. My argument here is a continuation of earlier work, see Gaakeer 2008; Gaakeer 2011; Gaakeer 2012a.

oriented interdisciplinary legal studies themselves can move beyond the academic and into the realm of *praxis*.

1. Facts and norms, theory and practice

In what follows I proceed from a double premise. Firstly, that law as an academic discipline firmly belongs to the humanities given its historical development since the eleventh-century rediscovery of the Justinian Code, characterized as law is and has always been by a strong language-oriented, philological-hermeneutical perspective. That is to say, a perspective not done away with by new trends in mediality and visuality in law, because hermeneutics is not merely a methodology for interpretation, but rather a philosophical view for a broad mode of inquiry into both text and action, as Hans-Georg Gadamer already propounded in his seminal *Truth and Method*. And secondly, that as a consequence jurists necessarily combine the theoretical and the practical.

Why? Because the art of doing law in its different professional guises always requires their attention to the reciprocal relation between fact and norm, as well as to the ways in which the system of substantive and procedural rules and norms is deployed to achieve justice. A characteristic feature, then, of legal methodology in the sense of the perception of the case or legal topic at hand is the constant movement from the facts to the legal norms, and back, a dialectic movement, this going hither and thither so to speak, coined by the German jurist Karl Engisch as the 'Hin-und Herwandern des Blickes' (Engisch 1963, 15), a notion taken up an elaborated upon by Karl F. Larenz in his *Methodenlehre der Rechtswissenschaft* (Larenz 1991, 204). In performing this movement, jurists should constantly bear in mind the influence of their own interpretive frameworks on both fact and norm, because as humans we cannot escape our hermeneutic situation of being culturally determined, professionally and personally. And what is more, this also goes for the reciprocal relationship between perception and ordering: the systematization of knowledge in the field of law too is subject to a comparable movement back and forth. In other words, when confronted with a new case, the legal professional starts with a diagnosis of what are deemed the relevant facts (established facts and facts admissible as evidence and/or with a certain probative value), then proceeds with a first, tentative, legal classification of the materials on this basis, deliberating about the next step of formulating a response and fine-tuning his classificatory analysis. In all this one's specific position as a legal professional is of decisive importance, of course, in that a judge will combine this process with her prior experience of hard and easy cases, and a defense lawyer will seek as many as possible anchors for the construction of his argument.[3]

3 Cf. Andrew Abbott on the tripartite division of diagnosis, inference after deliberation and treatment as a response to a diagnosis, 'Theoretically, these are the three acts of professional practice. Professionals often run them together. They may begin with treatment rather than diagnosis; they may, indeed, diagnose by treating, as doctors often do. The three are modalities of action more than acts per se. But the sequence of diagnosis, inference and treatment embodies the essential cultural logic of professional practice' (Abbott 1988, 40).

As far as the relation between theory and practice is concerned, from this follows that those working in legal practice always reflect on the consequences of any theoretical or doctrinal assumption for the outcome of the specific case. That includes attention to the possible theoretical justification of the position taken when viewed against the background of the wider significance of the combined legal and cultural framework, for example in cases that attract the attention of any given society as a whole (media attention included). In turn, theoretical knowledge in law is augmented by the actual *quid-iuris* questions that legal practice raises, because they often go far beyond what academic, doctrinal discourse can even start to imagine. Where practice turns to theory for justification, theory thrives on practical input. In short, the jurist's methodology is never purely deductive or inductive but always the combined effort of the perception and assessment of the facts against the background of what the legal norm (including the academic propositions made for it) means, and the awareness that the whole process is governed by the dynamics of the interpretive frame that is itself subject to constant developments and challenges of a varied nature (e.g. technological or societal). In this ontological uncertainty—at any time something new may crop up that challenges existing meaning—also lies the possibility of critique and innovation.

The interrelation sketched here affects legal theory too, in that, ideally at least, as George Pavlakos and Sean Coyle argue, it should be understood as engaged in, rather than detached from, questions underlying doctrinal debates that concern moral and political aspects of law as well. The aim of legal theory in their view, one most congenial to me, would then be to understand legal ideas as a reflection of values and an explanation of how they came about. This concept of law as a discipline is what Pavlakos and Coyle call jurisprudence, derived from the Latin root '*prudentia* which engages in practical accounts of law' (Pavlakos and Coyle 2005, 2). Jurisprudence denies 'the possibility of generality in theoretical accounts of the nature of law' (Pavlakos and Coyle 2005, 12), because such generality entails a detached form of observation by legal theory, conceived as legal science or *scientia*, of the social institution that is law, with as its aim to provide an objective account of it. The latter presupposes the existence of theory and practice (in the sense I use it above, i.e. doing law broadly conceived) as disconnected entities so that the legal theorist's (i.e. the one who does *scientia*) sole task would be to analyze legal practice from a safe distance. The idea behind it is that there is such a thing as scientific neutrality or objectivity when it comes to taking theoretical standpoints, and that is precisely what jurisprudence rejects on the view that both the doing of law and the reflection on it are to be viewed in their historical, moral and cultural contexts. Furthermore, as Francis Mootz says, in reference to Gadamer on the point of human experience being fundamentally interpretive, 'within legal practice we can understand a binding norm only within a practical context: understanding and application are a unified pact' (Mootz 2000, 721). Thus, legal professionals in their actions show their specific knowledge that is a 'reflection-in-action' (Schön 1983, 130), consisting of a creative interaction with a problem situation. Obviously, they therefore benefit

from reflection on what works and what doesn't and that is especially acute when they have to confront the situation that more than just one response to the problem is possible. It is here that the topic of *phronēsis* comes in, i.e. the ability to see what is the best solution under the given circumstances and act on it. For the judge this also means arriving at the decision that does justice to law's demand for coherence. Behind this enterprise is the idea that professional knowledge is transferred by means of reproduction in the sense of the constant recreation or renewal of a shared background that makes understanding possible. The intertwinement of theory and practice has as its most prominent feature a focus on adjudication of which the judge is the exponent. With this in mind I turn to the works of Paul Ricoeur because of his detailed attention to the virtue of *phronēsis* as originally conceived by Aristotle, and his insistence on the input of the humanities when it comes to developing judicial *phronetic* intelligence.

2. Building blocks from the humanities for a model of judging. Part I: insight into particularities and (dis)similarities

2.1 Phronēsis

In the Aristotelian spectrum of the intellectual and moral virtues, *phronēsis* is placed in the category of intellectual virtues and distinguished especially from *epistēmē*, i.e. theoretical or scientific knowledge that is conceptual and propositional in nature, aimed as it is at 'knowing that', and from knowledge of how to make things, the technical skill of the craftsman that is called art or technē that can relatively easily be taught and learned. Aristotle starts his analysis with a definition of the prudent man, the *phronimos*:

> We may arrive at a definition of Prudence (i.e. *phronēsis*) by considering who are the persons we call prudent. Now it is held to be the mark of a prudent man to be able to deliberate well about what is good and advantageous for himself […] as a means to the good life in general. (Aristotle 2003, 1140a24-29, 337.) […] But no one deliberates about things that cannot vary, nor about things not within his power to do. Hence inasmuch as scientific knowledge involves demonstration, whereas things whose fundamental principles are variable are not capable of demonstration, because everything about them is variable, and inasmuch as one cannot deliberate about things that are of necessity, it follows that Prudence is not the same as Science (i.e. *epistēmē* or *scientia*). Nor can it be the same as Art (i.e. *technē*).[4] It is not Science, because matters of conduct admit of variation; and not Art, because doing and making are generically different,

4 A note on translation: both in the translation used for purposes of this article and in other translations available that I consulted the terminology is awkward in that *technē* is translated as 'art', a term which for modern readers has a connotation different from the Aristotelian meaning of 'technical skill'. In the sense, however, that *technē* also refers to the knowledge of the artisan embodied in his hands and eyes, this opens up the possibility of a reading that goes beyond the idea of a purely routinely artisanal skill in that it emphasizes professional skill, and that is, of course, also a characteristic of the *phronimos* in action.

> since making aims at an end distinct from the act of making, whereas in doing the end cannot be other than the act itself: doing well is in itself the end. It remains therefore that it is a truth-attaining rational quality, concerned with action in relation to things that are good and bad for human beings. (Aristotle 2003, 1140a32-1140b7, 337.)

The above clearly shows why to Aristotle *phronēsis* is not just the virtue of knowing the ends of human life, but also of knowing how to secure them, that is to say the virtue includes the application of good judgment to human conduct, 'knowing that'. As such it necessarily pertains to the probable in the sense of provisional truths, because whatever theoretical knowledge it does incorporate in its reasoning, this is always occasioned by the practical aim of action (i.e. in the sense of *doing* well as distinguished by Aristotle). Perceptual and dispositional in nature, *phronēsis* is the capacity to see what the situation demands and act upon it.[5] Thus, it defies methodological reduction because its main characteristic is deliberation (or *bouleusis*), primarily with oneself but when transposed to the realm of the juridical[6] deliberation is also with others, so that as a way of reasoning it does not aim at arriving at universal, abstract truth, but thrives on dialectical reasoning.[7] It therefore has its focus on advancing arguments for and against a specific premise. Although categorized as an intellectual virtue, as a virtue in the sense of a dispositional quality that one acquires, e.g. through instruction and one's education generally, *phronēsis* is nevertheless at the same time a matter of *ethos*, character, on the view that it is not a mere combination of knowledge (e.g. knowledge of widely accepted moral rules) and deliberative technique, but rather the ability to apply insight gained in specific situations, context-dependent as such insight necessarily is, to new questions as these crop up. Thus ethics and epistemology go hand in hand in *phronēsis* as a *praxis* of concrete action in specific situations. The critical quality of 'Understanding' (*sunesis*), then, answers the imperative quality that *phronēsis* is and has. That is to say: to start with, one needs to have good understanding (*eusunesia*) in order to be able to judge well, and *phronēsis* then takes this one step further in that additionally it emphasizes the need to act on that judgment. To Aristotle this means that the end of Understanding 'is a statement of what we ought to do or not to do' (Aristotle 2003,1143a 9-10, 359). Understanding and *phronēsis*, while not identical, are concerned with the same objects ('it [Understanding] is concerned with the same objects as Prudence' (Aristotle 2003, 1143a8, 359)), as Aristotle points out, because understanding is also about those things that are subjects of questioning and deliberation, rather than about the strictly defined, universal givens of scientific

5 'Prudence deals with the ultimate particular thing, which cannot be apprehended by Scientific Knowledge, but only by perception' (Aristotle 2003, 1152a26-28, 351).

6 Aristotle's argument allows this, given the connection he makes between Prudence, generally, 'Prudence as regards the state […] Legislative Science' (Aristotle 2003, 1141b25-26, 347), and Prudence as essential for the faculty of judging equitably that is dealt with below.

7 For an Aristotelian view on the ideal of the lawyer-statesman who epitomizes *phronēsis* in relation to its professional, educational and political consequences, see Kronman 1993.

knowledge.

This concept of *phronēsis*, then, permeates Ricoeur's thought on justice and the law. It is constitutive also of his views on morality and ethics as well as of his view on equity as a corrective of law as a (codified) system of rules, that is to say of equity as 'the *sense* of justice, when the latter traverses the hardships and conflicts resulting from the application of the *rule* of justice' (Ricoeur 1992, 262).[8] What matters to me here, to start with, is that Ricoeur consistently connects his discussion of the deliberative aspect of *phronēsis* with the idea of the hermeneutic movement, circular as it were, of the 'back-and-forth motion' as he significantly puts it in *Oneself as Another* (Ricoeur 1992, 179) between the idea that we have about, say, the good life or justice, and the decision to be made about that.[9] This ties in neatly with the legal methodology of connecting the facts and the relevant norm, as well as with the tripartite structure of professional practice as diagnosis-inference/classification-treatment, as can also be seen in Ricoeur's view on rule application in the situation of a criminal trial, 'The application consists both in adapting the rule to the case, by way of qualifying the act as a crime, and in connecting the case to the rule, through a narrative description taken to be truthful' (Ricoeur 2007, 55-56). Ricoeur also approvingly refers to 'the close tie established by Aristotle between *phronēsis* and *phronimos*, a tie that becomes meaningful only if the man of wise judgment determines at the same time the rule and the case, by grasping the situation in its singularity' (Ricoeur 1992, 175). On this view, secondly, *phronēsis* is thus perceived as an essential component of actual judging. A judge may well be the best there can be as far as her theoretical knowledge of the black letter law of relevant statutes, principles and precedents is concerned, but if she lacks *phronēsis*, the outcome in the individual case may prove to be unsatisfactory or downright unworkable for the parties involved, and/or others concerned.

In Ricoeur's terms, in short, the wise judge is a *phronimos*, a sensitive person who combines attention to the circumstances and insight in the demands of a specific case with the theoretical knowledge that law suggests her to apply, and orients her deliberation at choosing the best of the available legal means in order to translate these into the appropriate action: '*phronēsis*, which became "prudence" in Latin … consists in a capacity, the aptitude, for discerning the right rule, the *orthos logos*, in difficult situations requiring action' (Ricoeur 2007, 54). On this view, the right rule

8 This is important to note because of the differences in perspective on the subject throughout his works, and hence the philosophical gradations to be discerned and distinguished. In the studies that form *Oneself as Another* (Ricoeur 1992), *phronēsis* is discussed in the ethical realm of deliberation on the good life, so that the emphasis lies on moral judgments in specific (and uncertain) situations in relation to the ethical aim or rather end to be pursued. In *The Just* (Ricoeur 2000a) the focus is on the relation between the idea of justice conceived as a moral rule and justice mediated by the institution, i.e. 'incarnated in the person of the judge, who, as a third party between the two parties, takes on the figure of a second-order third party' so that the concept of justice as 'just distribution' (Ricoeur 2000a, xiv and xiii) becomes pivotal, as can also be seen in the engagement in *The Just* with John Rawls' *Theory of Justice* and its description of society at the level of the distribution of market and non-market goods.

9 It should be noted that Ricoeur's treatment of *phronēsis* invariably starts from (applied) ethics before moving to the analogous examples of medicine and law.

may be a (codified) rule of law in the one case, while it may be the equitable decision in another case. That is to say, it depends on the circumstances. Furthermore, *phronēsis* as an actual form of reflective human judgment is also a form of self-reflection and hence self-knowledge, as good reasons for a specific decision unfold to oneself, and subsequently legitimize why in a particular situation *this* rather than *that* is what is required under the circumstances. In the sphere of the juridical, self-reflection should thus always be a constitutive element of the judicial *habitus*.

What makes Ricoeur's thought especially attractive from a point of view of humanistic legal studies is not only that it is embedded in the literary tradition, canonical as we now perhaps critically perceive it, starting with the Greek dramatists Sophocles and Euripides, but also that Ricoeur consistently argues that the particularity of these literary 'profiles of virtue' such as liberality, courage and justice, culturally informed as they are, (Ricoeur 2007, 54) invites rereading and rewriting in the sense of adapting what they teach us to our contemporary situation. A fine example is his analysis of Sophocles' *Antigone* in the study entitled 'The Self and Practical Wisdom: Conviction' in *Oneself as Another* (Ricoeur 1992, 240-296) in which he offers *phronēsis* as the lens through which to view tragic conflict on the plane of the political when it comes to just distribution. If we combine this with what Ricoeur calls analogy at the level of forming judgments and making decisions in spheres as otherwise as different as the medical and the juridical, although both 'imprint praxis with a tragic stamp' (Ricoeur 2007, 57),[10] the need to develop our understanding of the close tie between the singular, the particular and *phronēsis* by means of augmenting our insight in metaphor becomes acute.

2.2 Metaphor

As far as I am concerned, Ricoeur's view on 'the rule of metaphor' as 'the metaphorical process as cognition, imagination, and feeling' is essential because it ties aspects of *phronetic* intelligence to 'the semantic role of imagination (and by implication, feeling) in the establishment of metaphorical sense' (Ricoeur 1978, 144). Here, too, Ricoeur turns to Aristotle for the elucidation of this somewhat dense phrase. The topic of metaphor is treated in both the *Poetics* and the *Rhetoric* (that adopts the definition from the *Poetics*). Aristotle denotes metaphor as '[…] the application of a strange term either transferred from the genus and applied to the species, or from the species applied to the genus, or from one species to another or else by analogy' (Aristotle 1965, 1457b7-9, 81). Ricoeur shares Aristotle's interest in the semantic gain of metaphor as a process, i.e. '"to metaphorize well" is "to see *resemblance*"' (Ricoeur 1986, 23), arguing for the assessment of the role of the imagination, 'that it is in the work of resemblance that a pictorial or iconic moment is implied as Aristotle suggests when he says that to make good metaphors is to contemplate similarities or […] to have an insight into likeness' (Ricoeur 1978, 145). In the sense that the *lexis*

10 Cf. Eden 1986, 63f. for the Aristotelian link between the judgment that results from cathartic insight in classical tragedies and (literary) imagination and the human soul.

of a text in the Aristotelian sense, i.e. the characteristics of its discourse that make that discourse what it is by means of, as Ricoeur explains, ' … diction, elocution, and style, of which metaphor is one of the figures', sets before our eyes what it wants to display, there is thus a strong '*picturing function* of metaphorical meaning' (Ricoeur 1978, 144). In other words, when metaphor performs its function adequately, it makes us say, 'Oh, now I *see*'. Therefore we should learn 'to understand *how* resemblance works in this production of meaning' (Ricoeur 1978, 146).

Here, I would claim, is an interesting connection with the concept of *phronēsis*, namely in the demand for an ability of seeing similarities and dissimilarities in a particular situation that *phronēsis* and metaphorical insight hold in common. This is especially so because *phronēsis* implies the *phronimos*' straight eye that immediately because of its professionally trained intuition 'by doing' perceives what it is that needs to be done, for 'To metaphorize well,' said Aristotle, 'implies an *intuitive* perception of the similarity in dissimilars' (Ricoeur 1986, 6, emphasis mine). It should, of course, at once be noted that while this immediacy of perception may be the starting point for deliberation, it is not necessarily also its outcome. What seemed intuitively the *orthos logos* may need correction on second thought. The connection, then, between *phronēsis* and metaphor can be discerned in the scheme that Ricoeur offers to elaborate on the combination of metaphor and imagination. Its first step is to understand imagination as the 'seeing', the insight that metaphor offers when it asks us to contemplate on resemblance. This insight is 'both a thinking and a seeing', and in the sense that what matters is that 'to see *the like* is to see the same in spite of, and through, the different', it emphasizes the need to develop our imagination (Ricoeur 1978, 147). Thus the combination of thinking (including theoretical knowledge of doctrinal law in the case of judicial *phronēsis*) and seeing the particularity of the new situation comprised in the quality of *phronēsis* is found back in this first step in and of our using metaphor.

This also goes for the second step of incorporating the pictorial dimension, now that both phronēsis and metaphor depend on our imaginative capability to 'see' what connects that which we already know to the new significance of the presentation of the particular. Added to this iconic moment, then, is the third step which consists of the requirement of what Ricoeur calls 'suspension', 'the moment of negativity brought by the image in the metaphorical process' (Ricoeur 1978, 151). By it he means the moment that the ordinary reference, i.e. the reference as it is attached to descriptive language, is abolished in favour of the new meaning produced by the metaphor. That moment is (also) brought about by the working of our imagination. This combination of the cognitive and the imaginative also ties in with the division of knowledge in *epistēmē* and *phronēsis*. It highlights the critical element of judicial *phronēsis* because that too (always) depends on the legal imagination in order to be able to see what ties the singular situation of the case before her to the existing framework of law. At the same time the combination of *phronēsis* and imagination enables the judge to see which aspect of the singular situation calls for an adjustment in her application of the normative framework, however slight this adjustment may

be. *Phronēsis* thus enables the judge to bridge the gap between the generality of the legal rule and the particularity of the concrete situation.

To recapitulate, the Aristotelian focus on likeness as the basis for a good metaphor as elaborated upon by Ricoeur has as its linchpin the ability to understand how resemblance works in the production of meaning. Thus, insight into the metaphorical is essentially a contemplation of similarities and that not only requires insight into *what* is deemed a likeness, but more importantly, *for what reasons*. Given the reciprocal relation between theory and practice and its constitutive role in the formation of legal concepts, it is obviously very important to gain insight into the ways in which metaphor works now that doctrinal development and success in daily legal practice depend on it. And this should be done against the background of the local knowledge of a specific legal system, for example the Dutch, with its Penal Code and Code of Criminal Procedure, and a specific legal practice, for example that a Dutch defense lawyer needs specific authorization to represent his absent client during court procedures but that this authorization is not necessarily written down, so that how the judge can at all 'know' for sure that authorization has indeed taken place and the lawyer is allowed to speak on behalf of his client is an aspect to be taken into consideration. Local knowledge is therefore important. Why? Because as '[…] [a]n inquiry into the capacity of metaphor to provide untranslatable information and, accordingly, into metaphor's claim to yield some true insight about reality' (Ricoeur 1978, 143), we need to ground our research too in concrete circumstances.

Now one might argue that a judge has no need of metaphorical insight on the view that her analytical and logical competences not only prevail but suffice, and, furthermore, that metaphor as far as 'it consists in speaking of one thing in terms of another that resembles it' (Ricoeur 1986,197) easily leads to category mistakes. In defense of resemblance as the guiding feature, Ricoeur refutes the accusation of logical weakness by pointing to the logical structure of the similar itself because 'in the metaphorical statement "the similar" is perceived *despite* difference, *in spite of* contradiction' (Ricoeur 1986, 196), so that it is precisely resemblance that brings close what was initially perceived as distant and different. As a strategy of language, then, metaphor aims to break down established logical structures in order to build new ones because that is what is necessary to see things anew. This is not a deviation but basically the same operation by means of which any classification of concepts into categories takes place.

Applied to our subject this means that the work of metaphor does not take place outside law. On the contrary, it is inherent in it, so that the ability to metaphorize is part and parcel of *phronetic* intelligence, both for the development of law in theory and for the contribution to law in practice. This is even more so now that the days in which the legalistic and positivist idea of law as restricted to a set of codified rules are long behind us and law in civil-law countries since the early twentieth century includes principles, the interpretation and application of which by their very nature demands a deliberation about and balancing of the interests involved. The Aristotelian attention to resemblance thus also forms an argument in favour of a

discursive view of metaphor given the way in which metaphor elaborates both terms of the comparison in their reciprocal relation, for example, when we say, 'Judge Rex is a fox', or 'Judge Hercules is a hedgehog'. Obviously, this too pertains to the topic of conceptualization and classification in law aimed as it is like scientific language to eliminate as much as possible any ambiguities (cf. Ricoeur 1985), in that it is important to be aware of the metaphorical of the legal concept in general, and the legal fiction in specific. This can already be seen in Ricoeur's description of the project of the rule of metaphor as primarily concerned with metaphor as '[…] the rhetorical process by which discourse unleashes the power that certain fictions have to redescribe reality' (Ricoeur 1986, 7).

Following this, metaphorical insight is essential also for the topic of the development of law against its cultural and historical background, as Owen Barfield already explained in his work on the bond of poetic diction and legal fiction, in which not incidentally he also propounded the claim that '[…] every modern language […] is *apparently* nothing, from beginning to end, but an unconscionable tissue of dead, or petrified, metaphors' (Barfield 1984, 63). Barfield translated Aristotelian thought on metaphor by analogy as described in the *Poetics*[11] for the legal fiction in the following way, 'The […] analogy […] may be expressed […] in the formula: - metaphor: language: meaning: legal fiction: law: social life' (Barfield 1977, 58). That is to say, 'metaphor is to language as language is to meaning' is comparable to 'legal fiction is to law as law is to social life'. And with the latter element of the comparison, at least as far as I am concerned, Barfield also points to the impact of the 'metaphorical' choices made in law because of law's impact on people's lives. It makes the topic even more urgent for judges in that when they speak people's lives are changed,[12] especially given the interactionist metaphor for on the relation between theory and practice that Barfield then adds to his argument: 'There is not much that is more important for human beings than their relations with each other, and it is these which laws are designed to express. The making and application of law are thus fundamental human activities, but what is more important for my purpose is that they bear the same relation to naked thinking as traveling does to map-reading or practice to theory' (Barfield 1977, 63). In short, it is far easier to design laws than to apply them to actual cases, just as it is far easier to plan your hiking trip by means of a map than to know what to do when you encounter terrain that is rougher than expected. To Barfield, this should lead us to the study of jurisprudence in the humanistic sense I promote here, because it is 'well adapted to throw light on the mind and its workings', and he therefore laments that the 'respectful attitude to legal studies' which used to be 'an essential element in a liberal education' […] 'has long

11 'Metaphor by analogy means this: when B is to A as D is to C, then instead of B the poet will say D and B instead of D' (Aristotle 1965, 1457b11-12, 81).

12 Cf. Robert Cover's seminal article 'Violence and the Word' , '[…] legal interpretation takes place in a field of pain and death […] A judge articulates her understanding of a text, and as a result, somebody loses his freedom, his property, his children, even his life' (Cover 1986, 1602). For an extended treatment, see Gaakeer 2009.

since been abandoned' (Barfield 1977, 63).[13]

Not only is this interesting from a point of view of contemporary forms of interdisciplinarity, but this also speaks for attention to metaphor on the level of the development of national law, i.e. the internal, socio-historical development of a legal system. More importantly, given the enormous growth of the importance of supranational law in Europe and global developments in, for example, new technologies that create new forms of contract and commercial relationships, it speaks for attention to metaphor on the plane of comparative law. Why? Because to compare is to translate and this act too needs a perceptive attitude and an awareness of the way in which we use the technical language of an institution such as law all too easily to impose its conceptual framework to the detriment of other languages, other voices, other contexts, semantic, cultural or otherwise. As Ricoeur points out, metaphor is not 'a simple transfer of words', but 'a commerce between thoughts, that is, a transaction between contexts' so that 'metaphor holds together within one simple meaning two different missing parts of different contexts of this meaning' (Ricoeur 1986, 80). What is more, in the sense that metaphor adds something new to the reservoir of existing meanings, it provides insight into the development of (the rule of) law. So we should carefully consider the way in which this rule of metaphor works because by means of the introduction of a new metaphor in a specific field, or by taking a metaphor from one field to another, new meanings are generated and, as a side effect, original meaning may be suppressed, if only for the time being.

As far as legal practice is concerned, in the fact that to Aristotle and Ricoeur metaphor belongs to both rhetoric and poetics, I find an additional argument to emphasize the judicial need to become sensitive to the workings of metaphor. As Ricoeur explains, in both works metaphor is placed under the rubric of *lexis* 'as the whole field of language-expression' (Ricoeur 1986, 13). While in the *Poetics* Aristotle rejects the idea of *lexis* (in the sense of discourse as mentioned above) as restrictively organized according to 'modes of speech' (Aristotle 1965, 1456 b7, 73), from a rhetorical point of view, however, metaphor as part of *lexis* is important for modes of speech as varied as prayer, threat, statement, interrogation, giving a command, and telling a specific story in a specific way. Here the focus is on the usefulness of metaphor for legal rhetoric as part of legal practice. Knowledge of the transference of meaning by means of metaphor thus gains importance too in legal settings in which persuasive claims for meaning are made in oral procedure. This is especially so given the additional requirement of immediately grasping the metaphorical thrust as it is presented, on the view that transcripts of oral argument often do not repeat the words spoken literally but give a more succinct rendering of the propositional contents of what was actually said, so that a loss of intended meaning may occur when the transcript is read back in an environment necessarily different. When we return

13 In this context Barfield refers to the Italian philosopher and jurist Giambattista Vico (1668-1744). To Vico, our faculties of imagination and understanding should be thought of as interacting, cognitive faculties, i.e. as *ingenium* or imaginative understanding. He also advises us to strive after cultural knowledge as a whole and promotes the idea of contextual understanding for law. See Gaakeer 2011 and 2012a.

to Ricoeur's definition of the imagination as 'this *ability* to produce new kinds by assimilation and to produce them not *above* the differences, as in the concept, but in spite of and through the differences' (Ricoeur 1978, 148) and we connect it with the idea of *phronēsis* as a virtue necessary for the judicial activity of deciding cases after having exercised critical judicial deliberation, the very fact that *phronēsis* is variable, i.e. it depends and thrives on the possibility of things being otherwise (Aristotle 1924, 1357a5), points to its quality of contingency. As such it shows the importance of the heuristic function of metaphor for law: this 'seeing as' ideally enables us to see before our eyes things as it were already actual. Thus metaphor in its referential garb appeals to our making actual what is shown as potential, by means of the very act of creating meaning (and that is an act that we perform). In this way it appeals to our willingness to acknowledge the possibility of metaphorical truth. That is to say, when metaphor moves beyond the descriptive function of language it opens a new vista. Metaphor therefore cannot only make us say 'Oh, now I *see*', as mentioned above, but also 'I thought I knew, but now I see that it can also be otherwise'. This ties in with *phronēsis* as 'a truth-attaining rational quality' discussed above.To me, the idea of metaphorical truth and what Ricoeur calls the pictorial or iconic moment are also eminently suited to illustrate the importance of the interconnection of *phronēsis* and metaphor, on the one hand, and (literary) narrative and the equitable, on the other hand, in good judging, because judges when they select what they consider as the facts of the case and grasp them together with the relevant circumstances, are authors that try to figure out what happened and then perform the act of configuring a new narrative, and, as Ricoeur says '*to figure* is always *to see as*' (Ricoeur 1986, 61 emphasis in the original). To them, then, narrative insight and narrative intelligence are of crucial importance to their professional iconic moments.

3. Building blocks from the humanities for a model of judging. Part II: configuring (a sense of) justice

3.1 Narrative intelligence

'When a judge tries to understand a suspect by unraveling the knot of complications in which the suspect is caught, one can say that, before the story is being told, the individual seems entangled in the stories that happen to him. This "entanglement" thus appears as the pre-history of the story told in which the beginning is still chosen by the narrator.' (Ricoeur 1987, 129). In these lines from an article significantly entitled 'Life: a Story in Search of a Narrator', Ricoeur shows the importance of professional judicial attention to narrative in its various forms.

Attention, firstly, to 'the beginning' chosen for his story by the narrator-defendant, in relation to the competing stories as found in, for example, a victim's statement to the police or witness statements and/or written testimony. Is the story coherent? Is the sequence of events told and the way in which it is told at all probable? Questions about the story's plausibility and the narrator's credibility require the active reader's insight into narrative on the level of what Ricoeur elsewhere calls

'the act of the plot, as eliciting a pattern from a succession' (Ricoeur 1980, 178). In order to answer these questions the judge must be able to understand what it means to grasp together events initially considered separate into a story with a plot. At this level it is important to be able to decide whether an event is just a singular event or an essential element to the development of the narrator-defendant's plot. It is here that the contribution of the humanities comes to the fore. The judge because she has to be able to read for the plot can learn from the wealth of literary examples of plotting, including but not limited to 'legal' plots in trial situations, also to learn to test the veracity of evidence presented, both as a reader and a spectator (Biet 2002, 20).

Secondly, judges are themselves narrators in the configurational act of grasping together the facts and circumstances of the case and deciding what in the succession of events is relevant for the plot and what not. This plotting in the form of a selection is always done with the aim of arriving at a decision, or, as Ricoeur put it succinctly 'To tell and to follow a story is already to reflect upon events in order to encompass them in successive wholes' (Ricoeur 1980, 178). Thus the judicial configurational act has as its ultimate goal the (re-) structuring of reality. Like drama it is aimed at a *dénouement*, a solution of the problem (Holdheim 1969, 7). That is obviously always done with the normative framework of law in mind, also in the sense of a language of concepts. Here too, as with metaphor, being able to see difference and resemblance is important for the narrative construction of facts. What James Boyd White already emphasized at the start of what in legal theory we now call the interdisciplinary field of *Law and Literature*, as an essential ability for any jurist becomes poignantly clear: the ability to bridge the originally fundamental difference, both in herself and when recognized as competing tugs in other people's texts that the jurist needs to consider, between the narrative and the analytical, or the literary and the conceptual. White calls this the difference between 'the mind that tells a story, and the mind that gives reasons' (White 1973, 859).

Especially important, now that the judicial construction of the plot is not just the arrangement of events in a (dramatic) sequence, but the determination of what and who is to be included and what and who will be left out—and that is itself already a judgment—, is the professional demand of thorough judicial reflection before action. The outcome of the judicial configurational act ideally gives insight not only in 'the character of the judgment' (Ricoeur 1980, 178) but also in the judge's *ethos*. If judicial configuration is to be more than an automatism, it needs to be informed and the humanities can help provide insight in how narratives work both in theory and the actual world. Judges are the producers of sentences in at least two meanings: they sentence people and thus decide about the lives of others, and in writing down their decisions, in sentences literally, they have to state the grounds the decision is based on, so that others can form an opinion about its correctness. Ricoeur's thesis that 'to narrate is already to explain' (Ricoeur 1984, 178) thus points to the success demanded of a judicial decision as far as bringing together heterogeneous and contradictory facts and circumstances in one coherent whole that, as a story, must

have an acceptable conclusion.

This also links the ability to narrate well to the virtue of *phronēsis*. Here too the humanities can contribute to judicial training (and, of course, legal education generally),[14] if only to show, as Jerome Bruner contends, that the vitality of a culture lies '[…] in its dialectic, in its need to come to terms with contending views, clashing narratives' because '[W]e hear many stories and take them as stock even when they conflict with each other' (Bruner 2002, 91).

The input, then, of philosophical hermeneutics and traditional, as well as cognitive narratology aimed at providing insight into how the human mind deals with the very idea of 'story'[15] is of the utmost importance in order to instill into judges an awareness of what it is that they do and what that means. In his seminal trilogy *Time and Narrative* Ricoeur elaborates on the Aristotelian thesis that knowledge requires recognition or insight into the mimetic representation and that provides an important source for law and legal practice. His analysis of the threefold model of *mimēsis* ties in with his point of a necessary reflection on events before encompassing them in a narrative sequence as mentioned above, and with his analysis in *The Rule of Metaphor* of the discursive view on metaphor that includes *muthos* and *mimēsis* as constitutive elements.

To Ricoeur, narrative fiction as a composition shows us that *muthos* or emplotment in the sense distinguished by Aristotle is both fable in the sense of an imaginary and imagined story, and a plot in the sense of a well-constructed story. On this view emplotment is an integrative process. Going beyond Aristotle who restricts *mimēsis* to drama and epic, Ricoeur focuses on narrative as emplotment in a general sense. 'Plot, says Aristotle, is the *mimēsis* of an action' (Ricoeur 1984, xi) and to Ricoeur this means that narrative fiction as figuration of events also has the power to re-describe them. On this view, metaphorical redescription and *mimēsis* as imitation or representation of action are interchangeable.

Ricoeur distinguishes three stages of *mimēsis*.[16] The first is prefiguration, or *mimēsis1*. This term denotes the temporality of the world of action, and that includes the pre-understanding we have of the order of an action (Ricoeur 1984, xi), based on '*the pre-narrative quality of human experience*' (Ricoeur 1987, 129, emphasis in the original). It is inescapably a vicious circle, Ricoeur admits, because if human life is thought of in terms of stories, as '*an activity and a desire in search of a narrative*' (Ricoeur 1987,129, emphasis in the original), then any human experience is itself

14 'The reason why we enjoy seeing likeness is that, *as we look, we learn* and infer what each is, for instance "this is so and so"' (Aristotle 1965, 1448b5, 15, emphasis mine).

15 For an overview of the different strands in narratology, see Fludernik and Olson 2011.

16 It should at once be noted that Ricoeur's definition of 'fiction' is not just 'imaginary configuration', because the latter, as he explains 'is an operation common to history and fictional narrative and as such falls within the sphere of *mimēsis2*'(Ricoeur 1984, 267). In Volume 2 of *Time and Narrative* Ricoeur addresses the difference between historical and fictional narrative. For purposes of this article, I do not elaborate on this distinction on the view that precisely because the term 'fiction' can be thought of as both 'a synonym for narrative configurations', and 'as an antonym to historical narrative's claim to constitute a "true" narrative' (Ricoeur 1984, 64), it is so eminently suited to serve as a linchpin for a discussion of what jurists do in practice.

'already mediated by all kinds of stories we have heard' (Ricoeur 1987, 129). At the same time, this circularity should alert us to our task of acknowledging our own tendency to stick to a story once we have located it or told it ourselves, as I will argue below. Why? Because for professionals especially there is the risk of professional blindness if Ricoeur is right and '[T]o understand a story is to understand both the language of "doing something" and the cultural tradition from which proceeds the typology of plots' (Ricoeur 1984, 57), on the view that any profession has its specific plots of how things are done and how things work, with the legal 'whodunit' story as a case in point.

The next stage is configuration, or *mimēsis2*, a term denoting the world of the narrative emplotment of events, i.e. the world of *poiēsis* as making something, as composition (Ricoeur 1984, xi). Its prerequisites are, 'the composition of the plot […] grounded in a pre-understanding of the world of action, its meaningful structures, its symbolic resources, and its temporal character' (Ricoeur 1984, 54). This means that,

> […] an event must be more than just a singular occurrence. It gets its definition from its contribution to the development of a plot. A story, too, must be more than just an enumeration of events in a serial order; it must organize them into an intelligible whole, of a sort that we can always ask what is the 'thought' of this story. In short, emplotment is the operation that draws a configuration out of a simple succession. (Ricoeur 1984, 54 and 65.)

To Ricoeur, the importance of Aristotle lies in his already equating the plot with the configuring of opposite views. That is why Ricoeur refers to this simultaneousness as 'concordant discordance' (Ricoeur 1984, 66), for what we call narrative coherence combines the concordance of the ongoing plot and the discordance of the *peripateia*, i.e. changes in fortune, reversals, upheavals, unexpected events, and so forth.

Finally, there is refiguration, or *mimēsis3*. This term refers to the moment at which the worlds of *mimēsis1* and *mimēsis2* interact and influence one another. It is the moment when our pre-understanding is informed and changed by our act of configuration itself, i.e. when figuration executes its power of redescription as mentioned above. That is to say, when applied to the jurist's activity, it is our emplotment of facts and circumstances as well as the stage of our doing so against the background of the legal norms. Here we see the tie with the methodology of the 'Hin-und-Herwandern des Blickes' discussed above, for emplotment and application go hand in hand. In short, in the split second when the three stages of *mimēsis* come together, emplotment synthesizes multiple events and is itself a synthesis in that it unifies divergent components into a story. Thus it aims at creating unity, a whole comprising the story being told and the means for expressing it that should be investigated in their interrelation.

On the view, once again, that when judges speak the order in and the ordering of the world, and thus reality in the sense of the lives of other people, is changed by their sentences, the importance of the interrelation of the imagination, narrative

and literature becomes acute. Ricoeur's threefold distinction of *mimēsis* provides a literary model for law, given the close resemblance of the forms of *mimēsis* to the hermeneutic steps taken in the process of deciding a case (i.e. 'action' on the basis of a pre-understanding, professionally and otherwise, leading to an outcome in the form of an explanatory plot of what happened). '[W]hat is at stake […] is the concrete process by which the textual configuration mediates between the prefiguration of the practical field and its refiguration through the reception of the work' (Ricoeur 1984, 53), the practical field here being the existing legal background and reception referring to both the reception by the legal professionals and the larger field of societal reception including, in the end, societal acceptance. At this meta-level of reception, the idea of the justification of the judicial decision thus returns with a vengeance.

Furthermore, '[W]ith *mimēsis2*, opens the kingdom of the *as if*. I might have said the kingdom of fiction […]' (Ricoeur 1984, 64). Here is the link with the topic of metaphor discussed above. Since what is constructed in fiction is *mimēsis* as *poiēsis*, i.e. not just imitation but construction in and as the act of composition, metaphor to Ricoeur has as its function to show the deviation from the ordinary in the service of *lexis* as the demonstration of what happened. Thus we have a link to the idea of negative capability, the metaphor coined by John Keats for what it means to write (and be) a great work of art, '[…] that is when man is capable of being in uncertainties, […] doubts, without any irritable reaching after fact and reason' (Gaakeer 2007, 31 n8). It is normative for the judicial virtue of impartiality in that judges must give full attention to all the different aspects of a case, the manifold possibilities for meaning, always asking 'But what if this had been the case rather than that?', and in the meantime suppressing the inclination to come to a final decision (too) quickly.

Translated to the narrative aspect of a legal conflict, this also means that the chaos and tension of the initial phase of 'what happened' are, ideally at least, translated into a manageable form in the various legal documents culminating in the trial phase that finds its (re)solution or catharsis, in the new order imposed on reality by the judicial decision. In this sense that the legal situation resembles drama, we find here an opening to connect Ricoeur's thought to contemporary discussions on visuality and mediality in law, for there too attention to metaphor and narrative construction is of great importance. What is more, the discomfiting effect of metaphor (and the same obviously goes for satire, irony, hyperbole and tropes generally when found in a legal setting) should alert jurists to cultivate their story sensibility or narrative intelligence to prevent them from falling in the professional abyss of belief perseverance and confirmation bias, and other psychological errors that humans are prone to. This is even more important now that cognitive psychology has also convincingly shown us that professionals rely on a variety of skills rather than simply applying a rule. Thus sophisticated knowledge of how narrative works in the world and in us is essential lest misreading and misunderstandings reinforced by our natural tendency to cling to our initial beliefs combined with professional overconfidence about how things are done lead to miscarriages of justice. The epistemological question to be kept in judicial minds should always be whether there is indeed a chain of circumstance

'out there' or whether (some) one carefully fits together the evidence with other established facts, and, even more important, whether that someone is you.

Narrative intelligence ties in with the topic of professional ethos in yet another way. In the sense that any story of a professional's actions—and the written version of the judicial decision in which her line of thought unfolds is a prime example here—provides its author with a narrative identity, it leads, ideally at least, to self-knowledge in the sense of knowledge of the activities of which the judge as the knowing subject is the author, when she seriously engages with the criticism her decisions engender in others. Here is also the link with the topic of the justification of (the products of) her narrative identity. If the judge's deliberation is oriented at choosing the correct legal ends and means, and at translating these into the appropriate legal action, this implies judicial integrity that transcends the obvious demands of clarity and coherence of the judicial decision in that it includes the ethical aspect in the sense of the judicial disposition to keep probing her inner motives and to reflect on the tensions that arise when one has to get a grasp of two conflicting views (on the facts of the case or the point of law, or both).To Ricoeur, narrative intelligence is '[…] much closer to practical wisdom and to moral judgment than it is to science and, more generally, to the theoretical use of reason' (Ricoeur 1987, 123). In short, in narrative intelligence we witness the triumph of *phronēsis* over *epistēmē*, for story belongs to 'phronetic intelligence' (Ricoeur 1987, 124). In the sense that by means of literature we can gain insight in examples of the particularities of the human condition that may otherwise be inconceivable or beyond our reach, literary examples of the process of mimesis are therefore helpful too. Not in the least because, as Ricoeur explains, '[A]n essential characteristic of a literary work […] is that it transcends its own psycho-sociological conditions of production and thereby opens itself to an unlimited series of readings, themselves situated in different socio-cultural conditions. In short, the text must be able, from the sociological as well as the psychological point of view, to "decontextualise" itself in such a way that it can be "recontextualised" in a new situation – as accomplished, precisely, by the act of reading'.[17]

3.2 The right discrimination of the equitable

All of the above, I would claim, already settles the case in favour of the humanities as companions to law in order to augment the scope of legal *paideia*. In addition, attention to narrative can obviously also be translated into a meaningful vantage point from which to resist the reification that is the result of a one-sided, positivist attention to the language of legal concepts. Rules and norms are not self-applying. They are applied by man who in turn is responsible for any reductive tendency, for as Ricoeur put is 'one massive fact characteristic of the use of our languages [is]: *it is always possible to say the same thing in a different way*' (Ricoeur 2007, 116, emphasis in the original). A lawyer's, more specifically a judge's ethos in the sense of

17 Ricoeur 1987, 139; cf. for the heuristic force of fiction and the idea of intersubjectivity and fiction also Ricoeur 1991.

professional attitude cannot be separated from the persuasiveness of his judgment. If a lack of reflection on this bond may rightly be deemed an ethical defect, we cannot do without the input from the humanities in the process of going from the abstract, general norm to its particular application in a concrete situation, for the justice of the outcome depends on it.

On this plane the thoughts that Aristotle and Ricoeur offer on the subject of equity can also help elucidate the connections between *phronēsis*, metaphor and narrative. Aristotle, in examining the nature of human actions and ethical conduct, says that '[…] matters of conduct and expediency have nothing fixed or invariable about them […] the agents themselves have to consider what is suited to the circumstances of each occasion (*προσ τον καίρον*), just as is the case with the art of medicine or of navigation' (Aristotle 2003, 1104a4-10).[18] This is a call to find the persuasive materials suited to a task and appropriate to the occasion and one that is part and parcel of the virtue of *phronēsis* in its relation to law where the reciprocity of facts viewed in their specific contexts and the normative precepts of positive law is the cornerstone for 'doing law' and 'acomplishing justice', for the two cannot be separated. Justice in Aristotle means both the general, human virtue of justice as 'being a just person' and the legal idea of distributive and corrective justice.[19] When, then, an unjust result would ensue in an individual case due to the strict application of a legal rule, the divide between a positivist form of rule application and justice in the senses distinguished by Aristotle can be closed by means of equity. The reason is that equity not only parallels written law, but where necessary prevails over it as a corrective: '[…] law is always a general statement, yet there are cases which it is not possible to cover in a general statement' (Aristotle 2003, 1337b12-14, 315). The error that arises from the universality of the law is an omission that can be rectified by '[…] deciding as the lawgiver would himself decide if he were present on the occasion, and would have enacted if he had been cognizant of the case in question' (Aristotle 2003, 1137b29-33, 317). Aristotle concludes, 'This is the essential nature of the equitable: it is a rectification of law where law is defective because of its generality' (Aristotle 2003, 1137b28-30, 317). He then ties *phronēsis* to judgment as the right discrimination of the equitable. Equitable man is above all others a man of empathetic judgement who shows consideration to others, also in the sense of forgiveness, '[…] that consideration which judges rightly what is equitable, judging *rightly* meaning what is *truly* equitable' (Aristotle 2003,1143a24, 361, emphasis in the original).

Thus, Aristotle ties both understanding of a case and (correct) judgment to *phronēsis* and that is directly connected to the activity of *doing* law. The lawgiver deals with legal justice when he determines the rule, but he does so necessarily in general terms. The judge is the one who interprets the lawgiver's texts, and to her,

18 For later views on equity (Christopher St. Germain, Edward Hake, Hugo Grotius, William Blackstone, and Immanuel Kant), see Gaakeer 2008.

19 In Roman law it says *non ex regula ius summitur, sed ex iure quod est regula fiat*, i.e. what is law is not derived from the rule, it is the other way around in that the rule is constructed out of what is just.

technical acuity of the kind the lawgiver ideally possesses, is not enough. She needs the metaphorical '[…] leaden rule used by Lesbian builders: just as that rule is not rigid but can be bent to the shape of the stone, so a special ordinance is made to fit the circumstances of the case' (Aristotle 2003, 1137b30-33, 317). The doing of equity therefore depends on the particular circumstances of each case, as it combines the virtue of legal justice and the moral virtue that is the product of ethos.

If we connect this to what Aristotle and Ricoeur argue on the subjects of metaphor and narrative emplotment, and we allow for the fact that it is indeed possible to say the same thing in a different way, our very act of configuring law and justice has to confront the paradox of rule-following. That is to say that language requires a user who knows how to use it in concrete situations, because (the words of the) rules are not self-applying as noted above in this paragraph. The words of the rules in the books of law need application before they can become active. On this view, legal concepts too derive their meaning from the contexts in which they are developed and applied, including the fundamentally unpredictable nature of our social environments. As a result, the interpretation of language—not incidentally to Aristotle language and speech are the only means through the *zoon politikon* can discuss the topic of (in)justice—becomes a precondition for the development of law. On the view that interpretation is always linked to argumentation, the latter is necessarily a special form of practical reasoning, within, of course, institutional and procedural boundaries, and these too are subject to our *deliberative* reasoning as characteristic of the virtue of *phronēsis*. The right to speak within this framework implies a membership of the legal system and is therefore of enormous political and moral significance: 'Stating the law in the singular circumstances of the trial, hence within the framework of the judicial form of institutions of justice, constitutes a paradigmatic example of what is meant here by the idea of justice as fairness or equity' (Ricoeur 2007, 63). Since to Aristotle justice comprises both the just as a regulative idea and ideal, as well as the legal as the domain of positive law (Ricoeur 2005, 15; cf. Ricoeur 2000b), to Ricoeur this points to the social aspect, because 'Argumentation is the site where the bonds between self, neighbour, and others are established' (Ricoeur 2007, 7).

Combined with the development of *phronēsis* by means of literary works as a matrix for ethics and law, and the exercise of this virtue as inseparable from the personal qualities of the capable *phronimos* in action, the conjunction between the self (legal and otherwise) and the rule shows that self-reflection is constitutive of the judicial *habitus*.[20] Since, as Ricoeur claims, '[…] interpretation of the facts of what happened [is] in the final analysis of a narrative order' (Ricoeur 2007, 69), this is even more crucial in hard cases. Equity's knowledge, too, is narrative in its attention to the particular aspects of the case, which are necessarily connected to the stories of

20 'The collection of stories that interpellate a person is his or her narrative habitus […]' and '[N]arrative habitus provides the competence to use this repertoire as embodied and mostly tacit knowledge […] A person's narrative habitus enables knowing how to react when a story is told, according to what kind of story it is' (Frank 2010, 52 and 54).

the parties involved. The argument thus comes full circle as this also ties in with the idea of narrative emplotment and ordering and with that of narrative intelligence discussed above in paragraph 3.1.

So far I have referred to Ricoeur; now I would further suggest that his line of thought can be fruitfully combined with the important topic that Miranda Fricker recently addressed, because taken together these authors offer yet another argument for a humanistic perspective on law. Perceptual as the tie of *phronēsis* and judgment is, it is important for our dealing with testimonial (in)justice because, as Fricker puts it, it depends on 'the virtuous hearer's perceptual capacity […] understood in terms of a sensitivity to epistemologically salient features of the situation and the speaker's performance' (Fricker 2007, 72). She offers an illuminating discussion of two types of epistemic injustice from which discourses can suffer: testimonial injustice, i.e. when prejudice causes a hearer to give a deflated level of credibility to a speaker's word (either credibility excess or deficit), and hermeneutical injustice, a stage prior to it, i.e. when a gap in collective interpretive resources puts someone at an unfair disadvantage when it comes to making sense of their own social experiences. She too illustrates the problems resulting from such injustice by means of literary works. The ideal situation should be ' […] that the hearer exercises a reflexive critical sensitivity to any reduced intelligibility incurred by the speaker owing to a gap in collective hermeneutical resources' (Fricker 2007, 7) and that sensitivity is an ethical as well as an intellectual virtue. But because as humans we are fallible, it is almost impossible to escape testimonial injustice, and to the extent that we lack self-reflection the risk of hermeneutical injustice increases. So we should at the very least strive to attain a reflective optimum. To do so as jurists, we need to understand the elements of our professional self-fashioning, even though such self-discovery and self-knowledge can be painful when we are confronted with our own prejudices. For example, when in the courtroom we ignore 'hermeneutically marginalized persons' because they simple have not been assigned a place in our collective understanding given the dominance of identity prejudices, so that they suffer a 'situated hermeneutical inequality' (Fricker 2007, 154-162). Obviously this ties is in with the subjects of belief perseverance and confirmation bias discussed above and thus deserves our continued attention.

4. The defence rests

Firmly rooted in the idea of law as text as I am as a practitioner, I would contend that the core business of jurists as readers, writers and hearers is trying 'to figure out' the variety of meanings of the linguistic performances held before them and deal with these in terms of their (intended) consequences, of the kinds discussed above. If jurists are informed, then, by what the humanities, and especially literature and philosophical hermeneutics, can contribute to an illumination of the tensions at work in doing law, they may be able to deal with noted suspicions and unnoticed biases, cultural and legal, as well as private and public. They may learn to express what otherwise all too often remains inexpressible to the detriment of doing justice.

The humanities can inculcate jurists, and judges especially, with the professional humility that is required to do right rather than wrong. Thus, I would voice concern about the tendency of not a few literary-legal scholars of postmodernity to be averse to text traditionally conceived. As far as I am concerned we should cherish poetic faith[21] as a state of mind of openness to counter the waves of legal instrumentalism focused on policy rather than value that currently loom large in contemporary societies as they face a great variety of local and global challenges.

21 See Coleridge 1983, 6: 'that willing suspension of disbelief for the moment which constitutes poetic faith'.

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To Avenge, to Forgive or to Judge? Literary Variations

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The topics of justice, judges and trials have not ceased to inspire literature, theatre and cinema. Is it possible to put some order into such abundant material? Can the great literary archetypes help us to draw some dividing lines between the justice that one delivers to oneself and the one delivered by an institutional third party, between official justice, equity, forgiveness, and revenge?

This contribution aims to set a few milestones of this ambitious project, on the basis of a double distinction. The first is well known: it distinguishes between private justice and official justice (usually statist). The second is inspired by the philosophy of Paul Ricoeur who, reflecting on the meaning of the act of judging, assigns it a dual function that, for brevity's sake, we shall provisionally call 'distribution' [*répartition*] and 'participation' [*participation*]. However, this essay does not address the function of 'veridiction' exercised by the justice system (to establish the relevant facts of the case) prior to its function of 'jurisdiction' (i.e. to declare the law and the right, according to Paul Ricoeur's two axes), and as essential as the latter. Such a study would require work at least equivalent to the one now under way. It suffices to recall from the outset the conventional (and therefore constructed) nature of the judicial truth, as testified by the adage *res iudicata pro veritate habetur*.

With the help of the double-entry table we shall offer a grid of analysis that a quick glance through world literature will allow us to simultaneously illustrate, modify, and subvert. This is so because, while works of fiction provide some paradigmatic evidence of this or that element in the grid, they also offer an infinite gradation of situations which will soon complicate the always-too-reductionist theoretical distinctions.

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1. Paul Ricoeur and the two functions of the act of judging

In a text as short as it is deep, Paul Ricoeur inquires about the functions of the act of judging (Ricoeur 2000, 127-132). Based on a kind of phenomenology of judgment, he distinguishes a short-term end 'in virtue of which judging signifies deciding, with an eye to ending uncertainty', to which he contrasts a long-term end, 'namely, the contribution of a judgment to public peace' (Ricoeur 2000, 127). In the first sense, the *arrêt* puts an end to a virtually endless debate, by a decision that will become final after the period for appeals runs out and which law-enforcement agencies [*force publique*] will cooperate in executing. In so doing, the judge will have fulfilled the first function: he will have assigned the share belonging to each, in application of the old adage with which the Romans defined the role of law: *suum cuique tribuere* [to attribute to each his own]. The judge will have allocated the shares or remedied those improperly held by one or the other—in a nutshell: he will have decided between [*dé-partagé*] the parties. The judge thus functions as an essential institution of society that John Rawls precisely describes as a vast system of distribution of shares. In this first sense, judging is therefore the act that separates, that decides between (in German, *Urteil*, judgment, is explicitly formed from *Teil*, which means part).

However, the act of judging is not exhausted by this dividing function. While it is true that, fundamentally, the judgment occurs against a background of social conflict and latent violence, it is also necessary that the legal process and the judgment that closes it pursue a broader function as an institutional alternative to violence, starting with the violence of the justice that an individual deals himself. On these conditions, continues Ricoeur, 'it turns out that the horizon of the act of judging is finally something more than security—it is *social peace*' (Ricoeur 2000, 131). Not just the provisional pacification that results from the arrangement imposed by the law of the strongest, but the harmony restored after the fact that a mutual recognition has taken place: regardless of the fate of their case, each of the protagonists ought to be able to admit that the judicial decision is not an act of violence, but of recognition of their respective points of view. At this stage, we move to a higher conception of society: no longer just a scheme of allocation of shares synonymous with distributive justice, but society understood as a scheme of cooperation: through distribution, but beyond it, through procedure, but beyond it, allow us to strive towards something like a 'common good', which precisely makes the social bond. A good, paradoxically, made out of eminently shareable [*partageable*] values. In this respect, the communitarian dimension has taken over from the procedural dimension, incapable by itself of warding off violence.

In sum, judicial *allocation* [*partage judiciaire*] is at one and the same time the apportioning of *parts* (which separate) and that which makes us *take part* [*prendre part*] in the same society, that is to say, that which brings us closer (Ricoeur 2000, 132). From apportionment springs an emergent property, more important than the share falling due to each: concord reestablished and cooperation renewed.

2. A double-entry table

We are now able to present a double-entry table of justice and its variants, by crossing a vertical axis that distinguishes between institutional justice and private justice, with a horizontal axis that takes into account the presence of one or both functions of the act of judging, including failure of one or the other. Eight cells or figures may thus be identified.

Figures 1 and 2 aim at the model of 'ideal' justice that combines fair distribution of shares with the function of integration or restoration of social peace. Aeschylus' *The Eumenides* recounts the constitution of such a form of public justice that breaks away from the ancient law of retaliation. The author has not identified any literary example of an equivalent private model, but illustrations should be easy to find.

Figures 3 and 4, which aim at forms of justice, public and private, dealing exclusively with compensation for civil wrongs (short-term function), arise from a concern with mere balance, or with the status quo: the social order has been disturbed by a fault or damage that has to be repaired. Evil for evil, tit for tat—thus, the evil is 'maintained'. Figure 4 (private revenge) proves to be particularly well documented in literature, with an important variant: the justice dealt to oneself, by suicide generally.

Figures 5 and 6 illustrate a model of forgiveness, which is more frequent on a private level than in the public domain. This model is characterized not by balance but by excess: excess of gift, relinquishment, and forgiveness. The logic of give and take is left behind and the aim is to procure the emergent property that is the restoration of the social bond.

In contrast, figures 7 and 8 describe in turn the absence of the two functions attached to the act of judging, marking the model of absence of justice: default or denial of justice. Here, literature proves to be particularly rich, both as regards public order with the portrayal of all kinds of partisan and venal judges, and in the private order with a crescendo of perversion culminating in the stories of perverse justice that abound in the writings of Marquis de Sade.

	INSTITUTIONAL JUSTICE	PRIVATE JUSTICE
ACCUMULATION OF BOTH FUNCTIONS: DISTRIBUTION/ PARTICIPATION	1. - AESCHYLUS, *The Eumenides*	2.
DISTRIBUTION ONLY	3. - FRANÇOIS MAURIAC, *Thérèse Desqueyroux* - NATHANIEL HAWTHORNE, *The Scarlet Letter*	4. Private Vengeance: - SHAKESPEARE - RACINE - VON KLEIST Variant: justice delivered to oneself -FRIEDRICH DÜRRENMATT, *A Dangerous Game* -AMÉLIE NOTHOMB, *Cosmétique de l'Ennemi* -DOSTOYEVSKY, *Crime and Punishment*
PARTICIPATION ONLY	5. The South African Truth and Reconciliation Commission (TRC)	6. Forgiveness: - HERMAN MELVILLE, *Billy Budd, Sailor* - LEON TOLSTOY, *Resurrection* - ERNST WIECHERT, *The Judge*
ABSENCE OF THE TWO FUNCTIONS	7. Partisan or venal judges who pervert justice: - SHAKESPEARE, *Measure for Measure,* *The Merchant of Venice,* *Richard II* - Von KLEIST, *The Broken Jug* - LA FONTAINE, *The Oyster and the Pleaders,* *The Cat, the Weasel and the Little Rabbit*	8. Oblivion: - MILAN KUNDERA, *The Joke* Immanent Justice: - KAFKA, *The Trial* Perverse Justice: - SADE, *Stories of Justine and Juliette*

3. Accumulation of both functions: The ideal model

In Aeschylus' *Eumenides*, a tragedy written in 460 BC, we can find one of the most paradigmatic examples of constitution of a court (the *Areopagus*) capable of overcoming the ancient law of retaliation during the case of Orestes the mother-slayer and of pronouncing a verdict of acquittal after exchange of rational arguments (Ost 2004, 91-151). In this case, the first function of justice (to settle a dispute by

allocating each their due) is both fulfilled and surpassed; this is because the judgment handed down is not confined to 'putting things back to their original state'; rather, the verdict re-ties the civic bond and, so to speak, even contributes to reinforcing social peace. It is this last point, less well known but fundamental, that I would like to highlight. On the side of Orestes, the matter is clear: snatched from the avenging arm of the Erinyes, he is first welcomed as a suppliant by the city of Athens, then led to explain himself before the court, and finally reinstated into the community of the living even though he was threatened by frenzy and the underworld.

But reconciliation and reintegration were even more difficult to obtain on the side of the Erinyes, who saw themselves being robbed of one of their natural victims and ultimately humiliated by a verdict signalling the decline of their authority in Athens. Athena would have to show uncommon tenacity to calm down the 'Furies of long memory' and finally accomplish the spectacular reversal which would transform them into the kindly protectors of the city ('*Eumenides*'). All the categories of persuasion (*peitho*) would be covered in 140 verses and no less than four long speeches. The most urgent is first to restore the honour of the losing side: 'you have not been beaten'[1] (795); the result of the casting of ballots in fact brings no dishonour on them. Then comes a humble supplication ('do not […] bring the bulk of your hatred down on it [this land]', 800), matched with a promise ('In complete honesty I promise you a place […] to accept devotion offered by your citizens', 804-807). But nothing is accomplished; the Erinyes resolutely resume their menacing wailings.

Athena then adopts a different approach: she pretends to understand their rage, which doubtless explains their greater wisdom. Never mind: she predicts unequalled prosperity for Athens and again invites the Erinyes to join in this good fortune: '[you] shall win from female and male processionals more than all lands of men beside could ever give' (856-857). Again—refusal. 'I will not weary of telling you all the good things I offer', responds Pallas Athena, determined to fight it out: 'if you hold Persuasion has her sacred place of worship, in the sweet beguilement of my voice, then you might stay with us' (885-887). This time, Athena seems to have scored a point; a rift opens in the determination of the Furies' chorus: 'what is the place you say is mine? Shall I have definite powers?', they ask (892, 894). And finally this last question: 'You guarantee such honor for the rest of time?' (898).

Thus persuasion has done its work; the Erinyes are thenceforth prevailed upon to intone a hymn of goodwill instead of their dirge for the dead, a hymn without lyre and of dismal memory. All can now turn about: sowing, harvesting, prosperity are evoked in place of what was nothing but blood, leprosy and infection during the earlier 3600 verses. In the mouth of those henceforth called the 'Eumenides', favourable words, benevolent oracles and good graces have taken the place of previously unsparing curses: 'Let there not be civil strife […] Let them render grace for grace' (984).[2]

1 Translations and line numbers refer to Grene & Lattimore (eds) 1953 [Editors' note].
2 Translation slightly modified [Editors' note].

4. To apportion, to compensate or to retaliate: the model of the status quo

Is justice at the height of its mission when limited to 'allocating to each their own'? Many authors have replied negatively to this question. For, in restricting itself to restoring the social balance, this kind of justice does not look into the motivation of the main characters, nor does it question the inherent justice of the order it restores. Here it would be necessary to reflect on the fertile distinction between *litigation* and *differend* presented in this regard by Jean-François Lyotard. While *litigation* is subject to a code of principles and values common to the two parties, so that it normally leads to compensation of the *litigant* who has suffered *damage* (this itself being assessable according to accepted scales), a *differend*, on the other hand, remains intractable: it is not subsumed under a common rule, so that the *wrong* [*tort*] suffered by the *victim* remains uncompensated, and often even inexpressible (Lyotard 1983).

An author in the shape of François Mauriac has taken this critique to a point of radicality rarely equalled. An attentive observer of the justice system (in either civil cases, criminal trials, or even political ones, notably post-war lustration, or concerning national liberation movements), Mauriac is persuaded that human justice is 'the most horrible thing that there is in the world' when not inspired by compassion (Mauriac 2010, 894).

Justice of this kind is nothing but another manifestation of the supreme law of 'mutual cannibalism' that rules human history (Mauriac is known in this respect to have shared Pascal's tragic conception of human nature, being convinced that evil is naturally an integral part of man, so that history is but the infinite repetition of Cain's crime).

More concretely, that kind of justice appeared to him as impersonal, inhuman, and mechanical. It stigmatises, labels, reifies, and diminishes precisely on account that it loathes putting itself in the shoes of the accused and therefore proves all the more incapable of forgiving him. Any such justice is nothing after all but reproduction of the established order (whether it is the privileges of the wealthy within the system of private property, or the hegemony of the strongest in the public sphere): in compensating the imbalance caused to the established order, this kind of justice reinforces and legitimises that order indefinitely. In confining itself within an almost arithmetic logic of equivalence of faults, it is but the official and institutional version of private vengeance and lynching (cf. Michel 2010, 37 and ff.).

Far from assuring the conditions of mutual recognition of the victim and the guilty (actual or potential), the real function of this kind of legalistic justice is to exclude those individuals deemed not to be integrated in the social order (this analysis is all the more significant considering that it comes from an author hardly suspected of militant leftism). Mauriac qualifies this sham justice as the 'justice of Pilate'—the conscientious agent of the state who has been washing his hands for two thousand years; a justice which merely gives the appearance of im*part*iality.

Mauriac's novel *Thérèse Desqueyroux* (1927) is without a doubt the most illustrative of this critique of statist 'Pilate's justice'. While giving the appearance of

a just decision, this is limited in fact to leaving the case to private family revenge, which places this work at the hinge between Figures 3 and 4. Thérèse, a provincial bourgeois who is stifled in the cloying atmosphere of her in-laws, tries to poison her husband; the crime fails and a judicial investigation opens. To preserve the honour of the family, the husband, supported by his own, withdraws his complaint in order to deceive the justice system, so that after a sloppy investigation, a decision to dismiss the proceedings is issued. That way Thérèse is given over to her own, to the vengeance of her own—a dish best served cold. Long years of condemnation to silence await her, confined as she is now within the prison of an act that received neither recognition nor official sanction. Everything happens, in fact, at the end of this decision to dismiss, as if nothing had happened, not even the intervention of the justice system. But what this denial of justice ultimately reveals is the objective complicity of this system with an order of families, which Mauriac's entire work depicts in its violent inhumanity.

The same lesson emerges from *The Scarlet Letter* (1850), the great novel by the American writer Nathaniel Hawthorne. The scarlet letter is the sign of infamy that from now on adorns the bodice of Esther, a proud young woman guilty of adultery in a New World Puritan community in the seventeenth century. Ostracized by the community, Esther bears her ordeal with dignity in the company of her small daughter, the child of sin. The deepest mystery reigns, however, as to the identity of the father. We find out gradually that he is the young pastor of the community, an inspired preacher whom everybody takes for a saint. Far from assuring him impunity, the anonymity behind which he is hiding is for him a far worse torture than the one Esther is enduring. Remorse is eating him away inside more cruelly even than the external stigma of his companion. This is especially so—the terrible truth is revealed little by little—since the unfortunate pastor lives in company of an old doctor (none other than Esther's ex-husband), who has pierced through his secret and submits the pastor to a daily vengeance that will eventually consume him. Here again, it would undoubtedly have been better to endure public sanction and the atonement of guilt exposed.

The transition thus occurs naturally to figure 4, the realm of private justice limited to the function of compensation. For thousands of years humanity has settled its conflicts by means of clan, family or private vengeance. Still in classical Greece, one and the same term, *dikē*, designates both vengeance and justice. Often channelled and moderated by a set of customary rules, vengeance does not appear indeed as irrational: striking blow for blow—with the same intensity and with the same forms—it is in its own way part of the contractual logic of give and take, and it reproduces the great human law of reciprocity. Moreover, in traditional and closed societies bound together by inflexible honour codes, vengeance appears even as a sacred duty to restore violated honour. The problem, to be sure, is that absent the intervention of the institutional third party it is difficult to ensure respect for its equilibriums, so that one can imagine endless discussions about the reality of the fault and the extent of the damage. It can be maintained, then, that, from the

fact of being kept alive from generation to generation, the spirit of revenge ends up producing a hatred that feeds on itself, and generates a mirroring violence that nothing can stop.

Likewise, the topic of revenge traverses world literature with extraordinary recurrence. Many works by Shakespeare, Racine and von Kleist there found the best of their inspiration. Space is here too short to discuss any of these texts. It will suffice here to draw attention to an interesting variant of this fourth figure: the kind of justice dispensed to oneself, usually by suicide. As if, referred to the court of his own conscience, the individual sought neither alibi nor mitigating circumstances.

Friedrich Dürrenmatt's *A Dangerous Game* [*Die Panne*] will illustrate this point (but many other works could be cited, such as Amélie Nothomb's *Cosmétique de l'Ennemi*). During one of his trips in the provinces a sales representative, unable to find a place in a hotel, is hosted by a retired judge. The latter invites him to share a dinner he organizes monthly with a prosecutor and a lawyer, both retired like him. During the meal they improvise a game to which the three friends seem well accustomed: a fictitious trial in which the guest is invited to take part. What would he have to fear from the rest: isn't he just an ordinary salesman? However, in the course of a skilfully conducted cross-examination it appears that the man may well have been the cause—indirect but probable—of a heart attack that killed his boss. Lawyer and prosecutor then engage in a passionate battle that concludes with the death sentence pronounced by the judge. The game ends in a good general mood, with the three agents of justice pleased at having been able to engage once again in their favourite activity. But when they knock at the door of the salesman's room in order to show him the written record of his conviction, they will find him hanged… Apparently the man's conscience turned out to be more inflexible than the small company of legal professionals.

It would also be necessary to re-read Dostoyevsky's *Crime and Punishment* in this light: what pushes Raskolnikov to confess his crime if not the need to confess, and by the same token, by the desire to pay his debt and thereby reintegrate in the society of men?

5. Deciding to take part. Forgiveness, the model of an emerging property

Sometimes reality resembles fiction: what better example, in order to illustrate a statist system of justice that rejects being constrained by the classical role of adjudication-retribution and rises straight away to forgiveness—token of reconciliation and concord—than the famous Commission for Truth and Reconciliation set up in South Africa by Nelson Mandela and Archbishop Desmond Tutu in the aftermath of the apartheid system? Such a commission, which aims to combine full confessions, civil reparations, forgiveness asked from, and granted by, the victims, and penal amnesty, can be analysed at the same time as a gesture of memory and a stake in the future. The forgiveness that is accomplished does not hide any facts and assures full recognition

of the victim, but in making credible the perspective of an alternative future without resentment it enables protagonists to break away from a destiny of disaster. After the passage and by means of this experience, the importance of *narrative* in the workings of justice must be underlined: the issue is one of constructing a narrative which, in the absence of an absolutely exact truth of the facts, (Who would tell all the truth? We know, on the other hand, that the judicial truth does not at all exhaust the factual truths) will make sense for the protagonists and be accepted by the community. The issue is one of 'putting the right [*justes*] words on facts' and also of 'declaring' [*dire*] the responsibility or the guilt of those concerned.

Let us recognize nonetheless that forgiveness is more often the doing of individuals and private justice. Often, moreover, it issues from the failures of public justice (when the facts are legally prescribed by the terms of the law, for example, or when, in the gravest cases of mass-crimes, real reparation is simply impossible), or after its disqualification. In the writings of an author as radically utopian as Leon Tolstoy, forgiveness is an evangelical requirement that is the only acceptable reaction in the face of evil, since it is for God alone to judge, and every human system that were to try it would be, by nature, corrupting and itself criminogenic (this is the entire theme of *Resurrection*).

The German writer Ernst Wiechert, in a novel entitled *The Judge* [*Der Richter*], also appeals to forgiveness as the only possible alternative to miscarriage of justice. In Nazi Germany, on the eve of the War, an investigative judge discovers that the guilty party in the political assassination he is investigating is none other than his own son; this knowledge soon begins to confuse him, and, assuming his role both as father and judge, he persuades his son (named—is it a coincidence?—Christian) to turn himself in. But in a delinquent Germany, where evil has taken the place of good, there is no one to prosecute him—he is rather congratulated on having executed a political opponent. It remains for the father to appear with Christian before the 'highest court', the victim's parents. Christian will ultimately be forgiven by them; as for the judge, he sends his resignation letter to his superiors the next morning; the final lines are thus conceived: 'Where there is no justice, there is no place for law, or for the judge' (Wiechert 1962).[3]

We shall find another singular example of the combination of private forgiveness and failure of official justice in *Billy Budd, Sailor* by Herman Melville. This short sea novel suggests the idea of justice as a necessary evil in a world marked by the universal guilt of original sin. Recruited by force on to a British warship during the time of the Directory and in the aftermath of a wave of mutinies that left their mark, Billy Budd is wrongly accused of mutiny by the master-at-arms on board. Unable to defend himself verbally, the sailor strikes a blow that proves fatal to the officer who accuses him. He is judged straight away by a court martial presided over by Captain Vere; all are convinced of the sailor's innocence, but his death sentence is nevertheless decided because there is no point in showing the crew the least sign

3 Editors' translation.

of weakness in such times of war and in the aftermath of a period of mutinies. At daybreak, Billy is hanged by the ship's yardarm.

At first, we can read this tale as a fierce critique of summary military justice that knowingly condemns an innocent man to death for the sake of martial law and military discipline. But Melville invites us to go beyond this first interpretation, and invites us to make a Christian-like reading of the sacrifice of the son (Billy) by the father (Vere) in expiation for the fault of the original sin that weighs on all, the innocent included. How otherwise to understand the final words of Billy Budd 'God bless Captain Vere!' and Melville adds this observation: while Billy rose, 'the East was shot thro' with a soft glory as of the fleece of the Lamb of God seen in mystical vision'. Everything happens as if, in this atmosphere of mercy concerning the common original sin, Billy was brought to forgive the justice of men, as if as a Christlike figure he assured redemption of the universal guilt of judges.

6. Neither of the two functions. Denial of justice or flawed model

The extreme alternative to justice is resolution of conflict that fulfils neither of the two functions of compensation and reintegration. This brings us to the paroxysm of perversion of the institution; touching the limits of dehumanization.

When such 'justice' is delivered by sworn judges, within the legal forms and the legal framework, the corruption of the institution is at its peak. Literature, which does not shrink from reversals by going to the limit, provides many examples. Shakespeare in particular draws an impressive gallery of portraits of partial and biased judges, personally interested in the object of the trial, often because they are themselves the culprits that they pretend to prosecute. An example of this is Richard II, in the eponymous play, who arbitrates (before putting an end to it arbitrarily) a judicial duel in the form of an ordeal between two of his vassals who accuse each other of a murder of which the real culprit is the King himself, as no one is unaware.

We could also mention the misnamed Angelo, who condemns Claudio to death on the grounds of fornication in *Measure for Measure*, while he himself proposes the condemned man's salvation to the sister, a young novice nun, whose virtue he aims to take as well.

We could also recall the famous Portia, who in *The Merchant of Venice* inflicts an impressive lesson of equity on the ill-fated Shylock, the local Jewish usurer, thus contributing to his unjust condemnation, in which Portia herself has a close interest.

The topic of the guilty judge conducting his own trial also constitutes the subject, this time in a comic mode, of von Kleist's *The Broken Jug* [*Der Zerbrochne Krug*].

And how can we not mention the multiple venal judges who haunt Jean de la Fontaine's *Fables*? Thus Justice Nincompoop in his *The Oyster and the Pleaders* [*L'huître et les Plaideurs*] who, having swallowed the oyster, leaves each of them no more than a shell—'without costs'—he remarks. Or again Judge Rascal (*The Cat, the Weasel and the Little Rabbit*) [*Le Chat, la Belette et le Petit Lapin*] who caused the

litigants to be of one mind by devouring one and the other, and by appropriating for himself, 'without any other form of trial', the burrow over which they quarreled.

The descent to the underworld continues when literature addresses the absence of the two functions within the framework of private justice, completely de-institutionalised. Actually, the concept and the very term 'justice' are only used ironically in this context, as if to signal a radical flaw. A full inventory of the various forms of such anti-justice remains to be made. Here it suffices to provide three manifestations.

Admittedly, the first might seem rather trivial. It is inscribed within the simple register of *oblivion* and renunciation, as if a sleepy weariness or powerlessness had taken the place of justice. This is perhaps the key to understanding Milan Kundera's peculiar novel *The Joke* [*Žert*], in which ultimately the terrible abuses of the communist regime in Eastern Europe find no effective verbalization, or process capable of repairing their ravages. Only oblivion, as a lethal veil, covers the field of ruins. But we must be wary of oblivion when it takes the form of repression, which leads to brutal and devastating 'retaliation by the repressed'. A 'past that does not pass' is the most fertile ground for the violence of tomorrow.

Amnesia deceives justice in a sense even more elemental than those suggested by Ricoeur's distinction: assuring no recognition to the facts, it translates a denial of truth (or even simply of reality) into a denial of justice. In annihilating the past, in reducing memory to nothing, amnesia definitely rules out the possibility that justice will be done one day.

Franz Kafka's *The Trial* [*Der Process]* leads us to the edge of another abyss. What do those absurd and grotesque snatches reveal of the judicial process which Joseph K. confronts during the twelve months that the preliminary investigation of his case lasts? It is not so much the malfunctioning of the justice system (Kafka is well beyond that conventional criticism) as the truly terrifying manifestation of an 'immanent justice' anchored within our most archaic fears. This immanent justice reflects what may be called a 'law of necessity' which strikes without motive the innocent and the guilty alike, and is inscribed in a pre-logical mentality where fault is indistinguishable from error, madness, illness, and misfortune. According to one of the meanings in the German language, the process (*Das Prozess*) is to be comprehended as a morbid *process*, imprescriptible and without remission, rather than as an institutional judicial procedure. What it accomplishes is a *metamorphosis* (like the novel of the same title) that is as physical as it is spiritual: the progressive transformation of the innocent into the guilty, just as Gregor wakes up one morning inside the shell of a cockroach. Here, the fault-stain, as the model of the ancient Greek *hamartia*, is at once hereditary (it can be passed on from generation to generation) and contagious (it strikes without cause by mere proximity). This form of justice, which Kafka painfully confronted all his life as testified in his *Diaries*, is a cruel lottery which distributes 1001 kinds of misfortune as a prize.

After oblivion and immanent justice, we can still move down a notch and evoke the *perverse justice* that aims at procuring evil for evil's sake, such as described

in certain demonic pages of Sade, notably in the *Stories* of Justine and Juliette. The big and small masters that the two sisters meet, in the convents, in the factories, in the salons and boudoirs, do not cease to issue over-precise regulations which they know are impossible to obey. Hence they derive pleasure from their wholly arbitrary application according to their whims, increasing their unwarranted privileges as much as their vexatious punishments. In this context, the simulacra of justice in which Sadean doers-of-justice engage are the final culmination of a perverse law they have succeeded in replacing for the common law of the city. As in Sodom and Gomorrah, the currency (symbolic currency, law, language, economy) that is exchanged in the Sadean universe is stamped by the seal, purely solipsistic, of ruthless tyrants.

The path that we have just traced, however stimulating, surely remains largely incomplete: only certain paths have been tracked of the immense literary continent, with regard to an object itself so multifaceted. In the end, its main utility, in the manner of a 'Mendeleev's table', resides in its heuristic function: the numerous empty cells that it contains (for there can be no doubt that the eight figures distinguished do not at all exhaust the complexity of the act of judging) appeal to the need for continuing the search. Not so much with the purpose of accumulating species in the manner of a philatelist or entomologist, as for deepening our understanding of the human; since the times of Cain and Abel called to choose between vengeance, judgment, or forgiveness.

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Speaking of the Imperfect: Law, Language and Justice

Marianne Constable*

Even as legal positivism asserts that there is no necessary connection between law and justice, persons appeal to law when they seek justice. What is the relation between law and justice? This paper argues that the answer today to the question of the relation between law and justice lies in language. Even as sociolegal scholars study law as a matter of social power and empirical impact and dismiss 'law-on-the-books' in favor of 'law-in-action', citizens contest or affirm such power through claims made in the name of justice. What is the relation between socio-empirical reality and claims of justice? This paper argues that understanding claims of justice, as well as the reality of law for that matter, solely in terms of social power and empirical impact neglects important insights that the humanities bring to bear on law and language. The answer to the question, 'what is law?' today lies in law's relation to speech. The answer to the age-old philosophical question, 'what is justice?' lies in further exploring speech and the silences out of which speech comes.

The argument develops from *Just Silences* which suggested, in the context of U.S. law, that the justice of positive law lies in silences (Constable 2005). Positive law is not and has not been the only law. Positive law may indeed be a matter of the empirical impact of coercive or state power, of social control, or of policy-making, as sociolegal scholars and others would have it. But in the history of the West or of the global North, law has also been a matter of custom, of divine or natural law, of higher morality, and of procedural fairness. Whatever one now takes law to be, this paper argues, law today is also and perhaps more fundamentally, like justice, a matter of language.

This is not to say that law is justice, nor that either law or justice need be said explicitly. Quite the contrary, as we shall see. As legal positivism points out, the connection of law to justice is not 'necessary' in any logical or universal or empirical sense. Further, although contemporary state law indeed often presents itself in

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documents and files and professional law schools focus on reading and writing, neither is the connection of law to language a logical or empirical necessity. Rather, this paper argues, law is language in what one could call a grammatically 'imperfect' sense.

Grammatically, a sentence is in the imperfect when its subject is acting continuously, incompletely, habitually, routinely, indefinitely, in an ongoing manner that can be interrupted. 'We were speaking, when we were interrupted by a large bang', for instance. When one is said to be speaking a language like English, one might be said to be speaking imperfectly or in the imperfect. One belongs with others to an imperfect community of those who know, incompletely and to varying degrees, how to speak the language. The 'imperfect' does not exhaust grammatical relations to action and to temporality of course. When I declare something to you or you tell me to do something, for instance, our utterances take a present active form that can later be described in the past tense or as grammatically 'perfect' or complete. 'I warn you that a big storm is coming', for instance, or 'Go inside!' Such exchanges manifest themselves in a present, as interruptions to our incompletely articulated and articulable knowledge of our shared tongue or against the imperfect background of our speaking English. 'As we were hanging out talking as we usually do, you warned me about the upcoming storm'.

As with language, so too with law. On the one hand, we share an imperfect and incompletely articulable understanding of law as our way of living. On the other hand, in the legal speech acts such as marriage, contract, and appeal that take place in a present, we—officials and others—speaking with and hearing one another, initiate and transform states of affairs. A couple is now married, obligations have been established, a conviction is challenged. The shared knowledge that enables legal acts to transform the world and to bring new names and judgements into being, is not simply causal or empirical. It belongs imperfectly to 'we' who share knowledge of language and who emerge from turn-taking claims of 'you' and 'I' in dialogue. 'We' do not always agree with one another in speech or about legal acts done through speech, but even when we disagree, we who acknowledge these acts as what they are do so against a background of our imperfect and shared knowledge of how to speak of the world with one another.

As a response 'from a law and humanities perspective' to the topic of 'law's justice' for this special issue, this paper very briefly sets out a context for approaching law as language, sketches an approach to law as language in a bit more detail, and suggests its implications for justice.[1] It speaks in the English language with an eye to U.S. law and hereby acknowledges the limitations and qualifications that must be implied in such a focus. It proceeds in three parts. Part 1 situates the current question of law's relation to language in the history of law and justice that grows out of Friedrich Nietzsche's question of what it means to presume that there are foundations of law at all. The turn to language arises from this question. Part 2 explains further the double

1 The argument is being developed more fully in my forthcoming book *Our Word is Our Bond: How Legal Speech Acts* (book manuscript in progress).

aspect of law as imperfect and active that is mentioned above. Part 3 argues that although language does not strictly offer a foundation for law, both law and language serve as sites of judgement and of attributions of responsibility and go wrong in particular ways. The imperfect aspects of law and language offer an entry into the issue of justice. Just as truth or unconcealment is the promise of language, a promise that will not always be kept, that is, so too justice is the implicit appeal of law that, ever imperfectly, insists that promises must be kept.

1. Foundations?

Traditional courses in the philosophy of law are said to concern themselves with the moral, political and social foundations of law. After reading Nietzsche, one asks what it means to presume that there are foundations at all.[2] Although the question may be taken as a nihilistic dismissal of foundations and of past thought about law, there are also genuine questions here. How have so many come to have faith that there *are* foundations? What does it say about *us* that our philosophers and others have, for millenia, believed in foundations? And where does the questioning of foundations today lead? Let us take each of these questions in turn.

First, for Nietzsche, faith in 'foundation' or in 'reason' is an error advocated by language (Nietzsche 1968, 'Reason in Philosophy', par. 5). '"Reason" in language: oh what a deceitful old woman! I fear we are not getting rid of God because we still believe in grammar', he writes. Language as grammar (in English and German) everywhere divides the world into doers and deeds, nouns and verbs, subjects and predicates. Complete sentences in which subjects predicate follow the illusory model of a God in charge of his creation: God creates, man acts, authors write, nouns verb! Although in actuality 'accountability is lacking', language attributes responsibility to subjects for what they do, according to Nietzsche (Nietzsche 1968, 'Four Great Errors', par. 8). The imposition of grammatical and linguistic constructions on a world of becoming secures 'truth' by compartmentalizing and rendering things static. Indeed, we have imagined entire true worlds—heaven, the noumenal world, the so-called ideal versus real world—in static and universal terms and have used these worlds and their truths as standards by which to judge *this* world as lacking, Nietzsche writes (Nietzsche 1968, 'How the True World Became a Fable'). Words are unable to capture a world that is perpetually in flux. For Nietzsche, words represent only the dead leaves of his formerly 'colored thoughts' (Nietzsche 1967a, § 296).

Second, that we have for so long taught and believed in such successful untruths as God as first cause, the ideals of morality, and the value of reason over instinct, attests according to Nietzsche to a need or a sickness or weakness on our part (Nietzsche 1968, 'Problem of Socrates'). The nihilistic disease that characterizes the kind of life we live, which constantly finds its values elsewhere in the more 'real' or 'true' or ideal worlds that we invent, threatens to send us spiraling downwards. To ask how untruths have come to have the hold on us that they do is a complicated task for Nietzsche

2 For a first approach to this, see Constable l994a, and 1994b; referring to Nietzsche 1968 [1888].

however. The task, to begin, is to explain through genealogy how we have become who we are and how we cannot have been otherwise (Nietzsche 1967a and 1967b). The task is also simultaneously to enable the possibility of overcoming who we are, which of course implies bringing about the impossible situation of no longer being ourselves. Nietzsche's solution to the dilemma appears in the overcoming of nihilism that he associates with strong will-to-power, the eternal return and the overman.[3] As Martin Heidegger points out, the quest to secure truth that Nietzsche would criticize manifests itself here again, this time in Nietzsche's own thought (Heidegger 1979-1987). It appears in the form of the absolute mastery that is asserted in the will-to-power's insistence on overcoming the problem of nihilism and in its inability to let it be.

In the context of philosophy of law, Nietzsche becomes the thinker and prophet of a 'sociolegal positivism' in which social power threatens to become the sole or unlimited frame of reference for knowing law or determining what to do (Constable 2005, 9-11, 28-34, 43-44). Self-reinforcing social sciences and policies of 'society' that study, affirm, and impose the will of society recognize no limits to the social power to command or to determine the world. While social or societal will appears to many today to be a benign force, it precludes appeal to law or justice other than its own. Indeed in the name of social and empirical reality, current knowledges of society deny that past laws, of custom or religion for instance, have ever been anything other than 'social' interests or constructions. Any possible distinctiveness belonging to issues of law and justice is lost, as the contemporary regulations and policies that constitute 'law' also are characterized as social practices in a world of social practices.

Today, then, the question of the foundation of law changes complexion. It no longer suffices to inquire as did Nietzsche into the conditions of faith in foundations and the possibilities and pathologies of reason as such. It is not enough to ask whether we must reject justice as a false ideal or whether we can think about law without reproducing old metaphysical truths. Over the course of history, we have grounded law's justice in the virtue of the polis, in natural law, in the categorical imperative, in principles of utility. Most recently, we have grounded it in the positive law of society that asserts its own will through social scientific power-knowledges of governmental regulation. With the recognition that with positive law, 'the power of command assumes the place of ground and source of all law [...] What indeed empowers the will to command is the will itself' (Nonet 1990, 670) the solipsistic social mastery or social regulation that is the positive law of society comes keenly into view. The issue now is to ponder such mastery. The question is how to speak of law and justice without falling under the sway of a sociolegal world-view that would treat all law and its justice in the terms of empirical, calculating, instrumental strategies and techniques that properly belong to modern regulatory society and its positive law. Are there words with which to let *other* law show itself? Can the

3 See for instance, Nietzsche 1974 [1882], §§ 245 and 381, and Nietzsche 1954 [1883-85], 'On the Vision and the Riddle'.

language of the modern positive law of state and society show anything other than itself?

2. Language

Today state law appears as positive law or as 'the' law, presenting itself at least in part in written texts and spoken acts. Many acts of state law—not only marriages, contracts, and appeals mentioned above, but also deeds, wills, sentences, appointments, judgements, dissents, objections, enactments—are acts of language that must be expressed by one and apprehended or heard by another to succeed. These acts of language are 'social' in the sense of requiring another to hear them, but they are not necessarily social in the causal and efficacious ways that sociolegal studies recognize.[4] Even, or perhaps especially, those who would identify law with the power of a violent state admit that the formally valid speech acts or enactments of officialdom may be neither powerful nor efficacious. Legal realist scholars dismiss the language of law or downplay it as a manifestation of more telling social power.

That even acts of state law or positive law need to be heard in order to transform states of affairs suggests that law is not exclusively within the control of its speaker, much less a pure matter of command or of will.[5] Nor is the successful legal act completely conventional in the sense of being socially agreed-upon or determined according to rules.[6] Law is a matter of rhetoric; as speech, it appeals to an audience and is open to contestation, as well as to going wrong. In law, two or more persons engage in a dance or a dialogue of claims and counterclaims whereby first and second persons take turns as 'I' and 'you,' persuading and being persuaded by one another. Persuasion in this sense need not be manipulation. It indeed requires the skillful performance of an act before an other. But that the act must occur before an addressee who apprehends it, shows that it is not completely in the charge of the person who speaks. That its contestation may be persuasive shows that it is not completely conventional or generally agreed-to as such (Reinach 1983).[7]

Speech acts of claiming or of complaining or of objecting, for instance, do not cause claims or complaints or objections. The social act of marriage does not cause the marriage. In its joint expression and apprehension, the social act of claiming (or of marrying) *is* the claim (or the act of marriage). A felicitous claim requires expression by a speaker and apprehension by another, who may acknowledge the claim for what it is, a claim, while simultaneously disagreeing with or rejecting it. That a social act such as a claim has occurred changes a state of affairs. Although an objection to a

4 I follow Reinach in calling these 'social acts', but it is important to note that they are social in the sense of involving both a speaker and hearer, rather than in the sense of being a 'product' of society.

5 J. L. Austin says as much about speech acts more generally in Austin 1975.

6 Here I veer from some readings of J. L. Austin. Austin himself notes that conventions may be initiated, however.

7 See Cavell 2005, distinguishing conventional performative utterances in which 'I' am the focus, and passionate utterances of seduction, persuasion, disappointment, for instance, in which 'you' are crucial to the success of the speech act.

question during cross-examination at trial for instance may be quickly sustained or overruled, the utterance that succeeds as an objection initiates or transforms a state of affairs for however short a period of time such that the questioning objected to is suspended. In the usual course of things, such an objection calls for a response from the judge. That particular responses (sustaining, overruling) are more conventional than others does not mean that the objection causes the judge's particular response. The objection may cause an observer to groan or opposing counsel to shake her head, but these responses or effects are not essential to the legal/social act of objection as such.

The felicitousness of a legal utterance as an act of *this* particular sort, in other words, does not cause a particular outcome nor imply that its hearer agrees with it, although it does initiate a new state of affairs. It does imply that the hearer understands something of the speech or language being used. The speaker's and hearer's shared knowledge of language and how it is used and is usually responded to is 'imperfect' in several senses, however. First, the knowledge of language use of two persons is seldom if ever identical. Their dialogic skills differ. So too does their knowledge of the world in which and about which they speak. Further, in addition to being an incomplete knowledge, theirs is an ongoing and continual knowledge of speaking. In a grammatical sense then, as noted in the introduction above, the knowledge that the two share can be represented as 'continuous' or as 'imperfect'. 'They were speaking English at the time that one complained', for instance. 'They were still speaking English when the other responded'. Or: 'although they both speak English, the other failed to respond. They no longer spoke'.

As these examples show, legal/social acts no less than other utterances take place as events against a backdrop of shared practical knowledge of speech. They participate in habitual or ongoing ways of speaking and living and also interrupt them. 'Law' refers not only to particular acts and events of these sorts, but also to the imperfect and incompletely articulated and articulable knowledge of how to speak and act with one another that is required for these legal/social acts and events to occur. In other words, law refers not only to particular acts, but also to what Robert Cover calls a '*nomos*' or normative world (Cover 1993) or to what Pierre Clastres associates with the 'empty words' of a chief who repeats, without any need to be listened to, that this is the way our ancestors lived and that we must follow their example (Clastres 1987, 151-154).

Identifying law with shared language this way leads to thinking about membership and belonging less in terms of state citizenship, national identity and moral or religious community, than as matters of the common though imperfect and possibly overlapping tongues through which persons understand one another. Conflicts of law cases and indigenous claims to sovereignty suggest as much.[8] But we must not get too far ahead of ourselves. Let us stick to the current language of law. In what is commonly taken as law today, social acts of positive law such as those

8 See articles in special issue edited by Knop, Michaels, and Riles 2008; see also Constable 1993.

mentioned above—marriage, contract, appeal, complaint, objection, and so forth—take place in dialogue where (at least) two persons take turns speaking and hearing as 'I' and as 'you'. In dialogue, the 'I' or speaker of law—whether claimant or official or something else—addresses another who hears, but the 'I' does not address 'you' simply. In acts done in the name of the law, the speaker speaks in the name of an ostensible third party, law. As such, the speaker aims to recall to you, who 'we', who share that law even as we share language, are. Enactments beginning 'This law shall be known as [...]' attest that even ostensibly neutral measures addressed 'to whom it may concern' appeal to hearers who are presumed to know and share language.

Third parties are susceptible to being misrepresented. The third party that is law is no exception. An addressee may disagree with or contest the claims that a speaker makes in the name of their shared law. In disagreeing, the former second-person 'you' speaks now also as 'I' in the name of 'our,' first-person plural, law. 'Law' again names the imperfect relation of 'you' and 'I' (or 'we') manifest in our usual or habitual, continual and ongoing, yet interruptable ways of living, acting, and speaking together. Even as our knowledge of language and law remains imperfect, 'we' are bound through imperfect and dialogic speech to one another.

In being spoken, law is susceptible not only to misrepresentation as has just been noted, but also to other infelicities of speech and action. Legal utterances can be coerced or mistaken. They can be misheard and misunderstood. They can be spoken inappropriately, incompletely, incorrectly, insincerely. Legal claims may be deceptive, hypocritical, or strategic. (Indeed, some sociolegal scholars imply that they always are.) Law struggles to master speech, training its students and practitioners to read and write, endlessly codifying and glossing its own words. It criminalizes perjury and fraud; it regulates the time, place and manner in which things may be spoken. Even as it aims to structure its own speech and hearing through civil and criminal procedures, it also acknowledges that it cannot always hear what it's told, as in the *Miranda* warning,[9] or tell what it hears, as in obscenity law.[10] Dicta and precedent return to haunt the common law. Law's own speech as well as the speech of others escapes the control of positive law. Language and its use fails. In failing, it cannot provide foundations of law in any traditional sense. Yet, as Part III suggests, the language of law and its failings may yet have implications for law's justice.

3. Justice

If as a historical movement, positive law grounds itself in its own absolute will as the will of society and thereby threatens justice (Part 1), it is nevertheless still the case that the positive law of the state today relies on and is to some degree indebted to language and speech (Part 2). Its law is not justice, as legal positivism reminds us. Neither is language truth. Words, in particular contexts, may be true or false though. So too laws, we shall see, may be just or unjust. The truths of our words are possible

9 *Miranda v Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1966); see analysis in Constable 2005, chapter 7.
10 Justice Potter Stewart: 'I know it when I see it'. *Jacobellis v Ohio*, 378 U.S. 184 (1964).

on the joint basis of the human capacity to speak and of the promise of language to reveal the world. Not only truths, but also concealment and untruths, accidental infelicities and deliberate deceptions, however, accompany speech (Heidegger 1997, 220).

Through contract law and criminal law, modern law addresses breaches and promises of truth. It does so imperfectly. The contract law that recognizes agreements for instance has not always and does not universally require the keeping of words or of promises; it remedies breaches of enforceable promises, often, only with monetary damages. Criminal law too, despite the dependence of its sentences on the conviction of subjects who predicate as Nietzsche points out, modulates its judgements of responsibility. Even as it holds those who act accountable, it qualifies acts or verbs through adjectives of intent, offering human beings who act 'unknowingly' excuses for instance. It inscribes not only the grammar of subject and predicate, but also the grammatically-inflected dualities of bodies and minds, acts and intents, *mens rea* and *actus reus*, into law.

In the same way as language, however imperfectly, reveals the world we know, law names our way of living or being with one another. Just as particular utterances can be judged to be true or false only because language promises to reveal the world truly, so too particular laws can be judged to be just or unjust only because law claims, however implicitly, justice. Where is the claim of justice to be found today? Legal positivism, recall, disclaims or disavows the justice of law, while state policies and officials present positive law as regulations grounded in the will of society. Even as they impose such a will, however, officials insist, often crudely and in behavior that is dismissive of words, that they are carrying out their duties in the name of the law. An appeal to the 'name' of law by the powerful social forces of the state points to the inadequacy and even deceptiveness of speech. The state, imposing itself, recognizes no other name or law than its own and takes itself to be grounded in will. Words fall short in this world of absolute positive law. The name of law to which the state appeals only conceals the state's actual insistence on an absolute law of society that neither recognizes nor respects anything outside its own power, including language.

But for those with ears behind their ears, as Nietzsche puts it, the appeal of the state to the name of law is an act or claim of language. This claim suggests that 'justice' remains, at least implicitly, an issue. Justice is at issue in the false and possibly unspoken appeal by the state to law, which as a word or a name belongs, in the first-person plural, to we who speak a common language. Appeal to the name of law implicates, in a potential dialogue of admittedly imperfectly shared language, those who speak and hear such words as 'name' and 'law'. 'We' who hear are joined and divided over issues of law through a common tongue that positive law, with its simultaneous drive to articulation and paradoxical dismissal of law-on-the-books, has not completely mastered. Speech escapes positive law. Our language recalls other laws. Our language and its—most gentle—law quietly raise issues that exceed the articulations and control of powerful states and the concerns of the most strategic and instrumental of social policies or positive law. These are the issues of justice.

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Justice and the Colonial Collision: Reflections on Stories of Intercultural Encounter in Law, Literature, Sculpture and Film

Rebecca Johnson*

We also have no history of colonialism.
Canadian Prime Minister Steven Harper[1]

Communities, and particularly national communities, are constituted in part through narratives about their origin. In settler societies, originary stories of contact and arrival have played foundational roles in the national imaginary. Questions of membership, belonging, inclusion and self-definition have been imagined in particular ways in these stories—stories which position people in relationship to each other and to the state.[2]

While there are still some who continue to tell stories of Canadian colonial innocence, it is clear that the Canadian national imagination continues to be haunted by the question of aboriginal-settler relations. The Canadian state has had a long history of criminalizing indigenous law and culture, of hanging their leaders and incarcerating their people, of dispossessing indigenous peoples of their land, of forcibly removing their children from their families to be placed in residential schools where they suffered physical and sexual abuse, of legislation prohibiting indigenous people from using law to pursue their claims.[3]

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** Many thanks to the editors of this volume for opening a productive space for me to spend time thinking about this case, and sorting through the different genres in which justice might be expressed. I have learned much along the way. As always, the process of learning is filled with debts. Elisapee Karetak is at the front of that list, as her film made visible to me a history that I had not known, a history that remains to be re-storied. My wonderful colleagues at the University of Victoria have always fostered a space for engagement and thinking anew, and I have learned much from students in my criminal law class, who asked questions that helped me focus attention in different directions. I owe further debts to all those involved in the visionary Akitsiraq I law program, a program that opened space for a different way of imagining Canada's colonial past and future.

1 Ljunggren 2009.

2 For a longer elaboration of this point, see Lessard, Johnson & Webber 2010, 5.

3 Much of this history is captured in the Report of the Royal Commission on Aboriginal Peoples, Canada 1996. See generally, Borrows & Rotman 2003.

Law, while implicated in many of these histories of injustice, has not operated on only one side of the colonial equation. Though law has been the vehicle through which people have been stripped of land, culture and indeed humanity, it has also been used to undo colonial policies, acknowledge indigenous claims and histories, deliver justice.[4] Even in the face of law's many failures in Canada's colonial past, one can point to moments of seeming success. For example, the acquittal in *R v. Kikkik*, a high-profile murder and criminal negligence trial from 1958.

The case involved two Ihalmiut families. The Ihalmiut were a small band of Inuit (at the time called 'Eskimo') whose culture was dependent almost exclusively on caribou. The Ihalmiut, due largely to author/explorer Farley Mowat's book, *The People of the Deer* (1952), were among the best known Inuit in Canada,[5] and in 1956, were featured on the cover of *Life* magazine, with the title 'Stone Age Survivors'.[6] Two years later, they were in the international news again, but this time the headlines spoke of murder and criminal abandonment. A man named Ootuk had shot his brother-in-law Hallow in the back of the head. Hallow's wife Kikkik in turn stabbed Ootuk to death. Then, in an attempt to reach the nearest trading post, she began a 45 kilometer trek, carrying a baby on her back, and dragging two of the other four children behind her on a caribou skin. Several days into the journey, she left her daughters Nesha and Annacatha behind, buried in a snow cave. Nesha froze to death, but Annacatha was found alive. Kikkik was charged with the murder of Ootuk, for criminal negligence in the death of Nesha, and for the abandonment of Annacatha. The jury hearing the trial seemed to understand that the trial was a space of intercultural encounter, and in that space, acquitted Kikkik of all charges.

In this paper, I take up *R v. Kikkik*, one of these moments of ostensible success, in order to ask what might be learned about law and justice by exploring the different ways the story of encounter is told. Here, I juxtapose four different accounts of Kikkik's story: the trial transcript; a narrative account in a best-selling book; three Inuit sculptures; and a documentary film.

We will begin with the legal story captured in the trial transcripts of *R v. Kikkik*. From the transcript, I will focus on the statement given by Kikkik to the police (through a translator), the strategy of Kikkik's lawyer, the judge's charge to the jury, and the jury's moment of judgement. The trial transcript seems to offer us an objective account of the facts, one focused on questions of *actus reus* and *mens rea*: what did Kikkik do, and what were the reasons for her actions? In this story, though challenges of cultural translation float just below the surface, Justice itself emerges primarily in the jury's pronouncement of the phrase 'not guilty'.

The second text is a chapter from Farley Mowat's book *The Desperate People*

4 On this double-direction in law in the context of settler-aboriginal relations, see Borrows 2002.

5 In contemporary Canada, the community would be referred to as the *Ahiarmiut*. Here, where much of my focus is on a case situated in the 1950s, I will largely use *Mowat*'s term, *Ihalmiut*, conscious of the very real politics of naming. For more on the challenges of ethnic nomenclature for the peoples of the arctic, see King & Lidchi 1998, 10–17.

6 For the role of these photos in sustaining a certain image of the Ahiarmiut, see Marcus 1998, 190.

(1959). In this work, Mowat draws on a number of literary tools to offer the reader a powerfully subjective and embodied experience of Kikkik's story, as well as the backdrop conditions of starvation and cultural dislocation caused by the government's 1957 decision to relocate the Ihalmiut from their traditional territory to a location over one hundred miles to the North. This text invites the reader to occupy the subjective points of view of several of the parties, and makes visible a number of the colonial injustices which had remained unaired in the courtroom.

There is a third rendering of the story in three carvings by Inuit sculptor Peggy Ekagina, carvings that are part of a collection of Inuit sculpture on display in the Yellowknife Courthouse. These three sculptures (representing the deaths of Hallow, Ootuk and the child Nesha), open up space for another way of engaging with Kikkik's story. We will consider both the images captured in stone, and the conditions of their production in order to pose additional questions about colonial collisions.

Finally, we will look at the film *Kikkik* (Gjerstad and Karetak 2001) – E1-472 (Kreelak 2003).[7] Made nearly 50 years after the fact, the film offers us the tale of Kikkik narrated from the perspective of Kikkik's daughter Elisapee (who was carried on her mother's back in 1958, but who knew nothing of the events that occurred until, as a 16 year old, she read Farley Mowat's book). The film foregrounds questions, like 'Who was my mother? How did these terrible events happen? And how am I linked to this past?' The film draws us into a conversation about the continuing demands of justice, demands linked perhaps less to questions of guilt and innocence than to questions of visibility, acknowledgement and the need to think about reconciliation of colonial and indigenous legal orders in the present.

Set alongside each other, these different texts make visible the many challenges for the legal imagination as it seeks to do justice at the encounter of settler and indigenous legal orders. Each genre of story, with its enabling and limiting conditions, provides us with a different field of vision. Taking inspiration from James Clifford's work on juxtaposition (Clifford 1988, 10), the recasting and repositioning of those stories alongside each other can better help us understand how, in the space of intercultural encounter, we are both caught in and implicated in the stories of the other.

1. The legal case (the trial)

Let us begin with our legal text, captured in the form of 'the case'. This was a case that had captured national and international public attention. Murder in the far north was an uncommon event, and this story involved 3 dead bodies. The facts were widely reported, and seemed largely uncontested: Hallow was dead at Ootuk's hand; Kikkik had admitted to killing Ootuk, and to leaving two of her children buried in the snow.

7 The 2001 film is available online at <http://gjerstad.info/ole/portfolio/kikkik-2001/>. There is a second version of the film, completed a few years later, written by Elisapee Karetak, co-produced by Ole Gjerstad, and directed by Martin Kreelak, which draws on the material from the first documentary but adds another 30 minutes of footage. Available on <http://www.isuma.tv/hi/en/imaginenative/kikkik-e1-472>.

At issue was only the legal meaning to flow from these facts. Two separate trials were to be held, one on the murder charge, the other on charges of criminal negligence and abandonment. The trials were held in Rankin Inlet before Justice John Sissons, the first resident Justice of the Northwest Territories Supreme Court. The Crown Prosecutor and Defence lawyer were flown in from far distant parts of Canada. A 6 man jury was struck from the community, all of them men working in the Rankin Inlet nickel mine, two of them Inuit. Time-Life had also flown a team of journalists to the north, providing the public with photos and media coverage of the trial.

In Canada, non-jury trials result in publically accessible judicial reasons, generally in the form of written and reported judgements.[8] These judgements do not simply report the outcome, but also set out the legal question, give an account of the evidence and arguments made, and provide a thoroughly reasoned application of the legal principles to the facts. Jury trials do not generate the same kind of legal texts: while the trial judge has a legal obligation to provide reasons for the conclusion,[9] the jury is prohibited from doing the same thing.[10] In a jury trial, the functions of judgment are split,[11] and the jury's role is to perform its judgement in the most binary fashion, pronouncing an accused 'guilty' or 'not guilty'. In the context of an acquittal then, we are left with a very spare form of legal text, little more than 'a conclusion'.

To better understand the elements behind a jury's moment of decision, one can look backwards to the trial transcript.[12] Though the transcript is not a judgement, it does provide us with a kind of legal text to explore: the record of what went on in the courtroom, the testimony of the witnesses, the rulings on admissibility of evidence, the arguments of the lawyers, the judge's charge to the jury, and the jury's conclusion. From the transcript, I focus on 4 pieces of the story: the challenges of translation, Kikkik's account of the killing, the strategies used by the defence lawyer in cross-examining witnesses, and the judge's address to the jury.

The first observation is that the challenges of both linguistic and cultural translation are visible throughout the transcript. This is not surprising since there

8 For Bryna Bogoch's work on the reporting of judgments in Israel, see Bogoch, Halperin-Kaddari & Katvan 2011.

9 In the Canadian context, the duty of a trial judge to provide reasons for conviction is set out by the Supreme Court in *R. v. Sheppard*, [2002] 1 S.C.R. 869. The reasons must be sufficiently intelligible to allow an appellate court to review those reasons for correctness.

10 See § 649 of the Criminal Code of Canada, which makes it a crime to disclose any element of the juror's deliberation process, or any discussions of the jury that happened outside of the open court process.

11 In a jury trial, the functions of judgement are split between the judge and jury: the judge (the 'finder of law') ensures trial fairness, and explains the relevant legal principles to the jury. The jury (the 'finder of fact') decides what facts have been proven and applies the law to those facts to come to a conclusion on the question of guilt or innocence. Where the jury pronounces an accused guilty, there is a sentencing hearing, and in the report of this hearing, there may be a more robust account of the story, and the judge determines the appropriate punishment. But where an accused is acquitted, there is nothing more to say.

12 Unless there is an appeal from a jury trial, the trial transcript is generally not available. In his own biography, Judge Sissons devotes a chapter to the Kikkik case, reproducing parts of the transcript from each of the two trials. Elisapee Karetak acquired a copy of the transcript from the murder trial, and made it available to the University of Victoria's law school library. Unfortunately, it seems that the transcript of the second trial (on the criminal negligence and abandonment trials) is no longer available.

were very few people from either community who were truly literate in the language of the other. A conscious effort was made to ensure a representative jury, but even still, one of the Inuit jurors had to be replaced because he could not follow the proceedings in English. Further, the court interpreter had to be replaced as he kept summarizing the testimony rather than reporting it. Throughout, there is evidence of slippage in the words and concepts being used to speak across the language divide. We will return to this question later, at this point noting only that worries about translatability were very much in the minds of those participating in the trial.

With the challenge fore-grounded, let us turn to the account of killing provided by Kikkik herself. While other witnesses took the stand, the main evidence against Kikkik came in the form of the statement she gave to the police (through an interpreter during two days in custody).[13] Here, I reproduce the statement as it was admitted (and read to the jury):

> Q. Will you tell me everything that happened on the day your husband died, to the smallest detail?
> A. Yes. Early in the morning Hallow got up and we had no food, he went jigging and caught two fish, he returned to the igloo and started to eat. Just before Hallow started to eat Ootuk came to visit us and ate with us. While eating Ootuk and Hallow discussed going for Family allowance to Padlei, they did not talk anymore and Hallow left to go jigging.
>
> Ootuk stayed in the igloo. Ootuk said that he would like to gather up the caribou hide as it would be good to eat. I said I have no more caribou hide. Ootuk tried to eat a small piece of caribou hide which were scraps from the boots I was sewing. When Ootuk finished eating the hide he said "I would like to look for ptarmigan" and Ootuk went out.
>
> I told my daughter Ailoyoak "you go out and see where Ootuk went." I asked her this because it was a very stormy day and I knew it was no good to hunt ptarmigan and I wanted to know which way he went. My daughter Ailoyoak went out and came back right away and Ailoyoak said that Ootuk is walking downwind towards the edge of the lake.
>
> A little later I heard someone walking outside the igloo and I thought Hallow had come back but Ootuk entered the igloo and said "it's cold." He stood beside the stove. Ootuk wanted a cup of tea and Ailoyoak put some old tealeaves and a little water on the stove. When the tea got warm, everyone had a little tea. Ootuk then asked my children to fix his doorway, but the children did not go. Ootuk then asked me to go and fix the door to his igloo and for me to take Hallow's shovel. I said "yes" but I did not go.

13 Judge Sissons spent significant time determining whether or not the statement had been voluntarily given. Though this case was heard long before the right to counsel found constitutional protection in the form of § 9 of the Canadian Charter of Rights and Freedoms, it is nonetheless disquieting to see in the record that not only was Kikkik questioned over two days without the presence of a lawyer, she was also unrepresented by counsel at her preliminary inquiry. Elisapee Karetak pointed out (in an email conversation, on file with author) that her mother's case changed the way the Circuit Court subsequently addressed the need for an accused to have a lawyer present in questioning.

Ootuk then went out and I followed shortly after. Ootuk was cleaning Hallow's big rifle just outside the igloo. I asked Ootuk why he was cleaning the rifle and he answered "I am taking the snow off it." I was afraid and told Ootuk to leave the rifle alone. Ootuk was rubbing the snow off the rifle with his hand.

I took hold of the rifle and Ootuk held it also. Ootuk said "I won't bother you and you let it go." I let go of the rifle and Ootuk started pointing the rifle at me. I was about five to six feet from him at the time. Ootuk had the rifle at his shoulder at a normal firing position and I jumped and grabbed the barrel near the muzzle. The rifle went off and the bullet just missed my head as I had pushed the rifle sideways as it went off. I had grabbed the rifle with my left hand. After the bullet we started to fight for the rifle. I got both hands on the rifle. I fell down but managed to get up again. We were fighting at this time. When I got up I knocked Ootuk over. Ootuk was pretty weak and chilly and not strong.

I was right on top of him and I called for my daughter Ailoyoak. She came quite soon. I thought that Hallow was still alive. I asked Ailoyoak to take away the rifle and said, "As soon as you get it away you bring your father to help me." Ailoyoak got the rifle and started running with it towards the jigging hole to get her father. Ailoyoak returned, was crying and saying, "My father is shot and is dead." I asked Ootuk why he had shot Hallow and Ootuk answered, "it's not my fault, my wife told me to kill Hallow." I said "I don't believe you as Hallow is Howmik's brother." Ootuk said "Hallow was Howmik's brother and does not look after his sister." I did not answer and Ootuk said "You let me go now." I said "yes" but did not let go. Ootuk then offered to give me his deaf and dumb daughter to let him go.

My daughter Ailoyoak went in the house at this time. I told her to go as she was getting chilly, cold. I asked Ootuk how I could look after my family now that he had killed my husband. Ootuk answered "You will get lots of family allowance and will be all right after." I answered "I could never look after them." Ootuk said "I will get lots of rations and I will look after everybody." I did not answer. We did not talk again and I still held Ootuk down.

I then called "Daughter, daughter" and both Ailoyoak and Karlak, my son, came out. I was still holding Ootuk. I asked my daughter to bring me a knife. Both Ailoyoak and Karlak bring me knives which they got at the igloo. I then tried to stab Ootuk with the large knife my daughter had brought but it would not work, as it was too dull. I stabbed once near the right breast with the large knife but it would not go in. Ootuk grabbed the knife with his right hand and took it from me. When he grabbed it away he struck his forehead some place and I got the knife back and dropped it and picked up a little knife which my son Karlak handed me. Karlak was standing beside Ootuk and I. As soon as I got the small knife I stabbed in the same place. The knife went in and I stayed on Ootuk until he died. When Ootuk stopped moving I removed the knife and stood it up in the snow behind Ootuk's back.

Kikkik's lawyer, Sterling Lyon, later to become the Premier of Manitoba, did not object to the admission of the statement, taking the position that it revealed no crime: Kikkik had simply done what was necessary to protect both herself and her children. The Crown Prosecutor took the position that there was no self-defence here as the evidence showed Kikkik to have been in complete control of Ootuk. The Crown did suggest, however, that Ootuk's killing of Hallow was the kind of provocation that could reduce murder to manslaughter.

In his cross-examination of the Crown Witnesses, one can see the defence lawyer buttressing Kikkik's defence by painting a story of starvation and of fear. On the first of these, he asked each of the Crown witnesses questions about food shortages amongst the people at Henik Lake.[14] In each case, he sought confirmation that food had been scarce, that there was little found in the stomachs of the dead. His questions also made visible that one of Ootuk and Howmik's children had died a few days earlier of starvation. The second set of questions focused on Ootuk himself. Each witness was asked if they knew of Ootuk's reputation as a 'witch doctor' (rather than using the less pejorative term 'shaman'), and if they were afraid of him.[15] During his cross-examination of Howmik (Ootuk's wife), Lyon also suggested that Ootuk would beat Howmik, because Ootuk wanted to swap wives with other men. This line of questioning tended to characterize Ootuk as someone particularly dangerous, and of bad character, someone that Kikkik would be right to fear.

Let us turn then to Justice Sissons' address to the jury.[16] In his own biography, Sissons reproduced this section of his charge to the jury:

> The privy council of Great Britain knows the common law and has been for centuries the final court of appeal for British colonies, and has a wide experience with, and knowledge and understanding of, colonies and native peoples. I think we should follow the Privy Council thinking and approach. It is by far the best there is.
>
> According to the Privy Council the application of common law principles is somewhat controlled by the evolution of society. Self-defence and provocation have been differently estimated in differing ages. The common law has not changed but in earlier times, when our society was less secure and less settled in its habits, the courts took a more lenient view towards provocation and self-defence, as an excuse or justification, than is generally taken in our society

14 These questions are interesting in terms of the gap they open up, both in terms of Ihalmiut/settler differences, as well as with respect to questions of translation. So, for example, the lack of food is emphasized in the cross-examination of Howmik (at p. 58). But then, on p. 63 of the transcript, there is this interchange between Lyon and Yahah (Howmik's brother): Q. Were you able to leave any food for Kikkik and her children when you left for Padley? A. No Q. Food was very short, was it? A. No, it was not short. Here, one wonders about the translation of the phrase 'food was very short'.

15 Here, the word 'shaman' never emerges, but only the more pejorative term 'witchdoctor'. See the cross-examination of Howmik at p. 56; also the cross-examination of Yahah at p. 64: Q. Was Ootuk a witch doctor? A. Yes. Q. Were you afraid of him? A. I had no cause to be afraid of him.

16 In the address as a whole, he reviews the law on murder, explains both provocation and self-defence, and reminds the jury that their job is to be the judge of the facts.

> today when we are more secure and life is guarded by an efficient police force and there is a policeman at every door. [...]
>
> In this present case we have a very primitive Eskimo society, which has not changed very much and is still very insecure and unsettled, with no policeman within one hundred and fifty miles. Justice demands that we revert in our thinking to an earlier age and try to understand Kikkik and her life and her land and her society.
>
> We have at this trial a jury which is well balanced and has an exceptionally wide and accurate knowledge of the area and the people, and a great deal of good common sense. […] [T]he tests here have to be applied to an ordinary Eskimo, Kikkik, and such a jury as we have here is invaluable.

Justice Sissons' address to the jury foregrounds the challenges of justice in the space of intercultural encounter. While one might, with contemporary eyes, take issue with Sissons' description of the Inuit as 'a primitive society', one can see manifest his sense that she should not be judged by the expectations of a southern people, a people unaccustomed to the land. In the reference to the need to 'revert to an earlier age', in his reference to her as 'a woman of a primitive society' we also have very clear echoes of enlightenment notions of progress, of more or less advanced peoples. And here, the colonial centre is drawn on as a source of understanding and justice: the Privy Council understands the colonies and native peoples, and has an evolutionary approach to justice. The jury is invited to use the resources of the colonial legal system to do justice in this case.[17]

The jury, we are told, returned in ten minutes with its verdict of Not Guilty. While we cannot know 'why' they came to this conclusion, one might imagine that the facts and context allowed the jury to absolve Kikkik of responsibility in these deaths by placing the blame elsewhere: on Ootuk, who had killed Hallow and threatened to kill her and the children; or even on the North itself, which had failed to provide sustenance for the people, leaving them deranged from hunger or sorrow.

But this acquittal did not mean she was free, for it was only the first of the two trials[18]. The second trial, on the Criminal Negligence and Abandonment charges, began later the same day, picking up where the evidence at the last trial had left off. On February 8th, Hallow and Ootuk both lay dead. At this point, Kikkik's only hope of survival lay in finding food at the Padlei trading post, some 45 kilometers away. The court heard from Kikkik's 12-year-old daughter Ailoyoak, her testimony being translated a sentence at a time by trader Henry Voisey. Through the child, the jury were told that Kikkik had loaded up the children and the sled, and, pulling it herself, had begun to walk. After the first day of travel, they met up with Yahah and his family,

17 Indeed, one gets the sense that the jurors are invited not simply to determine Kikkik's guilt, but simultaneously to put colonial justice on trial. This is an argument made by Orit Kamir (2000, 39) in the context of thinking about King Solomon's judgement (that what is on trial is not the question of 'who is the right mother', but is rather 'what is the source of Solomon's wisdom').

18 A copy of this second transcript is no longer available, and so we can turn only to discussions of the case in the memoires of Justice's Sissons and Parker.

who were also attempting to reach Padlei. They were, however, unable to keep up the pace. Yahah (who also gave evidence to the court) told them he would take the sled to go on ahead, and they should remain in a snow house; he hoped to make faster time and return with help. Yahah gave them a small amount of caribou entrails to eat before leaving, and they waited in the snow house for several days. After no help arrived, they decided they would have to go on: Kikkik carried the baby on her back and hauled Nesha on a deerskin, while Ailoyoak hauled Annacatha. At night, during a blizzard, Kikkik shovelled a depression in the snow, covered the children with the skins, and sat up for the night. In the morning, she woke the two older children, left the younger ones sleeping under the skin, covered them with the snow blocks and some sticks, and continued on.

Later that day, an RCMP (Royal Canadian Mounted Police) plane spotted Kikkik outside an abandoned cabin, midway between Henik Lake and Padlei. The temperature that day had ranged from between 28 to 42 degrees below zero. Having been told there were 5 children, they asked Kikkik where the other two were. She told them that Nesha and Annacatha had died during the night and that she had buried them in the snow. Kikkik and the three children were then flown on to Padlei. The following day, Constable Laliberti organized for a ground search for the two children's bodies. They followed the trail backwards with an eight-dog team and Inuit guide. Though the men lost the trail, the dogs heard something, and ran for a mound of snow off to the side. The two men heard a voice calling out. Throwing off the sticks that marked the mound, they moved some snow blocks to find a blanket of caribou skins, with two children covered, lying on their side, facing the same direction. Both were wearing heavy corduroy shirts, and were naked from the waist down. Nesha was dead, but Annacatha, still alive, simply smiled up at the constable. The jury were told that there had been no tears, or hysteria from the child.

The question at this second trial was, 'why hadn't Kikkik told the rescuers that the two children had been buried alive, and that they were not yet dead when she left them?' If she had told them right away, there was a possibility that both girls might have been saved. Again, Kikkik's words entered in the form of a statement given to the police through an interpreter:

> Q. Were Nesha and Annecatha alive when buried?
> A. Yes, both of them.
> Q. Why did you bury them alive?
> A. They could not walk. I had dragged them a long way. They were heavy.
> Q. Why was it that when you were found that same afternoon that you did not tell the police about Annecatha and Nesha, as there was still every possibility that they could have been saved?
> A. I was afraid to say.

Justice Sissons charged the jury, telling them that she should be judged not based on the black and white letter of the law but rather in light of her circumstances and her culture. He further directed them to look at the context in order to assess whether or

not she did have the ability to provide the necessaries of life. Again, he referred to the principles of the common law, telling that, if Kikkik could not furnish adequate food, shelter, clothing or protection, the jury could conclude that she had no alternative, and that there was thus no abandonment.

The jury was out only for a few minutes before returning with a verdict of not guilty on both counts.[19] Certainly, the rapidity of the decision-making suggests that the testimony of death, starvation, and freezing storm provided the grounds for an assessment that Kikkik was not 'responsible'. Again, the problem was outside of her: in starvation caused by the failure of the caribou migration, in Ootuk's tragic murder of Hallow, in the punishing cold of the north itself. In such contexts, it is possible for the jury to understand the decision of Kikkik to leave two children behind as the kind of tragic choice made in order to save the lives of some. This is a story of tragedy, not a story of crime.

2. The book *The Desperate People*

Let us turn then to our second account of the story. This text is by Canadian author, Farley Mowat, an iconic conservationist and adventure/travel writer of the 1950s. Mowat, had travelled widely in the North, and had spent time living with the Ihalmiut people (including Hallow and Ootuk), who wrote a series on the case for the newspaper, and then followed up with a book called *The Desperate People*.[20] It is in the final chapter of the book that he tells the story of Kikkik.

Mowat arrives at the final chapter after having first drawn a vivid portrait of life amongst the Ihalmiut, a community of inland Inuit who had lived on the land near Ennadai Lake for over 1000 years, and whose culture was intimately linked to Caribou.[21] There had been little contact between them and the Canadian state before the 1940s. From the 1920s on, however, the Canadian government had been increasingly focused on questions of Northern Sovereignty. Though no treaties were signed with the people (Diubaldo 1985, 381), weather stations, military bases and DEW (Distant Early Warning) line radar stations were constructed across the north. All Inuit ('Eskimo') were counted and given tags with identification numbers, and were treated as wards of Indian Affairs.[22]

19 Indeed, in his memoirs, Judge Sissons said that the jury returned 'before the prosecutor could finish voicing his many objections to my charge'. Sissons also reports that the Justice Department had been unhappy with the charge to the jury (being of the view that the judge had pretty much directed the jury to return with an acquittal in the second of the two trials), and had wanted to appeal the case, but had not done so, realizing that 'public opinion would not stand for further harassment of Kikkik' (Sissons 1968, 111).

20 Mowat, unlike others at the time, had access to the trial transcripts, which Time-Life magazine had acquired for him.

21 This is in opposition to the coastal Inuit, who also hunt for caribou, but whose culture is more closely linked to the sea: seals, walrus, whales, polar bears.

22 These disks, stamped with 'Eskimo Identification Canada' provided a first name and a number. The number would indicate if the person was from the East or West, provide the number of the region the person was from, and then follow with an identifying number. The numbers enabled them to be identified for the purposes of Family Allowance, a social benefit that was available to all Canadians. In 1968, Project Surname began the process of shifting away from the Eskimo Identification Numbers.

Mowat makes visible the ways that contact with white traders and government policy seemed to bring in their wake patterns of social and physical dislocation: changes to migration patterns of the caribou, increases in tuberculosis and disease, periods of famine and starvation. By the mid-50s many Ihalmiut had died of starvation or disease. By some counts, there were only 52 Ihalmiut left near Ennadai Lake.[23] Around this time, the government decided the Ihalmiut should be relocated and retrained as fishermen.[24] This attempt failed miserably, and the Ihalmiut simply walked the long distance to return to Ennadai Lake. But in late 1957, following two more years of starvation, as the caribou migration had failed to pass by Ennadai, the government again decided to relocate the people. With no advance warning, planes arrived one morning, and in 6 flights, the Ihalmiut were flown from Ennadai to Henik Lake, over 200 miles away, and 45 miles from the nearest trading post at Padlei.

While the legal tale hinted at the hunger and starvation as a way of explaining Ootuk's actions (and justifying Kikkik's response), Mowat's text shows us that the starvation is not simply a matter of failed caribou migrations, or poor hunters. The people were left at Henik Lake with little more than what they had on their backs. Their dogs had mostly died (or been eaten) in the famine the year before. They were left in a terrain that was not familiar to them, with no winter food caches, no kayaks, and no dog teams. They could not travel to the caribou, and the caribou did not travel to them. Requests were sent for help that never arrived. Finally, in the blizzards of February, we watch family after family attempt to walk to the Trading Post to get help. We follow the trail of frozen dead bodies littered along the way, as people succumb to starvation and cold. In this narrative account, we watch as the Ihalmiut are crushed 'in a hell which had been contrived from them by men of good intentions' (Mowat 1959, 254).

And it is here that Mowat finally arrives at the story of Kikkik. The chapter opens in April of 1958, in the Rankin Inlet courtroom (or, as he describes the makeshift location, 'the beer-parlor-cum-recreation hall of the North Rankin Nickel Mine'). He describes the physical space, the jurors sitting uncomfortably on the wooden bench, an audience of off-shift miner's wives, a husky nuzzling at a garbage can outside the insulated building. He describes the planes converging on Rankin Inlet, bringing crown attorneys, defence lawyers and Indian affairs people from hundreds of miles to the west, east and south, and the strange disconnection of the small woman sitting on a bench, her moccasined feet not reaching the floor. He lets us hear the indictment being read to the accused:

23 As Marcus points out, there is contestation in the literature about the size of the population, whether they numbered in the thousands or only in the hundreds. But we do know that by the mid-50s, they had been reduced to only 50 people (Marcus 1995).

24 For an elaborated account of this and other attempts to relocate, retrain, and resettle the Inuit, see Tester & Kulchyski 1994.

> You, Kikik of Henik Lake, stand charged before his Lordship in that you, Kikik, No. E-1-472, did murder Ootek [...] How say you to this charge? (Mowat 1959, 251.)[25]

But having situated us in the space of the courtroom, Mowat uses the device of a flashback to pull us back to the evening of February 7, 1958. Using the voice of an omniscient narrator, he draws us to Henik Lake, where only two Ihalmiut families remain, huddled in their snow houses after three days of freezing blizzard. Significantly, we begin not in the igloo of Hallow and Kikkik, but find ourselves instead inside the snow house with Ootuk and his wife Howmik (crippled from an earlier battle with polio). In Mowat's description of the children inside the snow-block barricade roofed with a piece of canvas, one can catch a flavour of the writing:

> The year-old boy Igyaka, lay rigidly inert, and did not hear the wind. His small body was shrunken into a macabre travesty of human form by the long hunger which, two days earlier, had given him over to the frost to kill.
>
> Beside him on the sleeping ledge of hard-packed snow his two sisters lay. There was Kalak who had been born deaf and dumb out of a starvation winter ten years earlier and there was little Kooyak who was seven years of age. They lay in each other's arms under the single remaining deerskin robe—and they were naked except for cotton shifts grown black and ragged through the months. There were no more robes to lay across their bloated bellies and their pipestem limbs, and none to hide the frozen horror of the boy who lay beside them—for the other robes which the family had possessed when winter came had long ago been eaten, as had the children's clothes; for all of these had of necessity been sacrificed to hunger. (Mowat 1959, 252–253.)

But Mowat describes not only the horrors of cold and starvation confronting these two families, the last two to remain alongside the frozen lake. He also describes their bonds, the relationship between these two men, Hallow and Ootuk, brothers-in-law, lifelong companions (in Ihalmiut terms 'song-cousins'), and complementary halves of a whole: one was a hunter, providing food for both families; the other a shaman/visionary, shouldering and resolving problems of the mind/spirit. And so he has us sit alongside the two men as the better hunter tells his life-long friend that there is no food here to sustain even one family, let alone two, and that on the morrow, he will take his family and attempt to trek to Padlei. We watch, privy to both men's knowledge that Ootuk will not be able to follow with his own family: having eaten most of their skin clothing and robes, his children could no longer leave the snow shelter. Both men knew that Hallow's decision was a death sentence for Ootuk. And both knew there was nothing to be done. Hallow headed back to the lake to see if

25 The spelling of names in the book differs from the spelling of names in the court case: Kikik instead of Kikkik, Ootek instead of Ootuk, Halo instead of Hallow, Yaha instead of Yahah. Given that part of the challenge was in determining how to represent the sounds of Inuktitut in English, there were a range of ways people's names were spelled. Here, I will use the forms of names as captured in the trial transcript, except where I am quoting from Mowat's text.

he could catch another fish before trying the voyage. And so, Mowat tells us, Ootuk finished drinking tea with Kikkik. Finally, he left, taking Hallow's rifle and walking out onto the ice:

> He did not pause until he stood a single pace behind the crouching figure of his other self. Perhaps he stood there for an eternity, knowing what he would do, yet hesitating until the wind, blowing through the torn cloth parka, warned him that he must finish quickly. For indeed this was the finish—not only of the broken life that Ootek had led through the long years but, so he believed, the finish of the interminable struggles of the people who called themselves Ihalmiut. When such an ending comes, it is not good to go alone. Ootek intended that the few survivors by the shores of Henik Lake should be together at the end—and so he raised the rifle and, without passion, blew in the back of Halo's head. (Mowat 1959, 258–259.)

Through referencing the same facts, the narrative invites us to understand them through the minds of the Ihalmiut. We are asked to imagine ourselves as part of this small group, banished to the far north and left to starve and die. This telling does not suggest the Kikkik was wrong to take Ootuk's life. But it gives an account in which Ootuk is not painted as threatening witchdoctor, or a crazed aggressor; he is someone whose life and death must be grieved. Most significantly, the government is drawn explicitly into the frame of those implicated in the terrible tragedy: through their relocation (deportation) of the Ihalmiut away from their traditional home at Ennadai Lake, and through their failure to respond to messages that the people were in desperate conditions.

The trial transcript hinted at the difficulties facing Kikkik at this moment. The narrative form here makes it explicit, telling the readers that there was not enough wood to build a fire, and that to give water to her children, Kikkik would have to hold a bag of snow against her body, using her own reserves of heat to melt it. Even when she meets up with Howmik's brother Yahah, we feel the exhaustion of the woman who, carrying a baby on her back and having pulled a sled the day before, now lags behind the group with her 9 year old son Karlak, who cannot keep up the pace. Her resources are so depleted that she is unable to close a gap of one mile in order to sleep in the travel igloo Yahah had built, and that she instead crouched in the snow during the night, using her body to shelter Karlak beneath while the snow piled on top of her. When she managed to make it to the igloo the next morning, we hear Yahah tell her that he will take her sled. He will travel faster without her and try to send help back. She is to wait in the snow house with the children till help returns. And so, Kikkik and her five children waited in the igloo for five days with no food, and no heat.

And Yahah did arrive at Padlei, telling authorities what had happened, and where to find both Howmik and Kikkik. A plane was sent out. Howmik and her children were picked up from the banks of Henik Lake on the 14th of February. The plane flew twice over the snow igloo where Kikkik and her children were known to

be waiting, but it did not return for them. As Mowat puts it, using the same language that would be used in the indictment against Kikkik, 'for two additional days and nights, Kikkik and her children remained abandoned' (Mowat 1959, 270). The plane, instead of returning for Kikkik, took two days to fly to deliver the bodies of Hallow and Ootuk to the coroner at Eskimo Point. When the plane failed to return for her, Kikkik knew that she had no choice but to continue. Having not eaten for over a week, she spent one more day walking, dragging the two young girls in a caribou skin, before deciding what must be done if any of them were to have a hope of survival. She left the two girls covered by skins, placed some snow blocks on top, covering them with two twigs in the shape of a cross. At that moment, whether or not they still breathed, they were lost to her.

And so when the police located her near an abandoned hut along the trail, and asked about the two other children, she said they were dead. The facts are the same, but the focus is different. Our attention is taken off her failure to tell the police that the children might be alive, and is focused instead on the police who had been more interested in taking the dead and frozen bodies of the men to the southern coroner than with continuing the search for Kikkik and her children. And we see also that, having found Kikkik, they were not so anxious to recover the bodies of two dead children, as they had been the bodies of the two men, simply leaving a constable behind 'to collect the dead children by dog team the next day' (Mowat 1959, 273).

And so, in the last two pages of the chapter, we are returned again to 'the law', and 'the trial'. Mowat says relatively little of the law, telling us simply that Kikkik endured two preliminary hearings and was examined by a senior crown attorney flown in from Yellowknife, and all this without a defence attorney present. At that point, 'the whole mighty paraphernalia of our justice closed about her' (Mowat 1959, 274). But Mowat also adds:

> But here, if anywhere in this chronicle, there emerges some denial of the apparent fact that man's inhumanity to man is second nature to him. Kikkik was tried before a judge who understood something of the nature of the abyss which separated Kikkik from us, and who was aware that justice can sometimes be savagely unjust. (Mowat 1959, 274.)

He puts his stamp of approval on the decision, saying that it is 'to the everlasting credit of the handful of miners who held the woman's life in their hard hands, they did acquit her'.

In *The Desperate People*, Mowat puts his descriptive and lyric powers to work in the service of a set of arguments about law and justice. And the genre he has chosen enables him to write the legal tale in a way that is both passionate and polemical. We are invited to exercise judgement, but not against Kikkik. Rather, we are asked to judge the government officials who moved the Ihalmiut to Henik Lake in the first place; the officials who did not respond to early calls for help; the RCMP who chose to deal with the bodies of the dead before seeking bodies of the living; a state that imagined it could be appropriate to put Kikkik on trial in the first place. Interestingly, Mowat sees judge and jury alike as candles against the dark. It is not

'the law' here that poses the difficulties; it is the Canadian Federal Government. If there is an indictment of the justice system, it comes in the assessment (performed through the chapter) that the real crimes were incapable of being addressed in the courtroom itself.

3. The sculptures

On display in the Yellowknife Courthouse one can see the Sissons/Morrow Collection: 14 small sculptures, each carved by Inuit hands, representing landmark cases from the Northwest Territories between 1955 and 1970. Three of the works in the collection concern the Kikkik case. Here we have a different genre in which the story is told. Before turning to the carvings themselves, let me make a few comments on the conditions of their production.

In the 1950s and 1960s, as Inuit were being relocated and resettled across the north, the government set up a number of art programs. These were a kind of make-work program designed to give the newly displaced people something to do and a way to make a living. While government attempts to turn the caribou hunting Ihalmiut into fishermen had been a total catastrophe, the move to press the Inuit in the direction of art was more successful. As Dorothy Eber notes, 'there is not an art gallery in the Western world without an Inuit print' (Eber 1998, 53–54). Welfare teachers like Jim Houston had been sent to the north by the Department of Northern and Indian affairs and had actively worked to develop carving talent in the community.[26] The Coppermine Inuit, even with restricted access to materials, became masters of small composite carvings.

Justice Sissons, known amongst the Inuit as *Ekok-toegee* ('He Who Listens'), received just such a carving as a gift from an Inuit defendant. Inspired by the gift, he decided he would like to have more Inuit carvings to document some of the important cases he heard: and so the Sissons/Morrow collection began.[27] Believing it would be inappropriate to directly approach carvers to have them 'carve him a crime', he was never directly involved in commissioning the works.[28] In her research into the collection and the artists that produced the carvings, Eber discovered that few of the artists had any idea who had commissioned the pieces, or where the carvings had ended up.[29]

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26 In his own memoire, speaking of Jim and Alma Houston (who put the Inuit carvers on the map), Sissons reports that Jim Houston told him that 'if an Eskimo was hard up and came to him, he simply handed him a piece of stone and told him to take it and do some carving' (Sissons 1968, 98). For more on Jim Houston, and early Inuit photography, see also Eber 1998, 53.

27 For a lovely full length treatment of the collection, see Eber 1997.

28 He was perhaps not wrong that some Inuit would hesitate to represent some of the terrible acts occurring in these cases. When Eber was interviewing Inuit and working with images of the carvings in order to finally attribute authorship to various carvings, she spoke to the adult children of Peggy Ekagina, the woman to whom the carvings are now attributed. Eber reports that, when asked about the Kikkik sculptures, Ekagina's children refused to believe that their mother had produced them, denying that she would have carved the desperate acts depicted in the sculptures. See Eber 1997, 198.

29 In one excerpt that makes visible the ways that art production was sustaining daily life, the wife of one

Let us then return to the story of Kikkik, and the images we have of these three carvings from the Sissons/Morrow Collection.[30] Now attributed to Coppermine Inuit artist Peggy Ekagina (c.1919–93), these three small carvings tell key moments of the case in stone and metal. In each case, the key moment involves a death. In her book *Images of Justice*, each sculpture is accompanied by a few words of description. And so, one can see 'Kikkik kills Ootuk'.

Photos courtesy of the Supreme Court of the Northwest Territories.

The second image carries the label 'Ootuk murders Hallow, Kikkik's husband'.

carver recalls that her husband made the carving around the time he had ordered an outboard motor, a tent, and fish nets and didn't have food for the children. As she said, 'He collected those small little pieces of whalebone from the ground around the old Co-Op store. He took them home and started carving them' (Eber 1997, 192).

30 The visual and the tactilic offer us ways of apprehending the world that sometimes overlap and sometimes diverge. Kikkik's story is carved in stone, but we are in a position here only to look at an image; we are still a step away from the actual carvings, and are thus not in a position to feel the coldness or weight of the stone, to run our fingers over the surfaces, or to move ourselves in space around them. There are good reasons to attend to the differences in the media explored, but in the context of this discussion, where the carvings are accessible to most people only through the photographic image, it is hard to avoid the slippage. I thus move back and forth between speaking of 'the carvings' and of 'the images' conscious that there are times when one or the other word might be substituted to better effect.

The third of the carvings, the one which might seem most ambiguous to a viewer unfamiliar with the case, is accompanied by the text, 'When Kikkik journeys for help, two children are left behind in a snow house that the others may survive'.

To begin, one can imagine a viewer without the advantage of labels, and with no prior knowledge of the trial. In such a case, that viewer might wonder why one person is pointing a gun at another, why a woman is holding a man down, what the two people are doing in the third carving? One might or might not see that there is any relationship of the sculptures to each other. There are a wide number of cultural narratives that might be drawn on to make sense of the images. But in the context of the labels given to the carvings, the three scenes seem fairly straightforward: as viewers, we are bystanders at the moments presumably of most concern to the legal order: the death of Hallow, the death of Ootuk, the death of Nesha. One might note that each of the scenes is situated just *prior* to a death. Frozen in stone is a moment of action—a moment where one person makes a choice that will shortly result in the death of another.

But in the act of noting what is captured in stone, one can also ask what is absent. What falls outside the field of representation here? In light of Farley Mowat's retelling of Kikkik, one wonders if the key moments of the tale could have been captured otherwise. What would it mean to have a carving of the Ihalmiut chasing after caribou? Or a bureaucrat in Ottawa authorizing the relocation, or an airplane carrying the people away from their home? Or of a family eating its own clothes for sustenance? Or of Howmik and Ootuk's child dead of starvation? Or of Kikkik carrying a baby on her back while dragging her daughters behind her on a caribou skin, or of sheltering five children beneath her body in a snowstorm?

In the context of a set of carvings by an Inuit woman capturing in Inuit form a story about another Inuit woman, one might be forgiven for having expected to somehow see something different. But of course, what we have are works that were commissioned for a judge wanting to memorialize landmark cases. In this landmark case, the criminal justice system (with its individualizing focus on questions of guilty act and guilty mind), was called upon to determine Kikkik's individual responsibility for the deaths of Hallow, Ootuk and Nesha. With such a question fore-grounded, it

is perhaps unsurprising that the colonial context seems to remain so clearly outside the field of the visible.

But of course, whatever the conditions that inspired its production, any piece of art, as an object, retains an element of its own autonomy. Art inevitably opens space for reflection that cannot be fully anticipated by its creator (or the person who commissioned the work). The carvings, as works of art, are more than simply representations, or pieces of a legal story, or totemic commentaries on colonial history (though they may also be that). Further, the sculptural medium itself gives us a very particular way of engaging with Kikkik's story. For in the freezing of images in time, the carvings have something of the character of what Rancière refers to as the 'Pensive Image' (Rancière 2009).

A pensive image, for Rancière, is one marked by a contamination of two arts, of two ways of making us see. In his discussion of the photograph of an Alabama kitchen wall, for example, he draws us to an image marked by both literary excess and pictorial silence. It is neither 'the raw record of a social fact', nor 'the composition of an aesthete engaged in art for art's sake' (Rancière 2009, 123). It is the contamination of these two ways of seeing (or, 'image functions') that gives us the pensive image. The pensiveness, he would say, is less a function of the image itself, than of the set of distances between different ways of seeing. These distances result in an image which 'resists thought—the thought of the person who has produced it and of the person who seeks to identify it' (Rancière 2009, 131). The pensive (with its distances, contaminations, hauntings) interrupts the expected relationship between narration and expression, and invites a certain state of contemplation.

The Kikkik sculptures are marked by this contamination, this 'pensiveness'. We have the fact of the legal story, with all the 'literary excess' that involves. But there is also the 'pictorial silence' of the sculpture. The idiom of stone is one in which action is arrested in movement. The freezing of the picture thwarts the narrative's logic of forward action, and puts conclusions in suspense. We are held in a space of stillness where the landscape of what can be seen or thought may be reconfigured. This does not mean that these sculptures are devoid of meaning or can't bear meaning, but rather that the minimalism of the object itself—and its freezing of a moment in time—invites the viewer into a different kind of relationship. The story of Kikkik is transformed by the idiom in which the story is captured. And certainly, this idiom, with its pensive quality, invites a different kind of work from its audience, and offers different rewards.[31]

The sculptures may have something to tell us, but not in any straightforward way. In these carvings, we have compelling works of art that speak to a moment in time, a moment of intercultural (legal) colonial encounter. The conditions for

31 As Rancière puts it, 'Like researchers, artists construct the stages where the manifestation and effect of their skills are exhibited, rendered uncertain in the terms of the new idiom that conveys a new intellectual adventure. The effect of the idiom cannot be anticipated. It requires spectators who play the role of active interpreters, who develop their own translation in order to appropriate the "story" and make it their own story. An emancipated community is a community of narrators and translators' (Rancière 2009, 22).

the production of the carvings, conditions in which the Inuit were 'tutored' to produce art for a southern economy, point to yet another complicated encounter between north and south. And the carvings themselves, both in what they do and don't represent, and in the productive contamination of 'image functions', open space for us to think about the shape of the colonial encounter, and the ways that, in art, questions of law and justice slide sometimes together, and sometimes slide in unexpected directions.[32]

4. The film

As is perhaps common in the context of family and community tragedies, after Kikkik's trial, the story lay silent for many years. Neither Kikkik nor her 4 older children spoke openly about the events of 1958. Elisapee, the baby who had been carried on her mother's back, grew up knowing nothing of the story. It was only when she was 16 that she discovered the secret her mother had kept from her, and it was long after her mother's death that she began the process of dealing with the event and the silences through film.[33] The film (part documentary, part biopic, part road trip) is not just an effort to learn about her mother, but also to pose questions about the past, and its relationship to the present. The film offers us a re-enactment of Kikkik's trial. But it also follows Elisapee from North to South and back as she travels across the country to meet Farley Mowat, her mother's lawyer Sterling Lyon, and Joe Laliberti (the constable who found Annacatha in the snow). She interviews a number of government officials about the relocations, and, taking two of the last surviving Ihalmiut elders with her, returns to Ennadai Lake for the first time since the relation of 1957.

A first observation is that this film, unlike the other three texts, is narrated from an Ihalmiut perspective.[34] While Ihalmiut voices emerge in the other three texts, those emergences are limited in ways that are worth reflecting on. In the trial transcript, we have some of Kikkik's words, but they are words which we see only in their translated version, and are words generated in the context of a police interrogation. In the Mowat text, we have a chance to enter more richly into the inner life of Kikkik, but we are offered that invitation through the descriptive and imaginative powers of a man who is sympathetic to, but not a member of, that Ihalmiut community. In the wonderful Peggy Ekagina carvings, we have the visual

32 Rancière puts it thus: 'What there is are simply scenes of dissensus, capable of surfacing in any place and at any time […] It means that every situation can be cracked open from the inside, reconfigured in a different regime of perception and signification. To reconfigure the landscape of what can be seen and what can be thought is to alter the field of the possible and the destruction of capacities and incapacities' (Rancière 2009, 48-49).

33 For those of us at University of Victoria, the film is particularly close, as she was part of the groundbreaking effort to place a law school in Inuit territory.

34 In saying this, I do not mean to imply that it is thus a more 'authentic' or 'more truthful' version. Indeed, the film is co-produced with a Norwegian-born and Montreal-based film-maker. The observation is simply that the film is a kind of intercultural encounter that invites the (English-speaking) viewer to linger for a while with Ihalmiut bodies, and voices and spaces.

representation of Kikkik, performing the words spoken in court. But again, if the images are Ihalmiut bodies, they are captured for a particular purpose, and prioritize a Southern way of understanding the tragedy. Without presuming that there is one particular or authentic kind of Ihalmiut voice, the film does offer us the opportunity to follow the story from the perspective of at least one of its insiders.

It is of interest that this insider perspective is one which actively engages with the stories told by others. Drawing on the transcripts and the sculptures, the film re-enacts portions of the trial, positioning the viewer somewhat in the position of the jury.[35] In addition, drawing both on Mowat and the documentary and governmental records of the past, the film presses us beyond the courtroom walls, to make visible the broader context of colonial encounter which led to the hardships endured by Kikkik and the other Ihalmiut during the 1950s. Powerfully, the film also considers the ways the past always laps into the present, allowing us to engage 50 years later with many of those who were touched by or implicated in the story. There are three parts of the filmic account I wish to focus on here. First, I will consider the trial re-enactments, and how their filmic performance opens up space for focusing on the real challenges of intercultural translation. Second, I explore how the film asks us to think about the role of government action in the tragedy. Finally, I will consider how the film asks us to think about finding answers in the present rather than exclusively in the past, and how it does this through its attention to testimony, witnessing, and action outside of the courtroom.

First, the film provides us with a re-enactment of moments from the trial. We find ourselves in the courtroom (filmed in black and white to further give us the impression of returning to the past), and listen to Justice Sissons remind us of the responsibility of giving Kikkik a fair trial. We see an interpreter standing beside Kikkik, translating for her. Judge Sissons emphasizes that Kikkik has the right to be presumed innocent, and to be judged by a jury of her peers. We are told to use our experience, and our common sense in rendering judgement. While we see a court attempting to take care to ensure both that she understands the process, and is understood, the court procedures almost immediately begin to feel jarring.[36]

The judge tells Kikkik to stand up so she can be sworn in as a witness.[37] She is first asked if she is a Christian. We watch her face as she is asked the question in her

35 In a classic article, Carol Clover argues that North American film-making generally situates the spectator in the place of a jury (Clover 1998, 97). There are of course subtleties between being situated as jury and being situated as witness, but this is a topic for a larger paper.

36 There is more to be said about the way the cinematographic choices of the film contribute to this sense. For an introductory survey of the ways legal scholars can take up the challenges of filmic texts, see Buchanan & Johnson 2001, 87. See also Buchanan & Johnson 2009, 33.

37 The film deviates in some interesting ways from the text of the trial transcript: Kikkik never testified at trial, and so was never sworn in. The film takes the material from the transcript (in which other Ihalmiut witnesses were sworn in) edits it down, and condenses it into this scene. While one might argue that it is not quite accurate, one would have to concede that it is also absolutely 'truthful'. The essence of what happened has been captured in a more tightly edited form, so that we can capture more cleanly the ways the oath-testing procedures of settler law did not fit with the reality of how the Ihalmiut experienced settler religion in the north.

own language, and she nods her agreement. The judge asks 'Which church?' There is an exchange between her and the interpreter, who then gives her answer to the court: 'Both of them'. At this point, the Crown smirks and adds, 'A prudent decision, my lord'. In follow-up questions about when she goes to church, she indicates that she goes 'When they come'. After another snort of laughter from the Crown, the judge accepts this answer. The court clerk places Kikkik's hand on the bible and proceeds to read out the form of the oath. The visual set up of the scene, with the plays around translation, the visual responses provided by the actress playing Kikkik (with a close-up which invites us to ask about her response), and the humor at her expense, provides its own form of commentary on the challenges of translating not only words, but experiences. It points to an abyss between Ihalmiut life/law/culture, and settler law as performed in the courtroom.

The question of translation is fore-grounded even more strongly in a later scene where Kikkik tells her own story to the courtroom.[38] While in the actual trial, her words were simply read to the jury, the film makes the choice to give Kikkik a voice. We listen (if we are English speaking) to her talk in a language that we do not know. She pauses between sentences, leaving time for the translator to repeat the sentence in English for the jury (and us). A close-up on her face invites us into close proximity with her, even though we are unable to speak her language and cannot be sure what she says. We are reliant on the translator, and that reliance is made visible/audible for us in a disruptive way. For though we know the translator standing beside her is an Inuit man, the English translation we hear is delivered through the voice of a woman. It is a woman whose accented voice marks her as an Ihalmiut (perhaps it is the voice of Elisapee?). This form of performance, though of course a creative enactment, places the question of translatability right in front of us. Whether or not we 'understand' her voice, we are made to 'hear' its difference. English listeners experience more directly the discomfort of wondering if the translation is accurate, and being unable to know for sure. This discomfort is amplified by a mis-mapping of genders (in terms of the translator we see and the voice we hear).

Later in the film the jury returns with a verdict of non-guilty. Judge Sissons asks the translator to let Kikkik know that she is not guilty. We sit watching as the translator speaks sentence after sentence to a baffled looking Kikkik. Eventually, the judge interrupts to ask what he is saying. The translator explains to Judge Sissons that there is no word for 'guilty' or 'acquit' in Inukitut, shrugs apologetically and says he is telling her that the jury has concluded that she didn't kill anyone. As he adds, she is having a hard time understanding. Judge Sissons finally says, 'well, then just tell her she is free to go'. In this brief moment in the film, one that draws uncomfortable or shocked laughter when shown in the law school classroom, the question of justice in a cross-cultural encounter is powerfully written in a way that would not be possible to replicate in a legal argument. The chasm is made visible.

Let us move then from the courtroom to the 'bureaucrat's office'. Recall that

38 Of course, in the trial itself, her voice was never heard: her words (translated into English) were read to the jury. See section on the trial transcript, supra.

the polemical edge of Farley Mowat's book had been aimed at the government. His indictment was that the Ihalmiut had been delivered into a hell contrived by 'men of good intentions'. The film allows us to hear from three of the men who had been involved with the Ihalmiut in the 1950s: Gordon Roberston (who had been the Deputy Minister, Department of Northern Affairs), Bob Phillips (who had been the head of the Arctic Division of the Department of Northern Affairs), and Walter Rudnicki (who had been the Chief of the Social Services Division of the Department of Northern Affairs). Just as the camera had allowed us to focus on Kikkik as she told her story, we now have the chance to focus on 'the face of government', to listen to three of its representatives give their own accounts of the decision to relocate the Iharmiut to Henik Lake. This part of the film participates in 'truth-telling' around the relocations, but does so in a way that makes visible the limitations of theorizing 'the government' as if it were a singular actor; we listen to very different responses from the three men questioned.

We hear first from Walter Rudnicki, who speaks openly about his experiences of the fragmentation in 'governmental' decision-making: it was not until after the deaths at Henik Lake had been reported in the media that he learned a decision had been made to move the Ihalmiut away from Ennadai Lake. He gives an account of decision-makers operating on the basis of incomplete and inaccurate information. Further, he explicitly links the tragedy to broader colonial attitudes of the time, and of the government sense that the Inuit were largely a portable people who could be moved without consultation. We get a quite different response from Phillips. Asked directly whether the Ihalmiut had been consulted about the move to Henik Lake, Phillips responds defensively, making a reference to the forces of political correctness which would seek to re-write the past to suit themselves. He insists on not only the good intentions of the government of the day, but on the moral correctness of their decision-making process. The government, he tells us, knew all too well about the consequences of repeated starvation, and knew that the horizon ahead was bleak. The Ihalmiut did not have the same information, he tells us, and were thus not in a position to make decisions in their own best interests. Robertson, our third voice of government, follows neither of these two paths. He weaves a line between the two, emphasizing the complexity of the problem government was trying to negotiate, and observing that, even at the time, there had been a number of different views on the question of how to ensure that the Ihalmiut could continue to thrive in the North.

Given what has come before in the film, it is hard to avoid discomfort in listening to someone assert that the government knew the land better than the people who had lived in it and on it for over 1000 years. We have already seen how these 'good intentions' were based on a very real ignorance about the land producing disruption, starvation and death. We also see how the compartmentalization of responsibilities marked the very real gaps that were present not only in decision-makers' knowledge of 'the north', but also in its knowledge of the people who had lived on the land for hundreds of years. There is certainly 'judgement' involved, but not of the kind that asks us to particularize guilt: what is indicted is a more generalized colonial

attitude that resulted in a kind of toxic failure to treat the Ihalmiut as important decision-makers in the shape of their own lives. We can see the limits of the legal approach which seeks to individualize responsibility for a tragedy; the target here is less an individual than an ideology. Indeed, when both Phillips and Robinson are speaking, a portrait of Queen Victoria hangs visibly in the background, offering its own commentary about the colonial attitudes which shaped the past and linger into the present.

The third aspect of the film I wish to focus on here concerns its stance with respect to the past and the present. Though the film re-enacts parts of the trial, and opens a space for calling government to account, the most powerful parts of the film involve its attempt to displace the question 'who is responsible' with the question 'what remains to be done'? The film asks us to think about what is necessary to deal with the full impact of the events of 1958 for the children who lived through it. Consider the way it engages with Annacatha. Figured in the three other texts only as a child abandoned, this text gives Annacatha voice. Speaking in her own language, Elisapee translating for her, she speaks of witnessing her mother's terrible exhaustion on the trek through the snow, and of begging her mother to let them walk, even as she acknowledges that they had no skins left to wear. She tells of her mother kissing her and Nesha, and wrapping them in the skin before covering them with snow, and hearing the footsteps walking away. Annacatha speaks aloud of her experience of being left alone inside the snow cave with her little sister to die and she tells of her sister singing snatches of a melody to her before she died. We also hear Annacatha singing an Inuit song, with subtitles telling us the song is one expressing thanks to a dead mother who gave all she could. The scene is followed by one in which Annacatha is reunited with Constable Laliberti (who had found her in the snow so many years before). There is something powerfully deep, both beautiful and terrible, in the keening noise she makes as the two of them stand in a tight embrace.[39]

The film points in the direction of several kinds of performances in Elisapee's journey. It raises questions about performing apologies from the past, but also moments where the victims of the trauma have the opportunity to meet with those who were allies, or helped them on this journey. The moments in which people attempt to give thanks for the help they were given in the past, are at least as powerful as those that direct our attention towards retribution on those who participated in the harms. In criminal law, our focus is rarely, if ever, on this side of the justice coin.

39 We are also able to follow Elisapee's older brother Karlak, who is reduced to tears as he has a chance (as an adult) to meet Sterling Lyon, and express his thanks for the work the lawyer did in defending his mother. In the longer version of the film, we also travel with Karlak out across the tundra, as he takes his own family to show them the place where his mother had sheltered the children on that last night. The scene speaks to the importance of sharing the memories with others, rather than keeping them hidden within. Again in the longer version of the film, we also hear from Kalak (Ootuk and Howmik's daughter, born deaf and dumb from starvation, the one Ootuk had offered to give to Kikkik). Her story written before her, she delivers it in sign language, Elisapee reading it aloud. She speaks of waiting in the igloo, of help finally coming, and of only knowing her father was dead with the frozen bodies of Hallow and Ootuk were loaded into the plane alongside them. This is a scene of painful touching power, linking these two cousins who had both been rendered fatherless by the tragedy.

These performances ask us to think about justice as a requirement on settlers to take action, to intervene, to do the best they can in situations of encounter, to do no harm and to behave with responsibility. These are not dimensions of justice that can easily be captured within the boundaries of a criminal law case, but they are questions that are no less pressing in the context of the larger project of theorizing the meaning and the demands of justice.

Elisapee's journey to discover her mother must also involve, the elders tell her, a return to Ennadai Lake, to reconnect with the land which had been their home (see Laugrand, Oosten & Serkoak 2009, 113–135). Taking 2 of the remaining 4 elders with them, Kikkik's children return to Ennadai Lake. We are brought to the land in summer, rather than in the winter landscape that occupies so much space in the cultural imagination of the North. We watch as a fish is caught, and food is shared as the Elders speak of the past and the time before contact with the white people. Wizened, ancient, bent over, the elders tell of their relocation, of the steam rollers that rolled their furs and tents into the ground, destroying their tools and their food caches, leaving only enough time for the men to gather their few remaining sled dogs as the people were loaded directly onto airplanes and flown 200 miles further north. We see one of the female elders pick through the shrubby landscape, identifying places where tents had sat, where fires had been built, and she retrieves a rusted, and now v-shaped bent can and describes how that tool had been used to boil water and make tea. What might appear to be the garbage of western society, functioned here as a marker of Inuit presence, and is evidence to her of the destruction of their homes. We sit before the screen and hear the wails of grief as well as her words telling us of her great happiness at finding herself one more time at the site where they had so greatly suffered.

While these emergences of the past in the present are painful to watch, they also contain the seeds of hope. Without denying the devastation of the past, we have a gathering in the present of family/allies/lawyers/police. In the gathering of the children and grandchildren of Kikkik, we see the survival of the people in the face of the many forces which so decimated their communities. And as we move towards the end of the film, we are pulled increasingly away from questions of guilt, and towards questions of healing. The film asks us to think about justice, not only as settling accounts, or revisiting of trauma on the heads of the guilty, but to think about the importance of particular forms of acknowledging and witnessing—a return to the trauma to restage as it should have been performed, by taking responsibility.

The filmic text, positioning the viewers to have an experience of connection, works powerfully to make visible the injustices of this legal approach to responsibility. The film asks questions not only about guilt and responsibility but about ongoing encounters between settlers and indigenous people. Elisapee seeks not judgement, but understanding, and she looks for keys to a path that continues to move forward. She models a different form of engagement, one which seeks to make visible both the pain of the past and to acknowledge the resilience of those who survived and the skills and practises that might foster more healthy way of moving forward in a

context where a return to the past is not possible but where the present must take account of the persistence of that past. The film invites the spectator to rethink the past, and to implicate oneself in both that past and the project of moving forward.

5. Conclusion

Bakhtin argued that meaning emerges most richly through dialogue and encounters, along borders and intersections (see Conquergood 1992, 41). The story of Kikkik affirms his insight. In the borders and intersections, we have a rare opportunity to explore what happens as a tale of intercultural encounter is retold in four different genres: legal, literary, sculptural and filmic. While in each telling we have a tale of colonial tragedy, we also have the opportunity to reflect on the challenges of justice in the context of that colonial history.

The trial transcript makes visible some of the challenges of justice in the context of intercultural encounter. While we have a pronouncement of 'not guilty', the process of getting there makes visible challenges of translatability. What we see is not simply the question of how to translate (and whether or not a particular translator provides an accurate translation), but also the challenge of different concepts of guilt and innocence. Even with all the challenges of the narrowness of form, it also points to the possibility of encounter, the possibility of understanding, albeit in a limited fashion. Even with all limits of the legal arena made visible, the trial transcript also shows us a group of legal participants, working within the spare, objective and dispassionate language of law to do justice.

While the courtroom account suggests a separation of passion and emotion,[40] Farley Mowat's narrative attempts to pull passion back into that legal story, in a way that makes visible the ways law's identification of legal questions leaves important issues of justice beyond the court's capacity to address. It aims to actively introduce more textured forms of subjectivity, albeit narratively imagined. The omniscient narrator allows us to imagine ourselves in a number of different positions: to imagine ourselves as Ootuk, as Kikkik, as Howmik. We are invited to imagine ourselves hungry in the cold, to feel the weight of a child on our back, a bag of snow held against our body. The account is a powerful cry of rage against the wilful innocence of government institutions and actors who had produced such a tragedy for the Ihalmiut. While polemical, it suggests that there is something important that happens in the moment of intercultural contact: that life amongst a people can help reveal things about their lives, their struggles, their motivations, that do not simply 'justify their actions', but also help us see how 'we' (as outsiders) are in fact deeply implicated in those tales.

The sculptures, in capturing images from the tale, push in the opposite direction. Where one might argue that in Mowat we have a polemic, Peggy Ekagina gives us 'pensive images'. The images, rendered in stone, arrest the forward movement of the

40 On the blending of passion and reason in judicial opinion writing, see Belleau, Johnson & Bouchard 2007.

story, disrupting the flow of the tale, inviting the viewer to pause. We have here a 'contamination' in the most productive sense of the word. The sculptures, rendering the legal tale in stone, can press us to think about representations of justice, and the translation of justice from one medium to another. Even in the texture of the stone carvings, we have traces of intercultural encounter and translation as two cultures bump up against their differences (in both legal concepts and forms of artistic practice). Again, we are invited to consider both that which is familiar and that which is strange in the images from the tale.

Finally, in the film, we see these different accounts put into dialogue with each other, as the story of Kikkik is situated as only one piece of a larger story; one implication shift to another space of exploration, in a medium that invites us to follow one woman on a journey through and with the texts, asking us to think about the shape of past encounters, and the ways the past not only inflects the present, but also demands continuing engagement with the traces of the past. Though it paints the most textured portrait of the harm done to the Ihalmiut, it also is most explicit in its assertion that the quest must be more than a search for villains. Without denying the power of a desire to name 'the truth' of the story, it also enables us to ask other questions about the ways that colonial practices of seeing the world have had devastating implications for individuals and communities.

Each of the four texts gives us something: additional angles of sight for engaging in a collective discussion about justice and its acts, pronouncements, patterns of reasoning, visual forms, affective engagements and its demand that we act, that we see, that we feel, that we question. All four texts invite us to draw something into the present, or to project ourselves forward into the future: it is in the nature of a text's invitation. In placing the different texts alongside each other, there is room not only for 'comparison' (which text is better or worse), but for reflection on the lenses of analysis opened for us as we put the texts into conversation with the present, asking how we might think of justice in the now.

It becomes perhaps easier to sense that the questions asked in the texts are ones not to be answered only by Inuit, but also by Canadian settlers. That is, the question of responsibility requires a different approach, one that takes up reconciliation in a more robust fashion. The solution is not to be lulled into the response Steven Harper gave in his talk on economic advantages in Canada—to claim that 'we' have no history of colonialism. An attitude of denial is it is not helpful to the project of living in the present in a way that acknowledges the inherited past. The 4 texts challenge us to think about the limits of an approach to Justice that ends with the speaking of the words 'Not Guilty'. They make visible the persistence of wounds, and the ways in which the injustices linger on, in spaces of silence, denial and shame. It asks us to think about what it might mean to repair those spaces, or to answer the questions left open. But it also asks us to understand how settlers are implicated in the story, and that we too carry this history with us. The film asks us to acknowledge the terrible damage that followed from mistakes that were made, rather than insisting on a position of innocence. The texts put together suggest that there is room for

change. One of these changes can involve taking a more proactive approach to our re-encounters with the past: one in which the colonial subject grapples with uncertainty, open to the possibility that all four texts, put together, can help us see more. Our history is full of archetypal stories of contact and arrival. Where we understand the stories as 'conjunctural, not essential', it may be easier to accept that the stories can sustain 'multiple telling and retellings to produce not an undecipherable jumble of competing claims but a conversation threaded with echoes, collisions, resonances, surprises, ironies, epiphanies, and invitations to rethink orthodoxies' (See Lessard, Johnson & Webber 2010, 5–7).

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The Heart of Law

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1. Premise

The central guiding idea behind this contribution can be summarized in the motto, 'When all becomes excess, it behooves us to devote a thought to measure'. Measure is the essential component of the social and political bond: it is the space without which human coexistence would be impossible, a space we cannot predetermine. Measure is the foundation on which rests the juridical, understood as that which is called on to regulate otherness, namely, the irreducible difference among humans, a difference that also works itself out as the otherness between humans and the mystery of life, with the accompanying fear of death, a difference that marks limit of human existence, exposing men to violent behaviour in their social relations.

The world of human societies is at its origin a normative universe, precisely in virtue of the need to define the boundaries of behaviour. It is out of this need that norms emerge and frame the space of social relations, on the basis of the 'part' that each person must have in every context of human experience, and they guide justice in recovering the measure of those boundaries when excess breaks out.

Our awareness of the continuity between law and justice—and of their common rootedness in the complex space of the boundaries imposed by otherness—is present from the origins of human culture in the myths that in telling of gods and men reveal the limit of human existence.

This complexity cannot be captured by modern Western legal science, nor can it be explained by the reflection that has accompanied the evolution of positive law. Little, if anything, will we achieve by bringing to bear on this complexity the distinction between law and morals (in its various formulations), or by abandoning natural or customary law and replacing it with an exclusively formal and rational law, or, generally, by relying on the concepts that have emerged out of the technicization of law. More eloquent is the sociological fact of the separation between internal and external legal culture, and of the confusion this distinction has generated in our

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common sense, in the meanings we ascribe to law, and in the feelings that feed our expectations of justice, or the claims we make in asserting a right. That fact invites us to look elsewhere in our culture in the effort to recover those aspects of the problem (or to understand the complexity involved in the problem of otherness) which the positive law has forced out, mistaking for an 'evolutionary achievement' its own movement away from the concrete reality of social life.

Far from offering facile judgments about legal modernity, and far from pursuing the chimera of an original *jus*, I make it my aim here to analyze a few literary passages that have passed on to us, from the origins of Western culture, in Greece, the memory of the link between law and justice. Visibly manifesting itself in this space is the true sense of measure and the ancestral fear of that violence—the matrix of every excess—which emerges from our human drive to find identity, as against recognizing otherness and difference, and which jeopardizes the life of the community.

It is my hope, then, to identify elements for thinking about measure, which has gradually been abandoned over time, as if measure were an aspect of the juridical that is taken for granted, any yet it is precisely with measure that we must reckon whenever our shared system of norms and meaning falls into crisis. That is the point from which we must proceed in an effort to shift this question of the law's justice from the abstract plane of theory to the more-complex plane of experience and society, clarifying what the boundaries of law are and what its justice should consist in, apart from legal procedures.

This is a problem we can work out by taking a law-and-humanities approach, which points out new avenues that legal science could take in seeking to get to the heart of juridicalness (*juridicité*).[1]

Among the several paths offered by the analysis of literary texts, the one that has won me over is that which takes the law as a story or narrative process (law as narrative). I follow Cover (1983) and Geertz (1983) in the belief that human communities are constitutively narrative and that the cultural universe by which these communities are structured is in itself normative. Which is to say that the transmission of moral, social, and legal norms, and the corresponding guiding of behaviour, happens through the telling of stories that we can share. These stories, fictional or nonfictional, can be of various sorts and be drawn from various sources. But what essentially makes a story juridical is its ability to structure daily life on a symbolic, normative, and emotional level, constantly offering formulas on which basis to achieve a balance in social coexistence. This also means that, as relational entities, we too are these stories, and above all it means that our way of understanding and access the world of everyday life does not reflect any rigid distinction between rational and emotional intelligence or between truth and imagination. Every human action always juggles emotions with rational strategies that kindle or mitigate one another.

1 *Juridicité* (juridicalness) is a concept developed by Jean Carbonnier (1969), the idea being to observe formal and informal law (*droit* and *non-droit*) as parts of a broader arena that coincides with social life itself.

The stories of literature, as well as the more popular stories, do capture this reality interwoven with the intellect, with the heart, and with fantasy, giving us an understanding of life, while also enabling us to imagine other possibilities, and for this reason they can give us greater insight into the law's justice than can the stories of positive legal science.

This is what happens with Odysseus' homecoming journey, or νόστος (*nostos*), the story that more than any other continues to exert an influence on Western culture.[2]

Unlike the story of war and siege told in the *Iliad*, the *Odyssey* addresses the theme of the hero's homecoming, which also signifies a return to life, to community, and to the order needed for the community to thrive. The point is not simply to retell a traditional tale so as to keep us entertained, nor is it to collect the contents of the ἀοιδοί (*aoidoi*), or bards' performances so as to preserve such contents and hand them down, as usually happens in communities based on oral culture. Homeric language gives shape to an anthropological grammar that makes it inherently normative, and it further enables the songs to guide behaviour in pursuit of an educational project inspired by values of peace (Havelock 1978). The songs' project is particularly effective because rooted in an understanding of the conditions necessary for social cohesion, an understanding that uses intelligence in all its forms: in thought, body, and emotion. These are the very forms of intelligence that are brought into play by epic, its words rhythmically chanted and listened to, its plots fantastic, but carrying thoughts about reality, and its force draws us in, on account of the feelings such poetry elicits: pain, fear, compassion.

Odysseus' *nostos* can ultimately be read as an opportunity for the bards, to depict a real world while also envisioning a possible one, where the song telling of the hero's homecoming and of his revenge becomes a means with which to explain the most sensitive, complex, and fragile aspects of human coexistence, while at the same time offering an ideal vision of humans and of their possibilities. As we will see shortly, the song is concerned at its core with the question of measure—the deepest nexus between law and justice—a theme the heart of the song keeps beating, keeping alive its memory not only for the epic's original audience, present in the background of the narrative, but also for all those who have approached the same narrative over time and into the present.

2. The measure of honour

The communities depicted in the Homeric narrative are governed by a feudal, warlike aristocracy and are permeated by the culture of honour. It is a 'shame culture' (Dodds

2 For a study conducted from a law-and-humanities approach on the world of Odysseus, see White 2001. I take the considerations that follow from the research I have been doing for several years, see my more recent Mittica 2007. I also would refer to this text for the extensive bibliography, confining myself in this article to pointing out only the principal essays which have a direct bearing on the discussion. The Homeric translation I refer to is by A. T. Murray (Loeb Classical Library). Harvard University Press and William Heinemann, Cambridge, MA and London 1919.

1951), where every behaviour is conditioned by the attribution or loss of honour (τιμή- *time*). The man who breaks the rules exposes himself to shaming by the people (δήμου φῆμις- *demou phemis*): this is a punishment so feared that it suffices in itself to keep unbecoming conduct in check just by virtue of psychological pressure, so much so that the nobleman can also be recognized as such by his ability to feel the shame that can come from dishonour. Conversely, it is the need to maintain one's honour, and above all the ambition to achieve glory, that prompts one to behave in worthy ways.

The drive to achieve success makes the nobleman's temperament very competitive. The hero's ambition is to be glorified more than anyone else among peers, achieving the greatest fame not only in war but also within the community, thus becoming a risk for life in common.

To this marked individualism, with a desire to prevail that could easily lend itself to usurpation and commandeering, the epic responds by offering a model of heroic virtue (ἀρετή - *arete*) in which we find the traits that typically make a warrior, but also qualities of a collaborative sort (Adkins 1960), the kind needed to foster and maintain communal bonds. Thus, aside from demonstrating an ability to rule (κράτος - *kratos*), to attack and plunder (βία - *bia*), and to win wars, a nobleman seeking to excel must also have the defensive strength (ἀλκή - *alke*) with which to protect himself and the community, and not just from external attacks, for it is the internal conflicts that pose the greatest danger. This is a strength that, having its basis in experience (δύναμις - *dynamis*), appreciates such qualities as prudence, good sense, amiability, and kindliness. In brief, the model of *arete* conveys the idea that a hero's greatest virtue lies in an ability to preserve social bonds and to recognize measure and the limits of aristocratic behaviour in relational life.

Indeed, the expression that most often accompanies a judgment about human conduct is κατὰ μοῖραν (*kata moiran*), literally 'in accord with measure', where *moira* refers to each person's 'part' or 'share', their lot in life; or it may signify the part that each person is due when splitting a loot or each person's cut of meat at a banquet; or, again, it may designate the status one is publicly recognized as having or the role that each is bound by.

The *aoidoi*'s idea of heroic virtue comes through from the narrative as a whole, but one incident in particular summarizes it quite well. We are at the Phaeacians' court, and the ideal is limned out through the words of Odysseus.[3]

The king's son, Laodamas, has organized some games of strength and skill to entertain Odysseus, and he invites the guest to compete, as is proper and customary. But Odysseus refuses and is insulted by one of Scheria's young princes, Euryalus.

3 The setting of the scene is not incidental. Phaeacian society stands as a model of peaceful coexistence. It is governed by a sovereign couple, Alcinous and Arete: the former name signifies defensive strength (*alke*) and the latter the greater quality, virtue (*arete*), each completing the other. And Odysseus, the man of *multiple talents* to whom the *aoidoi* entrust many of their reflections, is not only welcomed by the Phaeacians with all the honors usually reserved for guests of great fame but is also represented as a man equal to Alcinous himself, if not superior to him.

And here is the reply:

> Stranger, you have not spoken well; you seem like a man blind with folly. So true is it that the gods do not give gracious gifts to all alike, not form, nor mind, nor eloquence. For one man is inferior in looks, but the god sets a crown of beauty upon his words, and men look upon him with delight, and he speaks on unfalteringly with sweet modesty, and is conspicuous among the gathered people, and as he goes through the city men gaze upon him as upon a god. Another again is in looks like the immortals, but no crown of grace is set about his words. So also in your case your looks are preeminent, nor could a god himself improve them, but in mind you are stunted. (Od. VIII 166–177.)

The qualities of a hero, then, are not reduced to physical appearance and strength but also include intelligence, wisdom, and an ability to articulate arguments with confidence, and also kindliness and respect for the interlocutor. Beauty alone will be of no help to one who is mindless, just as no one can have any honour who does not act with measure.

It is on this basis that one can be judged worthy of honour, and by exerting pressure on everyone's behaviour, the judgment so made supports the normative structures that regulate coexistence, thus providing a means of social stewardship, even resolving conflicts by redressing the balance when someone has been wronged—a social technique that, as we will see shortly, lays emphasis on the ability to cope with relational crises by relying on discursive mediation rather than on physical engagement.

Not incidentally, Euryalus recovers his status of nobleman only once he retreats to a position where he is acting within bounds, thereby formally redressing the affront he inflicted and recouping the esteem he had lost in the eyes of the people. As Alcinous directs, 'let Euryalus make amends to the stranger himself with words and with a gift, for the word that he spoke was in no way suitable [κατὰ μοῖραν - *kata moiran*]' (Od. VIII 396–397).

3. The measure of law

The way of redressing offences exemplified by Alcinous' command forms part of a well-structured system of normative practices. Of these practices I will confine myself to considering those based on the rules that underpin political organization and compensation for injury. Most of the practices in question involve an exchange of gifts, whose symbolic relevance, acting through the complexity of the social bond, can lead to an understanding of measure as the matrix of the customary law known by the *aoidoi*.

It is only a handful of families that govern in the communities represented in the epic—nuclear families, even at this early time, and they make alliances in defending the common territory. The political organization is made up of three main bodies: the king (βασιλεύς - *basileus*); the chieftains' council (βουλή - *boule*), on which sit the elderly custodians of the law (γερόντες - *gherontes*) and the household

heads (βασιλῆες - *basilees*); and the assembly (ἀγορά - *agora*), in which all freemen participate.

It takes the highest public recognition to become king: that consists in being judged, or rather, 'honoured', by one's peers and by the people as being the most virtuous among all the leaders who can compete for the position. This honour is conferred with a gift, the γέρας (*gheras*), which in the songs is depicted as 'the choicest part' of the loot, the part the companions in arms give to the bravest in battle, but which also signifies a conferral of political leadership to the best *basileus* when gifts of various kinds are bestowed on him by the other *basilees* (Od. VII 148–150; XI 174–176). The *gheras*, however, does not come without a price: as is in the nature of the gift, it sets up a relation of mutuality, putting the king at the service of those who have consented to his kinghood. 'It is no bad thing to be a king (βασιλεύτερον - *basileuteron*). Straightway one's house grows rich and oneself is held in greater honor', says Telemachus (Od. I 392–393), but in return the king is bound to attend to all matters of common interest, bringing all his skills to bear, especially those included among the collaborative virtues (the virtues of diplomacy). In fact, his operation is constantly being watched by the chieftains' council and by the assembly, and as can be gathered from the further forms of reciprocity through gift-making (Rundin 1996), such oversight comes with an especially strong pressure exercised by the king's peers, who never cease to be in competition with him, waiting for an opportunity to take his place. In brief, then, the *gheras* symbolizes the measure of the king's power: the 'largest share' of power and at the same time the *limit* of such power, revealing the ambiguity of a bond that in the covenant of solidarity also conceals an element of control, an element which can be a source of enmity as well.

The sense of measure that guides social control is characterized by a further form of mutual giving. The administration of violence in Homeric communities is based on a retaliative system that has the function of mediating conflicts to restore the broken relationship between families when one has suffered an injury.[4] The way of returning the parties to a state of mutual solidarity is by bestowing a gift, despite the fact that different procedures govern depending on the kind of injury involved (economic or personal). Even in the case of murder the person responsible for the act pays to the victim's relatives a price (ποινή - *poine*) for the blood that was shed. Indeed, as much as the injured party is free to decide whether to resort to a blood revenge, the only cases we encounter in the songs are of murderers who pay the *poine* or flee from a threat of death that at worst resolves itself into a form of forced exile.[5]

The retaliative system, in other words, would have the main function of

4 The system can be found in different traditional societies. For the model's features, see Verdier 1980; for its confirmation in Homeric society, see Svenbro 1980.

5 The recourse to *poine* is the most practiced form of retribution in Homeric communities, or at least it is the one the *aoidoi* favor. Indeed, for example, the assembly's visible embarrassment in dealing with the question forming the subject matter of the famous scene depicted on Achilles' shield suggests that the victim's relative may be required to accept *poine*. See Il. XVIII 497–508.

interdicting the blood revenge and restoring the social bonds through a solution that, should it fail or prove impossible, would at most break those bonds, without triggering any feud. That said, the observance of this code is imposed by the culture of honour sung by the *aoidoi*, a culture based on the novel heroic model of *arete*, which invites one to compete in collaborative virtue, and so, clearly, in preserving social peace.

In this protection from possible infighting with dramatic outcomes lies the origin of the community, and among its devices we find the gift, understood as a rule of conduct to be followed in observance of the community's customs, but also as a measure to be found in making amends, a measure in the etymological sense of a *dose* (Benveniste 1969, 66-70). The gift stands as a symbol of the social bond, but it equally symbolizes the possible fraying or breakup of that bond, a danger that is always lurking. And that is something to be cognizant of. This law knows that the *basilees* are allies and rivals at the same time, and, especially, it makes no mistake about the futility of prohibiting violent behaviour. The only feasible way to intervene, then, is by looking to contain the damage inflicted.

On the steep terrain of a complex of relationships characterized by otherness, there is no way to fully bridge the gap that comes from difference. The gift brings out the paradox of this 'noncommunal bond of community' and illustrates the authentic sense of measure manifested in the need to 'pharmaceutically weigh' the right dose of action and reaction at every turn (Derrida-Doufourmantelle 1997). Without these doses, no peaceful relationship is possible among people (each an *other* with respect to everyone else), and so no community would be possible, either.

One should not be surprised to find, at this point, how important is the role recognized by the *aoidoi* for the rules of hospitality as a code that guides social relationships not only among people from different communities but also among neighbors within the same community.

Hospitality is owed: whoever shows up must be welcomed. The law of hospitality requires in the first place that foreigners and their otherness be welcomed, imposing a duty to give without expecting anything in return. And therein lies the principal value that hospitality finds in the *aoidoi*'s narrative. Before the measure of the gift exchanged between peers,[6] there is the offering of hospitality by taking into account the possibility of a gift that does not entail a commitment to reciprocate: this is the first measure to be found. The rules of hospitality make it necessary to deal with an uncompassable otherness: they require that a risk be taken so as to find compassion and sharing.

If, as I think, it is not coincidental that Odysseus, disguised as a foreign beggar,

6 Usually, when the foreign guest is a nobleman, hospitality becomes an alliance. The bond is formalized through an exchange of gifts. The relationship so obtained is of a sort very similar to that founded on the *basilees*' mutual control. But, and this is a problem that comes into play with otherness, like a foreign guest, so also a neighbour can be an ally who at any time could turn out to be an enemy. The law of hospitality is thus not confined to potential foreign allies but also applies *within* the community to maintain the pact of solidarity among men who share a territory and have their lives bound together.

should at one point benefit from the unconditional hospitality of the Phaeacians, in Scheria, and should later receive the same hospitality from Eumaeus, Telemachus, and Penelope, in Ithaca, then it stands to reason that this law is also that of the community, or at least that which the *aoidoi* hold up as a model. And that would also explain why, in the song, the main cause of the suitors' end is not the injury to Odysseus and his family but is the guilt for having disregarded the rules of hospitality toward anyone who might have turned up: foreigners or fellow citizens, peers or people in need.

4. On the boundary with the gods

So far the rules we have considered are those of a law governed by the ethic of honour, where justice is achieved through a finding of guilt or through the people's approval, and this is enough to maintain a balanced social existence, by channelling behaviour and intervening in the resolution of disputes. The fear of being blamed is enough to contain the violence inscribed in the aristocratic character, making it so that the customary law of community can keep such violence within tolerable and manageable limits.

When men disregard the bounds of measure, they move into a sphere they cannot enter without jeopardizing the survival of the community as a whole. For with any wrongful act comes the risk of reviving the original character of the γένος (*ghenos*) or family order, where a wrong is reacted against with blood, and the blood with more blood, thus touching off a cycle of violence having no end.

The epic thus picks up a theme present in many Greek myths: the human inclination toward excess, which prevents mortals from living a serene and peaceful life. In describing the dismay one feels at the wretched condition brought about by excess, the song also introduces the idea that excess pushes one beyond the limit within which men can act. Excess, in others words, is mirrored in the sacred. For this reason if men act beyond measure, only the gods have the power to restore the measure by placing men back within their boundaries.

The moral of story is: One who has caused an injury and makes amends for it remains a man of honour because he understands the measure of his action, and the same goes for the injured party if he accepts the restitution. But one who does not respect the rules will be punished by the gods. The *aeodoi* hope, in other words, that the fear of divine punishment can counteract the human inclination toward immoderation. The truth told by the song is that, whenever men fail to recognize the value of human law and its justice as a necessary order, they commit the sin of hubris (ὕβρις - *hybris*), understood as a degree of violence exceeding the limit beyond which human intervention is no longer possible. There are no more gifts one could possibly make when one goes beyond measure: therein lies the teaching.

All of the Odyssey's songs work toward the recounting of the revenge exacted on the suitors: as tributaries of a single river, they all do so out of the same concern with the community. The whole narrative plan revolves around the problem of the conflict arisen in Ithaca in consequence of the suitors' excessive actions and Athena's

decision to intervene and restore order in the island by driving Odysseus' *nostos*.

When Athena intercedes with Zeus for the return of Odysseus (Od. I, 45–95), Ithaca has been without its king for twenty years. The uncertainty about Odysseus' fate has stalled public life. There is nobody who will attend to the community's interests, and each family manages its affairs on its own.

After seventeen years, twelve noblemen from Ithaca and many others from neighbouring islands—all convinced of the king's death—show up at Odysseus' palace to compete for the hand of his wife, Penelope, without regard for the customary rules of nuptial courtship (Cantarella 2004), given that there is no way to determine whether she is actually a widow, and they take the palace by storm upon discovering Penelope's guile of weaving a pall so as to buy time.

Even if marriage to Penelope does not confer the title of king on the new husband, it is clear that this is a struggle for leadership, with each suitor hoping that Penelope's choice for him will give him public recognition.[7]

For almost a year now the situation has been completely out of control, jeopardizing social cohesion within Ithaca, and also its alliances with neighbouring communities. So Athena and Zeus provide that, on the one hand, Odysseus will resume his *nostos*—with the blessing of Zeus, who sends Hermes to Calypso so that she will leave him free—and, on the other hand, that the groundwork be laid in Ithaca for Athena, her first act being to call on Telemachus to publicly denounce the injury he and his mother are facing at home.

The goddess shows up at the palace in the guise of Mentes, leader of the Taphian pirates who has long been a guest of Odysseus. The erstwhile pact of solidarity among allies is soon renewed, this by sharing stories of mutual exchanges that have taken place between guests and by sharing as well the pain of not having had any news of Odysseus (Od. I 102–220). And that gives Athena an occasion to comment on what is happening:

> What feast, what throng is this? What need have you of it? Is it a drinking bout, or a wedding feast? For this plainly is no meal to which each brings his portion, with such outrage and arrogance (ὑβρίζειν - *hybrizein*) do they seem to me to be feasting in your halls. Angered would a man be at seeing all these shameful acts, any man of sense who should come among them. (Od. I 225–229.)

In addition to so passing sentence on the situation, the goddess gives counsel recommending that an assembly be convened to denounce the suitors' *hybris*, publicly enjoining them to leave the house and urging Penelope to return to her father if she wishes to remarry. At the same time Telemachus will request that a ship be outfitted so he can set out in search of news of his father, ascertaining whether he is really dead and, if so, taking his place in managing the affairs of the household (Od. I 272–297). Telemachus must show that he has grown into a man capable of

7 This is so even if the point of the story is not just to single out the qualities of true heroic virtue: as happens in other myths, so here, too, the body of the queen is the symbol of Odysseus' power.

protecting his interests in accord with customary law, reminding the community of the worth of Laertes' kin as men who understand the necessary order of the limit, turning in particular to the elders, for they have a greater appreciation of the law.

Mentes leaves again. Telemachus begins to step into his new role and sends his mother to her cloisters, away from the banquet hall, as is befitting for any other woman (Od. I 328–361). Immediately thereafter he confronts the suitors:

> Suitors of my mother, arrogant in your insolence [ὑπέρβιον ὕβριν ἔχοντες – *hyperbion hybrin echontes*] [...] in the morning let us go to the assembly and take our seats, one and all, that I may declare my word to you outright that you depart from these halls. Prepare yourselves other feasts, eating your own stores and moving from house to house. But if this seems in your eyes to be a better and more profitable thing, that one man's livelihood should be ruined without atonement [νήποινον - *nepoinon*], waste on. But I will call upon the gods that are forever, in hopes Zeus may grant that deeds of requital occur. Without atonement [νήποινοί - *nepoinoi*], then would you perish within my halls. (Od. I 368–380.)

In identifying the suitors' behaviour as *hybris*, Telemachus has announced his aim to publicly discredit them, thereby exposing them to a far more serious punishment. This can be appreciated from the threat he lays out: if the suitors will not make reparation, continuing to disregard the rules, the gods will intervene responding to the excess with excess, and those who have caused injury without paying the poine (*ne-poinon*) will die without any possibility of atonement (*ne-poinoi*).

5. Telemachus convenes the assembly

'Soon as early Dawn appeared, the rosy-fingered, up from his bed arose the dear son of Odysseus, and put on his clothing' (Od. II 1–3). Wearing precious robes, Telemachus embellishes himself with weapons. He convenes the assembly in the appropriate manner and shows up at the square only after everyone else has gathered, so as to have greater visibility. Athena makes him even more handsome, so that the people will admire him. Thus, in a gesture charged with meaning, he sits on his father's throne amid the elders (Od. II 4–14).

It is Aegyptius who, among the *gherontes*, is first to speak. He uses ritual formulas to ask who convened the assembly and for what reasons, all the while expressing how delighted he is at the initiative, because no assembly has ever been summoned since Odysseus' departure (Od. II 25–34), and also alluding to the decadent state the community lies in, and the unease this has brought about.

Encouraged by the elder's opening, Telemachus begins his address (Od. II 41–49), showing he is knowledgeable about the common rules and respects the rite, and he also demonstrates a remarkable argumentative capacity, which he puts to use in explaining why he called the assembly:

> Upon my mother suitors have fastened against her will, own sons of those men who are here the noblest [...] thronging our house day after day they slay our oxen and sheep and fat goats, and keep revel, and drink the sparkling wine recklessly; the larger part of our substance is already gone. For there is no man here, such as Odysseus was, to ward off ruin from the house. We ourselves in no way have the strength for it: in the event we would only prove how feeble we are and how ignorant of battle. Yet truly I would defend myself, if I had but the power; for now deeds past all enduring have been done, and my house has been destroyed beyond all show of fairness. (Od. II 50–64.)

It is a private matter he takes to the assembly. He has lost his father, and his inheritance risks being destroyed by the suitors who have taken over the house. He would like a peaceful settlement but cannot achieve it because the suitors do not acknowledge they have wronged him, and as the last in a line of only children (Od. XVI 117–120), he does not have the strength needed to successfully seek redress or throw the suitors out. So he asks the entire community to side with him, while fully recognizing the limitation of his request:

> Be ashamed yourselves, and feel shame before your neighbors who dwell round about, and fear the wrath of the gods, lest it happen that they turn against you in anger at evil deeds. I pray you by Olympian Zeus and by Themis who dissolves and gathers the assemblies of men, stop this, my fellow Ithacans [...]. For me it would be better that you should yourselves eat up my treasures and my flocks. If you were to devour them, some day there might be recompense; we should go up and down the city pressing our suit and asking back our goods, until all was given back. (Od. II 64–78.)

Telemachus knows he cannot obtain more than a moral rebuke against the suitors[8]; and yet he insists in his effort by trying to emotionally draw fellow citizens into the matter, looking to elicit their compassion and also the fear that the unjust actions in question should induce the gods to visit their wrath upon everybody. At the same time, his argument is designed to provoke the suitors so that the *hybris* by which their conduct is governed should become evident, thus also bringing to light the impossibility of a recourse to the customary forms of dispute resolution even in the public context of the *agora*.

Emphasizing the suitors' lack of measure, the *aoidoi* probably want to suggest that behaviour beyond the limit is a problem affecting not only one in the private sphere but the community as a whole. As further evidence, of the one hundred and eight suitors, it is just the *basilees* from Ithaca that Telemachus addresses.

Needless to say, Telemachus' speech goes right on target: it prompts Antinous, the most arrogant of the Ithacan suitors, to react with a flaming attack in which he rejects the accusation (Od. II 85–90) and goes on to describe in detail the ploy of

8 Telemachus knows that the retaliative system is based on the family order and that the effectiveness of revenge depends on the family's strength in claiming retaliation.

the shroud, which cost the princes a delay of close to four years. The only person responsible for their course of action, the suitor claims, is Penelope, whose arrogant misbehaviour has forced them to react with an equal arrogance (Od. II 90–128). On this argument, Telemachus would be a victim only of his mother. But the argument becomes weak in light of Telemachus' response, who cautiously continues to avail himself of reasons grounded in the community's law: he cannot force anything on Penelope while it remains uncertain whether Odysseus is actually dead; he cannot assume the authority of the household head and make a choice for his mother. It would be an insult to his father; to Penelope's father, Icarius, who would be entitled to reclaim the dowry paid for his daughter; and, finally, to Penelope herself. Not least, he would expose himself to public blame (Od. II 130–137).

Having brought into plain view the suitors' reluctance to accept ordinary reasons, and having set himself in contrast to the suitors as one who is conversant with the law of men and that of the gods, Telemachus can finally demand that the suitors leave the house if they are capable of any remorse, and can reiterate the threat of unavenged death expressed the previous evening at the palace (Od. I 376–380; II 141–145).

The plot is woven and begins to unravel even as the assembly is still gathered. As a finale at the end of Telemachus's speech, the *aoidoi* bring in a sign betokening the presence of Zeus: two eagles fly over the square and, having looked everyone in the eye—'death was in their glare'—they tear 'with their talons one another's cheeks and necks on either side' and dart 'away to the right across the houses and the city of the men' (Od. II 146–154). *Everyone knew in their heart what was to come*, and old Halitherses, who can recognize the signs sent by the gods, makes it explicit, further developing the idea that the suitors' lack of measure is putting the entire community at risk for survival (Od. II 161–169), explaining that a blood feud sets off an escalation of violence, depleting the community of its capital of human lives.

Confident of his own prognostication, Halitherses cannot but agree with Telemachus. With an equal grasp of the customary law, he thus echoes Telemachus' words by publicly enjoining the suitors to leave Odysseus' house, while urging the assembly to reflect on a possible solution.

Before anyone else can intervene in favour of Telemachus, the elder is met with an objection by another of the Ithacan suitors, the most strategically artful of them, Eurymachus:

> Old man, up now, go home and prophesy to your children, for fear in days to come they suffer ill. In this matter I am better far at prophesying than you. Many birds there are that pass to and fro under the rays of the sun, and not all are fateful. As for Odysseus, he has perished far away, as you also should have perished with him. Then you would not have so much to say in your reading of signs, or be urging Telemachus on in his anger, looking for a gift for your household, in hopes that he will provide it. But I will speak out to you, and this word shall be brought to pass. If you, wise in the wisdom of the old, shall beguile with your talk a younger man, and set him on to be angry, for him in

> the first place it shall be the more grievous, and secondly he will in no case be able to do anything because of these men here, while on you, old man, will we lay a fine which it will grieve your soul to pay, and bitter shall be your sorrow. (Od. II 178–193.)

The suitor uses reasonable arguments that may even have a basis in the common rules: it is reasonable to assume that Odysseus is dead, just as it is plausible that Halitherses has a duty not to endanger the life, or even the peace and quiet, of a man with whom he has formed a friendship. But then Eurymachus is taken away by his own excess: he answers Halitherses' demand with a spate of threats and insults, and blackmail, and he tops it all with a statement of the highest *hybris*, by denying respect for the elders and for the same assembly:

> Since in any case we fear no man—no, not Telemachus for all his many words—nor do we pay attention to any soothsaying which you, old man, may declare; it will fail of fulfillment, and you will be hated the more. (Od. II 199–203.)

In this way, he brings about his own condemnation and that of the other princes, by placing the behaviour of the suitors beyond the limits manageable by human justice.

Telemachus thus retreats, takes back his intimation, and stresses that no solution can be found without first ascertaining his father's death (this clarifies his own legal status and that of his mother). He then requests a ship so he can undertake a journey in search of news, as has been suggested by Athena, and he promises that if he fails to do so within a year, or if it turns out that Odysseus actually *is* dead, he will succeed to his father and give his mother away in marriage (Od. II 208–223).

This strategic act of resignation is an opportunity for the *aoidoi*, through Mentor's words, to draw a conclusion about the assembly's inability to deal with the problem at hand and to reflect, sadly, on the larger impossibility for the community to handle internal conflict driven by *hybris*:

> Never henceforth let sceptred king with a ready heart be kind and gentle, nor let him heed righteousness in his heart, but let him ever be harsh and work unrighteousness, seeing that no one remembers divine Odysseus of the people whose lord he was; yet gentle was he as a father. But of a truth I begrudge not the proud wooers that they work deeds of violence in the evil contrivings of their minds, for it is at the hazard of their own lives that they violently devour the house of Odysseus, who, they say, will no more return. Nay, rather it is with the rest of the folk that I am wroth, that ye all sit thus in silence, and utter no word of rebuke to make the wooers cease, though ye are many and they but few. (Od. II 230–241.)

In fact, no one intervenes. No one utters any word of rebuke. It is impossible to intervene in a private matter, or even to banish the suitors, since many of them are the offspring and relatives of those who sit in the assembly. The situation is structured in the narrative so as to underline the bewilderment of a community in the grip of

excess.

That much can be borne out by the way the assembly is brought to an end, with the suitor Leocritus showing no respect for procedure, and indeed giving offense to the elder Mentor, and making a show of power so brazen as to threaten that Odysseus might himself be slain if upon his return he should try to counter the suitors' efforts:

> Mentor, you mischief-maker, you wonderer in your wits, what have you said, bidding men make us cease? It is a hard thing even for a majority to fight for a dinner. For even if Odysseus of Ithaca himself were to come, eager at heart to drive out from his hall the lordly suitors who are feasting in his house, then would his wife no joy at his coming, much though she longed for him, but on the spot he would meet a shameful death, if he fought with men that outnumbered him. Your word miss the mark. But come now, you people, scatter, each one to his own lands. As for this fellow, Mentor and Halitherses will speed his journey, for they are friends of his father's house from of old. (Od. II 243–256.)

The assembly ends in the manner predicted by Athena: Telemachus has assumed the authority he sought and obtained the ship he requested. The suitors' arrogance has become evident, and the punishment proceeds according to the design of the *aoidoi*.

6. The revenge of Laertes' kin

Telemachus returns to Ithaca, having escaped a plot by the suitors to kill him. Odysseus is already on the island, disguised as a beggar at the hut of Eumaeus. It is here that the encounter takes place between father and son, in the countryside, in a humble dwelling, far from the loci of power, and it is here that, significantly, Athena also turns up, intent on persuading Odysseus to reveal his identity and to stage the massacre with Telemachus' help.

The facts leading up to the archery competition from which the massacre will take its cue are well known: they range from Odysseus' ingress at the palace as a beggar to Telemachus' return, where we see the *aeodoi* illustrating the suitors' behaviour and expressing a condemnation of human arrogance, while Telemachus arranges the banquet hall according to plan.

Despairing of her husband's return, Penelope decides to put an end to the havoc, offering herself in marriage to whoever can string Odysseus' bow and shoot an arrow through the holes of the twelve axe heads, as Odysseus was wont to do. This is a complex, symbolically charged act with many layers of meaning, not least because it places a woman in a position to judge a contest that may determine who the new king of Ithaca will be.

The competition is intended to determine how the suitors fare in demonstrating two main qualities of a good king, namely, strength and aim. It takes not just great strength to string Odysseus' bow but also an expert knowledge of the weapon, which needs just the right amount, or 'dose', of tautness. It is thus a test of *dynamis*: a

strength based not so much on physical force as on an experience acquired in using and measuring force. And the arrow that slips through the twelve axe heads planted in the ground symbolizes the ability to aim 'right', in such a way as to hold together different, potentially conflicting components, all of them forming a communitarian space—and perhaps it is no coincidence that the song speaks of twelve axes, the same number as are the suitors from Ithaca. The king must therefore have an ability to mediate and find common ground among all the leaders, a point of agreement, by understanding where their heart lies and aiming straight for it (in a metaphor where the heart is the hole of each of the twelve axe heads).

Penelope admits the beggar to the competition even though the suitors oppose his entry: Odysseus must reassert his superiority over the suitors before revealing his identity and giving start to the revenge.

So he strings the bow and shoots the arrow through the twelve axe heads. He then takes aim at Antinous' throat, killing him on the spot, and calls out his own name. Only now does he state the reasons that have driven him to inflict this punishment:

> You dogs, you thought that I should never again come home from the land of the Trojans, seeing that you wasted my house, and lay with my maidservants by force, and while I was still alive covertly courted my wife, having no fear of the gods, who hold broad heaven, or that any indignation of men would follow. (Od. XXII 35–41.)

All are in dismay except Eurymachus, who attempts a reconciliation according to the customary retaliative system:

> If you are indeed Odysseus of Ithaca, come home again, this that you say it just regarding all that the Acheans have done—many deeds of wanton folly in the halls and many in the field. But he now lies dead who was to blame for everything, namely Antinous; for it was he who set on foot these deeds, not so much through desire or need of the marriage, but with another purpose, which the son of Chronos did not bring to pass for him, that the land of well-ordered Ithaca he might be king, and might lie in wait for your son and kill him. But now he lies killed, as was his due, but spare the people that are your own; and we will hereafter go about the land and get you recompense for all that has been drunk and eaten in your halls, and will bring in requital, each man for himself, the worth of twenty oxen, and pay you back in bronze and gold until your heart is soothed; but till then no one could blame you for being wrathful. (Od. XXII 45–59.)

It is an interesting strategy that Eurymachus enacts in recognizing the avenger's reasons. Antinous has already been killed, and so he can be blamed for the most serious acts: the usurpation of power and the plot to kill Telemachus (Od. XVI 363–373). It is only Antinous, and no one else besides, who has gone beyond the measure of courtship by aiming to reap even greater rewards. The other suitors have confined themselves to circumventing the rules of a proper marriage proposal, and so the

damage for which they are responsible is only economic. And, by way of a further argument, Eurymachus notes that Odysseus should spare the other suitors because they are, after all, *his own people*.

Eurymachus brings to the table all the legitimate reasons backing his offer to make amends for the offense the suitors have committed: not least among these reasons is that the bonds of community would irreparably be broken if the young *basilees* of Ithaca and the neighbouring peoples were killed. Nothing prevents Odysseus from consummating his revenge by accepting the recompense that each suitor would offer in gold and bronze. But Odysseus refuses: there are no possible gifts or negotiations with the men responsible for *hybris* (Od. XXII 61–67). Because the suitors have overstepped the limit, Odysseus must himself do as much, overstepping the same limit, thus going beyond the common rules in place for managing violence.

There is no escape. Eurymachus urges everyone to defend themselves and is the first to lunge toward Odysseus, only to find death. From here on out there will no longer be any attempt to stop the carnage. Odysseus and Telemachus swing into action with their plan: having geared up for combat, they also provide weapons to Eumaeus and Philoeteus, the last remaining faithful servants, so they can back up Odysseus in the fight. The suitors, unarmed, begin to *fall thick on one another*. The court's exit has been blocked so as to not allow anyone to run for help.

The only one to come to the victims' rescue is Melanthius, the traitorous servant, who recovers the 'twelve shields, as many spears, and as many helmets of bronze with thick plumes of horsehair' in the storerooms where Telemachus has had the weapons stashed (Od. XXII 144–145): twelve complete sets of equipment for twelve of the one hundred and eight suitors. A curious circumstance, considering that no single man could possibly carry such a load on his own.

One can speculate that this is a clue left in the song as a device by which to mark off the limits of the revenge within the boundaries of the community. This would confirm that the *aoidoi* devote attention to the internal conflict, a focus supported by other elements, like the fact that twelve is also the number of maids punished for having sexually betrayed their master (Od. XXII 417–425), and that, as has been compellingly argued (Svenbro 1984), the suitors' relatives who go in pursuit of Laertes, Odysseus, and Telemachus to avenge the victims from Ithaca may themselves in all likelihood be twelve. Indeed, it appears that those weapons, all identical because they all belong to the king, are destined to arm Odysseus' fellow citizens.

In other words, the *aoidoi* have confined the conflict within the compass of those who bear arms: Odysseus, Telemachus, Eumaeus, and Philoetius, on the one hand, against the twelve *basilees* from Ithaca, on the other. With the same weapons equipping both sides, a mimetic relation is set up that brings out the fierce retaliatory reciprocity the song condemns as an affair that goes beyond the bounds of measure.

Only at this point does Odysseus come to appreciate the full magnitude of the problem before him: 'and great did his task seem to him' (Od. XXII 149). Before his

brethren-turned-enemies, the protagonist learns he is part of a much larger project led by Athena, whose ultimate goal is to restore the community to its previous order, within the boundaries of a tolerable violence.

While the fight rages on, the goddess appears at the court under the guise of Mentor, an ally of Odysseus, then disappears and begins to take on the enemies (Od. XXII 256, 273), crowning the whole of the action by making her appearance from above, clad in her battle array, so as to leave no doubt as to the divine origin of the 'justice' being dispensed.

Overwhelmed at the sight of the goddess, the surviving suitors fall in short order, all of them, at the hands of her protégés (Od. XXII 297–309). Only the *aoidos* Phemius and the herald Medon are spared, and the argument can be made here, too, that this is not coincidental, considering that the one represents singing and the other orderly speaking at assembly, and that the *aoidoi* hold both of these activities in the highest regard as arts serving the interests of the community.

After the massacre, Odysseus reinstates his kingly role at the palace, exercising the absolute authority the common rules recognize for a household head within the domestic sphere. He thus punishes the maidservants who lay with the suitors and Melanthius (Od. XXII 457–477; Cantarella 1992) and then sends Eurycleia for Penelope. Eurycleia is the faithful servant and nurse who has reared him as a child, and the dialogue between the two women reveals the truth about what has passed:

> Some one of the immortals has killed the lordly suitors in wrath at their grievous insolence [ὕβρις - *hybris*] and their evil deeds. For they respected no one among men upon the earth, evil or good, whoever came among them; therefore it is through their own wanton folly that they have suffered evil (Od. XXIII 63–67.)

Penelope's enlightened mind realizes that it is not Odysseus who has carried out the massacre but a god laying a punishment upon the suitors for their harrowing lack of measure, for the excess that has prevented them from showing respect for anybody, or rather, for 'any Other', whether it be a guest or a host. There emerges here, more emphatically than at any other place, the *aoidoi*'s precept that men should fear divine punishment, so that they should observe the rules of hospitality, understood as a general law of coexistence, and embrace its spirit.

Still, that does not remove the problem of the consequences touched off by the bloody revenge: the problem persists, and in fact it needs to be appreciated in all its drama, serving as an example of what must not be allowed to happen.

Unable to think of a way out the predicament, Odysseus and his companions prepare for the backlash from the victims' relatives by gathering in the countryside to meet up with Laertes, the family's chieftain (Od. XXIII 117-140).

Meanwhile, the misdeed is discovered in Ithaca. Having buried their dead and entrusted the other slain suitors to the fishermen, so as to make sure the bodies reach their homes, the community convenes at assembly (Od. XXIV 415–420). The first to speak is Eupeithes, Antinous' father, who encourages everyone to take revenge on Odysseus and his relatives before they can escape (Od. XXIV 426–437).

The despair over the loss of the best of Ithaca, coupled with the loss of honour, stirs up among the people a widespread feeling of compassion for the victims' families. At his point, however, Medon materializes and urges against any retaliatory action: he and Phemius, the only two to have witnessed the carnage and survived, testify that the revenge on the suitors has been the work of a god (Od. XXIV 445–449). And we again hear from Halitherses, the one who among the sage *gherontes* previously called on the suitors to relent during the assembly called by Telemachus:

> Through your own cowardice, friends, have these deeds been brought to pass, for you would not obey me, nor Mentor, shepherd of the people, to make your sons cease from their folly, they who committed a monstrous act in their blind and wanton wickedness, wasting the wealth and dishonouring the wife of a prince, who, they said, would never again return. Now, let this be the way of it, and do you do as I say: let us not go, for fear someone encounters a disaster he has brought upon himself. (Od. XXIV 455–463.)

The narrative is heading toward its conclusive moral. Those who can pick up the signs of the gods know it would be unwise to carry on with the blood vengeance. The suitors have gone beyond measure, and their *hybris* has brought forth gods' reaction. Odysseus is only the material agent of revenge: he never would have pursued it under ordinary circumstances. The suitors' relatives cannot pretend revenge because a violent reaction would be once again beyond measure.

The assembly in Ithaca is at risk of implosion. And so it must be in the narrative project. In fact, as much as Halitherses may have been cheered by more than half of those in attendance, the opposite sentiment also smoulders strong, especially among the direct blood relatives of the Ithacan suitors, who arm themselves and join Eupeithes against Laertes' family (Od. XXIV 463–471).

The community is definitely unsettled at this point, having yielded to a retaliatory logic in a spiral of violence that has escalated beyond repair, where none of the exchange devices the human law makes available would work to any effect. The doings at Ithaca cannot but find an artificial conclusion.

In the final dialogue between Zeus and his daughter, Athena, the goddess probes her father's intent in deciding whether to step in or leave the people the freedom to kill one other:

> 'Father of us all, son of Chronos, high above all lords, tell to me that ask you, what purpose does your mind now hide within you? Will you still further bring to pass evil war and the dread din of battle, or will you establish friendship between the two sides?' [...]
>
> 'My child, why do you ask and question me of this? Did you not yourself devise this plan, that Odysseus well and truly should take vengeance on these men at his coming? Do as you will, but I will tell you what is fitting. Now that noble Odysseus has taken vengeance on the suitors, let them swear a solemn oath, and

> let him be a king all his days, and let us on our part bring about a forgetting of the killing of their sons and brothers; and let them love one another as before, and let wealth and peace abound.' (Od. XXIV 472–486.)

Zeus' advice is, clearly, to stop the feud. The excess must not be allowed to continue unchecked if the community is to survive and if Odysseus, who has returned to bring peace, is to restore order to Ithaca.

Having no other means to quell men's 'thoughtless' desire for revenge, the gods make it so that the massacre is forgotten and that the Ithacans return to their cohesive life as in the past, observing the common rules.

The epilogue is well known. Just as the two sides are about to face off, Athena, who flanks her protégés by assuming once more the guise of Mentor, infuses in Laertes' arm a strength so mighty as to enable the old man to kill Eupeithes with his spear in a single stroke (Od. XXIV 516–525). The act marks the beginning of a brief fight whose only function is to formally establish the superiority of Laertes' family. Then, having reinstated the hierarchy of power, the goddess intervenes so that the conflict may cease:

> 'Cease from painful war, men of Ithaca, so that without bloodshed you may speedily be parted.' So spoke Athena, and pale fear seized them. Then in their terror the arms flew from their hands and fell one and all to the ground, as the goddess uttered her voice, and they turned toward the city, eager to save their lives. (Od. XXIV 531–536.)

All are seized by terror and turn to the city to save their lives. And so the point is that it takes a human fear of the gods in order for the value of community and of life to be understood. This is borne out by the fact that only upon witnessing the thunderbolt sent by Zeus at Athena's feet does Odysseus cease to press on with the fight, and that only at that point does he find 'peace of mind': it is the fear of punishment that instils wisdom in him. Only under these conditions can the covenant for the future prosperity of Ithaca be formed (Od. XXIV 546–548), that is, *only by virtue of the gods' will and of men's humility*.

Humans are thus always prone to excess, but like Odysseus they can achieve the greatest honour among mortals if they learn to act within limits, gaining that much more in awareness. This is the teaching of the *aeodoi* that makes the Odyssey a fundamental story in understanding the function of law and its justice today. If we recognize the limit we can learn to live as responsible members of a public space, where we need to measure that irreducible component which is otherness, so as to find the right 'dose', and with it the path toward community. It is by taking such otherness responsibly into account that the law of the community is formed: the law should have no other function than to express measure in rules, a measure that justice must constantly tweak, with a view to keeping at bay the human inclination toward identity. In this root lies the link between law and justice. And therein lies the challenge we should constantly be setting for ourselves.

7. Without end

The night after the massacre, Odysseus and Penelope meet up, but lest she should delude herself, he explains that his journey isn't over:

> 'Wife, we have not yet come to the end of all our trials, but still hereafter there is to be measureless toil, long and hard, which I must fulfil to the end; for so did the spirit of Teiresias foretell to me on the day when I went down into the house of Hades to inquire concerning the return of my comrades and myself. [...] Indeed your heart shall have no joy of it; for neither am I pleased, since Teiresias bade me go forth to a great many cities of men, carrying a shapely oar in my hands, till I should come to men that know nothing of the sea, and eat their food unmixed with salt, who in fact know nothing of ships with purple cheeks, or of shapely oars which are a vessel's wings. And he told me this sign, a most clear one; nor will I hide from you. When another wayfarer, on meeting me, shall say that I have a winnowing fan on my stout shoulder, then he bade me fix my oar in the earth, and make rich offerings to lord Poseidon [...] and depart for my home [...]. And death shall come to me myself away from the sea, the gentlest imaginable, that shall lay me low when I am overcome with sleek old age and my people shall be dwelling in prosperity around me. All this, he said, should I see fulfilled.' (Od. XXIII 248–284.)

The prophet Teiresias makes the prediction in the realm of the dead (Od. XI 100–137), where Odysseus has gone on Circe's advice to find the lost coordinates of his homebound journey. Only Teiresias can speak of the *nostos, pointing out its route and predicting how long it will take* (Od. X 539–540). He is blind just like Demodocus, and like the most famous *aoidos* of the songs, he can see beyond what humans can see.

We can suppose that the *aoidoi* want to offer not only the idea of a limit as truth of human existence but also the idea of new possibilities for life.

In the narrative plan Odysseus must become the very expression of human potential, a potential that comes about through suffering: a man who descends into the realm of Hades is one who will be capable of wisdom, because he has learned to go through suffering. Odysseus not only has dread of descending into the realm of Hades but also suffers at the sight of the dead souls (Od. XI 38–41), weeping profusely with every encounter. Odysseus meets his mother, too, and many of the fallen heroes at Troy, all of whom appear to him in a different light, with a wrenching love for life. That will enable the protagonist to find his own identity through memory, while also enriching that sense of self with a new sensibility. And with that new awareness Odysseus can resume his homeward journey.

The purpose of Odysseus' homecoming should not be to take revenge on the suitors. There is another trial awaiting him, the longest and most difficult of them all, before he can find his home: there lies more travelling ahead of him, for he must know many of man's realities before he can rest. His journey does not have any definite boundaries, being a metaphor for the need to experience the world and

gain an awareness of the human condition and of human possibilities, neither of which can be understood without having gone through the pain with which life is imbued.

Odysseus won't be ready for Ithaca until he will have wended his way to a place completely alien to his own where he is confronted with the existence of men who are unfamiliar with the ways of the sea but only know the land. An unequivocal sign will signal the end of his journey when he will recognize himself in another, in a wayfarer who in turn will recognize Odysseus as someone like him: in the encounter, Odysseus will be carrying on his shoulder an oar symbolizing the seafaring culture, and the wayfarer will mistake it for a winnow, which in turn symbolizes the peasant culture.

If Odysseus will finally make it home, in other words, this will happen when two men from different lands and backgrounds—strangers to each other but identical by virtue of their common condition as wayfarers treading the path of life—can each recognize himself in the other in this correspondence through which otherness becomes a bond of solidarity between mutual guests. The oar/winnow could finally be driven into the ground to symbolize a union aware of its own complex and irreducible difference, just as the twelve axe heads planted by the king symbolize anew the practice of sharing within the community. Only then will Odysseus be able to return home and travel no more, so as to die of resplendent old age in peace and prosperity.

The wise Penelope, identical in thought with her husband, accepts this fate by realizing that the biggest possibility lies in *hope*: 'If truly the gods are to bring about for you a happier old age, there is hope then that you will find an escape from evil' (Od. XXIII 286–287).

The *aoidoi*'s song appears to pierce through time, preserving a current relevance despite the different historical epochs across which it travels.

And so, to this day these songs keep rekindling the memory of a homecoming event that brings with it the hopeful possibility of political harmony among guests forming a community where otherness can find its place and measure in the intimacy of the social bond. But it will take a renewed ethic for that to happen, an ethic at once individual and collective that accords primacy to the core values which underlie life in common, so that these values may guide law and its justice, in such a way that there can no longer exist any difference between law and morals when the end being pursued is a satisfying life for everyone with everyone else. Understanding measure means identifying the point of mediation where different, potentially conflicting claims can be satisfied. And in such satisfaction lies the aim of law and its justice.

There is no need to push on beyond the threshold of human law. Here, too, the teaching of the song shines through with a wisdom that would be replicated in much of Western literature. Humans stand at the gates of law for the need to observe a limit within which to dwell with an utter sense of responsibility.

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Having Gods, Being Greek and Getting Better: On Equity and Integrity Concerning Property and Other Posited Laws

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This paper explores the classic dramatic tension that exists between, on the one side, a person's *prima facie* obligation to obey posited law, and, on the other side, a person's obligation to respect extra-legal norms, whether established by reference to 'gods' (which term is taken to include transcendental value systems of a non-religious nature, such as 'respect for human rights') or by reference to the immanent values of the social 'group', which I refer to by the shorthand 'being Greek'. The descriptions 'having gods' and 'being Greek' do not pretend to be definitive or mutually exclusive; naturally one can imagine examples of religious values that have become social values and social values that have become laws. The descriptions are merely heuristic, indeed the purpose of the present paper is to lead us out of these categories and to propose a way of performing life and practicing sound judgment that will avoid the perils of excessive obedience to law, excessive insistence upon transcendental rights or righteousness and excessive respect for the customary values of our group. It should be stressed from the outset that to live this way does not require anyone to compromise the sincerity of any deeply held view, but it does require that the expression of deeply-held views should be tempered or moderated for the purpose of public performance. What is called for is a compromise between the need to be able to live with oneself and the need to live with others. This is, of course, the dramatic struggle of any average life. The struggle, as I describe it in this paper, is the tension between, on the one side, the quality of desiring integrity in oneself or integrity in

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a certain thing, idea or code; and, on other side, the quality of desiring to open up the self or the thing or the idea or the code to external influences. I summarise this struggle in terms of an agonistic relationship between 'internal integrity' and 'equity'. The former is always seeking to close the doors and windows of a thing; the latter is always trying to open them up. So, for example, the former would insist upon the strict letter of a posited law, whereas the latter would temper the law by reference to its wider human context. It is precisely this dramatic struggle that has supplied audiences with compelling theatrical drama since ancient times, so it is natural to suppose that drama performed in theatre and other creative and representative arts has at least as much potential as any legal case or posited law to show us what is at stake and how we might better exercise our judgment and better perform our lives. With that in mind, we will shortly turn to the drama of the ancient Greeks.

First, though, it will be useful to summarise the structure of the paper. My starting point is to demonstrate a commonplace of ancient Greek thought by reference to classical theatre. The commonplace thought is this: that it is sometimes impossible to achieve perfect obedience to transcendental norms such as the law of the gods and the law of kindred blood. The messy facts of life frequently throw up scenarios in which the human actor is faced with a hard choice between one or more transcendental moral norms. From the perspective of such absolute moral laws or norms there is sometimes no perfectly right way of proceeding in practice, and so the human actor is then presented with the challenge of exercising practical judgment within the confines of a dilemma. One task for philosophy is to offer wisdom to guide action in the face of these hard cases. Such wisdom often takes the form of encouragement to act 'wisely' or 'reasonably'. In the next part of this paper I suggest that there is an alternative to such unitary concepts as guides to practical action. The alternative, as I present it, is to exercise two behaviours in combination with each other. One behaviour is to work towards internal integrity; the other is to work towards equity. The crucial insight that I offer is that internal integrity has no merit and does not deserve its name unless it is pursued with regard for equity, and equity, likewise, has no merit and does not deserve its name unless it is pursued with regard for internal integrity. I liken these qualities to the string and wood of a bow. Unless they are joined in agonistic tension there is no bow, there is only a practically useless stick and a practically useless length of string. This paper proceeds next to consider the status of private property rights. A key argument of that section is that the idea of private property in law has no real respect for transcendental moral norms and therefore cannot claim to have merit or virtue except in so far as it pursues integrity to itself whilst simultaneously respecting integrity to social and historical context—in other words, unless it seeks to sustain the necessary practical tension that should exist between internal integrity and equity. To allocate property rights between competing claimants according to law can seem morally repugnant from an external or transcendental perspective (for example, one that has an eye to global justice), but it can still have the merit of being done well from an internal perspective. One controversial implication of this, is that even thieves have

the capacity to divide their spoils amongst themselves in a way which, even though it lacks propriety from an external perspective, might have merit from an internal perspective if done with regard to the need to exercise internal integrity and equity. The paper then proceeds to make the suggestion that in the messy world where transcendental norms provide no clear answers to hard cases, and in which the on-going struggle must be to exercise equity to temper an excess of internal integrity, there will be cases in which apparently inequitable behaviour (that is, behaviour marked by an excess of internal integrity) will be tolerated because in the particular context there is recognisable common sense, that is an identifiable communal sense, that such behaviour is permissible even if it is not ideal. So now, at last, we will start with the drama.

Sophocles' *Antigone* (c.442 BC) proved so popular with theatregoers in the ancient *polis* of Athens that it prompted a re-write of the ending of Aeschylus' *Seven Against Thebes* (467 BC) (e.g. Vellacott 1961, 7-19; Dawe 1967). Aeschylus's play presents the epic military conflict between the seven defenders of the seven gates of Thebes and the seven captains of the Argive army who opposed them. It culminates before the seventh gate, where the king of Thebes, Eteocles, battles his brother Polynices, who has joined forces with the Argives. The brothers kill each other and the Theban law-makers resolve that Polynices, who is deemed to be a traitor, must be left unburied. It is at this point that the new ending inspired by Sophocles' play introduces Antigone, a sister of the two brothers, who has resolved to bury Polynices despite the legal prohibition. In this conflict the chorus reluctantly sides with the law, while the semi-chorus resolves to join with Antigone:

> Let the city take action or not take action against those who lament for Polynices. We, at all events, will go and bury him with her, following the funeral procession. For this grief is shared by all our race, and the city approves as just different things at different times. (Aeschylus, *Seven Against Thebes* 1072-1080.)

The play employs the semi-chorus (made up of Theban women) in much the same way that modern theatre uses the 'everyman' role: to prompt the audience to imagine itself in the place of the performers; to prompt the audience to engage personally with the universality of an ethical dilemma. The performance of a personal judgment is imperative, because the play presents the audience with a choice between the law-maker and Antigone, which, in the nature of a true dilemma, admits of no right answer. The play acknowledges that posited law need not command our total obedience and, being ephemeral, may be less deserving of our allegiance than more enduring sources of norms such as 'kindred', 'custom' and the 'divine'. Even today it is still our tendency to oppose posited law with, on the on hand, such transcendent values as religion and human rights (the notion of the 'human right' nowadays exerts a normative influence in social affairs equivalent to that of religion and, like religion, it claims an authority that transcends the present political will of the *demos*), or, on the other hand, such customary values as the familial, the filial and the patriotic (what I abbreviate here as the morality of 'being Greek'). There is, though, as I will

seek to show, distinct merit (distinct, that is, from the sorts of categorical norms that are demanded by the morality of 'having gods' or 'being Greek') in the practice of acting equitably. Equity moderates extremity whether it takes the form of an excess of 'right' or an excess of 'wrong'. As William West observed of equity in the context of law: '[e]quitie is always most firmly knit to the evil of the Law which way soever it bends' (West 1594, sect. 28). West's project was to explain the practical operation of the philosophical (essentially Aristotelian) idea of equity in English private law, and that, incidentally, is one aim of my own project. In this project I find that valuable guidance may be gained from the practical arts of drama and creative writing—arts that are not so different from the arts of law as some might like to think.

Consider, for example, a compelling ethical dilemma that is presented in series three of the contemporary French television drama *Engrenages*. It is a dramatic dilemma which would not have looked out of place had its essentials been played out in the tragedy competition of the city *Dionysia* in ancient Athens. It might seem that we are taking quite a digression from the path that will eventually lead to equity in English private law, but the *Engrenages* episode is universally informative, for it performs the archetypal human drama that is inevitably sparked when strict general rules abrade against the particular stuff of individual lives. Contemplate this scenario: you are an investigating magistrate and you discover that an intern has been pressurised into impeding one of your prosecutions. Add to this the fact that you are not fond of the intern on a personal level and, more significantly, that he is the son of your ex-lover with whom you now have an uneasy on-going relationship. Now imagine that you have the power to require the intern to resign from his judicial training, even though you know that in doing so you are effectively killing his career in the bud. What would you decide to do? Judge François Roban, an investigating judge (*juge d'instruction*) in the television series *Engrenages*, found himself in this position. Judge Roban is the classic figure of a strict and upright judge. For him the solution to the dilemma was straightforward and he would no doubt have claimed that his personal connection to the intern, still less his personal feelings towards him, did not enter into the matter. He terminated the intern's employment and as a direct consequence the young man committed suicide. Let us nuance the facts slightly, but significantly, so as to deepen the dilemma still further. Suppose that the intern had been not merely the son of the judge's ex-lover, but the judge's own son by that ex-lover. On such a set of facts the intern's suicide would be attributable not merely to the loss of a career but to a father's betrayal. But what could the judge have done differently; done better? How could he have upheld the sanctity of his judicial office, aligned as it is in his view with an almost religious respect for the rule of law, whilst making a concession to the context of his paternal bond and the moral demands of kinship which that entails? The dilemma is hardly less compelling than that which confronted Antigone. In normative, abstract and theoretical terms, there is no morally right answer to a true dilemma, but we will see that equity can be performed in practice to moderate an excess of internal integrity without commitment to moral absolutes. So how might equity be performed in the case of

the intern and Judge Roban? I will postpone my own suggestions until later in this paper. First, we will examine more closely the natures of 'equity' and 'integrity' as I understand those terms.

1. On equity and integrity

The argument that equity has merit without promoting a transcendental moral ideal is not straightforward, but equity is not the only instance of a quality for which we might claim such merit. Integrity is another. Integrity has the merit of respecting a thing for its own nature or 'in its own right'. Integrity is, for instance, the benefit that is gained when one respects the laws of property for their own sake even though respect for property rights perpetuates inequality of wealth distribution across society as a whole. Integrity in this sense has a rather closed and self-regarding quality, so I refer to it as 'internal integrity', to distinguish it from other senses in which the word 'integrity' might be employed. 'Internal integrity' is the morally neutral (at least it is not morally categorical) quality of integrating a thing to itself. It describes the quality of acting consistently with the internal relationships that constitute an activity or thing, even if the activity or thing may be considered immoral or otherwise wrong from an external point of view. Integrity of this sort does not of itself aim at any transcendental good, and it must, accordingly, be checked from blindly proceeding to excess. This function of moderating an excess of internal integrity is performed through the exercise of equity, thus internal integrity and equity are agonistically opposed to each other. Suppose that a simple example of internal integrity is adherence to legal rules and that a simple instance of equity is the recognition of exceptions to rules, then it can clearly be seen that equity is needed to check an excess of internal integrity but also that internal integrity is needed to check an excess of equity for an excess of exceptionality destroys the rule. Aristotle seems to have had a virtue of integrity in mind when he wrote in the *Nicomachean Ethics* that 'a function is performed well when performed in accordance with the excellence proper to it' (Aristotle, *Nicomachean Ethics* 1098a14-15), but whereas Aristotle argues that we cannot talk of virtuous ways of doing things which categorically lack virtue, I would argue that one can achieve a sort of internal integrity even in a normatively 'bad' context. To be more precise, Aristotle argues that one cannot achieve an ideal mean in a thing that is extremely right or extremely wrong, and this leads him to say that one cannot talk of a perfectly moderate way of committing theft, for example (Aristotle, *Nicomachean Ethics* 1107a10). That must be right. Theft can never be categorically ideal. Even the claim that there is merit in robbing the rich to give to the poor, depends upon such qualifying questions as 'rob why?'; 'rob how much?'; 'poor why?'; 'poor when?'; 'rich why?' and 'rich when?'. One may recall that Croesus, proverbially the richest man in the ancient world, was said, when in fear of imminent death, to have called out the name of Solon, for Solon had warned him that the happiness of a man cannot be judged until the story of his *whole* life is known.

The fact that theft cannot be categorically ideal, and indeed is generally considered to be categorically immoral, does not deny the possibility that thieves

might exhibit the attribute of internal integrity between themselves (so-called 'honour' amongst thieves). As John Locke wrote:

> Justice and truth are the common ties of society; and therefore even outlaws and robbers, who break with all the world besides, must keep faith and rules of equity amongst themselves; or else they cannot hold together. (Locke 1690, I.ii.2.)

It is, admittedly, highly controversial to suggest that there might be an acceptable way of doing something, like theft, which most people would agree is categorically immoral. Some would argue that a sound branch cannot grow from a rotten bough. Clearly one does not want to talk of 'good theft' any more than one would want to talk in categorical terms of 'moral killing', but one does not have to. The branch will naturally be rotten if the bough is rotten and nothing can change that categorical conclusion, but it is still open to us to consider whether the rotten branch, as a rotten branch, has the capacity to be a more or less vile version of that immoral type. If a thief is faithful to their partners-in-crime or an adulterer is faithful to their extra-marital lover or a sniper is obedient to their commander, we would not describe any of their activities as 'moral' or 'good'—the context categorically resists such a description—but we might recognise that they are failing less badly, in terms of categorical moral norms, than they might otherwise have failed. We do not want to say that there is virtue in any shade of failure, but if we free ourselves from ideal and absolute moral notions of virtue, we find that there is a less undesirable quality, if only less undesirable as a matter of degree, in the way in which these people do bad things. This is the quality that I have called 'internal integrity'.

Thankfully, we can find less controversial examples of internal integrity than the examples of the sniper, the adulterer and the thief. In the legal context, for example, we can say that a starting level—which has been called a 'threshold' (Dworkin 1977, 340) or 'preliminary' (White 2010, 574) level—of internal integrity is achieved by the simple expedient of deciding like cases alike. The first case might have been badly decided, in which case one compounds the error by deciding the second case in the same way (Alexander 1996), but at least one can be confident that one has achieved integrity between the two decisions. In such a case we commit two wrongs, but by virtue of internal integrity those two wrongs produce a distinct right, even as they individually remain wrong. It might be objected that internal integrity of this sort is nothing more than consistency. There are at least three responses to that complaint. The first is that strict consistency between judicial decisions in different cases is never possible, precisely because the cases are different. Hence, the process of treating like cases alike is a process that requires the judge to exercise an imaginative art of deeming one case to be like another. It follows that even when one is seeking consistency as a 'threshold' or 'entry-level' element of internal integrity, one must first enter into an imaginative engagement with the material. The second, and related, response is that the process of treating like cases alike is not based upon legal materials in the abstract, but upon respect for the community of judges who

produced them. One is never aiming for coldly calculated consistency, but for comity between persons united by an outlook or purpose that is in some respect shared. The third response is that even at its most simple, consistency is accompanied by predictability. Staying with the example of the law, we can observe that whether the law is good or bad, predictability should enable one better to adapt one's affairs to the law's demands. To reiterate, none of this is intended to promote 'internal integrity' as a categorical moral virtue; it cannot be denied that one may be consistently 'bad' as well as consistently 'good'. Likewise, none of this is intended to promote 'internal integrity' as a *free-standing* virtue of any sort. On the contrary, the pursuit of internal integrity is likely to be positively harmful, and it will certainly be positively harmful if pursued to its extremes, unless it is tempered by equity.

So what is the nature of equity's agonistic relationship to integrity? The struggle of equity is, as has already been said, to open up the doors and windows of a thing against internal forces that would pull the portals shut. A key way in which equity achieves this is by setting one idea of integrity against another. What I mean is that equity resists excess in a thing's integrity to itself by attempting to integrate the thing to the context in which it occurs. Equity's respect for the context of a thing can mean respect for the immediate factual circumstances of the thing and it can mean respect for the broader social and historical context in which the thing is set. Take a stereotypically English example. It is a rule that one should stand when the Queen enters the room in which one is presently seated. One can easily imagine that strict insistence upon the internal integrity of the rule could be cruel. It is for this reason that, if one of those present in the room is too old and frail to stand, equity moderates the rule to allow the elderly person to remain seated. This operation of equity could be called integrity to the particular factual context. If the elderly individual is a war veteran of Her Majesty's Armed Forces, the indulgence of equity is even stronger because the fact of the elderly person being seated must now be integrated to the broader social and historical context in which the fact is set. One could, of course, postpone the need for equity by redefining the rule to require 'all to stand when the monarch enters the room, if they are physically able to do so', but it would only be a postponement. Strict insistence upon the integrity of a stated rule will always risk harmful excess and will always call for equitable moderation. It is not so much the words of the rule that produce the wrong as the potential for powerful people to insist upon their own preferred reading of the words.

What gives an exception the character of equity and saves it from the error of excessive liberality? The answer is that the exception must be exercised whilst keeping the rule in mind. What gives consistency the character of integrity and saves it from the error of unthinking routine? The answer is that consistency to the internal code must be exercised whilst keeping in mind the equitable call for consistency to the external context.

The work of equity is especially necessary in the legal sphere because law prides itself on qualities of internal coherence, freedom from external influence and stability over time. The legal regime of rules is always seeking settled stability, which is an

extreme version of integrity to itself; but equity aims to integrate a rule to its social and historical context and will therefore moderate the law's attempts to establish a fixed settlement on the sands of a shifting society. Moving somewhere between the current of society and the status of statute, equity sets the walking pace of law. Lord Denning, who was by nature both deeply conservative and deeply compassionate, wrestled like a Greek with the problem of law's stability in a changing society. This is how the eminent Law Lord, Robert Goff, described Alfred Thompson Denning in the *Oxford Dictionary of National Biography*:

> […] [H]is great achievement stands: that he taught the English judiciary that the common law cannot stand still. It must be capable of development, on a case-by-case basis, to ensure that the principles of the common law are apt to do practical justice in a living society; even so, it is recognized that this must be done within the confines of a doctrine of precedent, the function of which is to ensure stability in the law and consistency in its administration, but which must not be construed too strictly to preclude the organic development of the common law.

I am impressed and persuaded by James Boyd White's argument that the law is not really stable at all (White 2012), but the *language* of stability is nevertheless perennially prevalent—and historically very stable—in the law (Watkins 1970, 321), as are symbols of stability (the 'set of scales' and the 'standing stone' are, for instance, genuinely ancient symbols of the stability of judicial or legislative order). Even if the law is churning inside, it pretends to stability, professes stability, takes pride in stability and wants to persuade the world through linguistic and embodied rhetoric that it is, in fact, stable.

Before concluding this overview of the idea of integrity as I employ it for present purposes, it must be acknowledged that Ronald Dworkin has already advanced a concept of 'integrity' as a virtue of judicial reasoning. His idea of integrity has, in one sense, more integrity than mine—but this may not be a good thing if we sometimes need to distinguish integrity to A from integrity to B. For Dworkin, judges can be compared to the authors of a chain novel who are bound to seek something more than conformity to previous decisions, for they are also required to keep the whole story of the law in mind: 'an experienced judge will have sufficient sense of the terrain surrounding his immediate problem to know instinctively which interpretation of a small set of cases would survive if the range it must fit were expanded' (Dworkin 1986, 245). This is all very well, but the problem with Dworkin's metaphor is that it invites judges to plot and plan a story that has integrity from an internal, distinctly judicial, point of view. According to Dworkin's metaphor, the judges as authors must always pretend to their own authority. Equity as I understand it, requires judges to pretend to (that is, etymologically, to 'reach out to') authorities beyond their internal point of view. It requires judges to pretend to humility. The dubious decision of an English court in the recent case of *X v A*, considered later in this paper, is one which is perfectly consistent with Dworkin's notion that an ideal judge will seek

the internal integrity of the judicial narrative, but what makes the decision dubious is that it fails to open up the law to claims that have authority from perspectives external to the law. The problem, in short, is that the imagined integrity of Dworkin's idea of integrity restrains him from differentiating the internal integrity of a relation from the integrity that the relation might have with things external to it. The tension between internal and external integrity is the drama of life, even the life of the law. Dworkin's analogy of the chain-novel lacks that drama, or seeks to solve it as if it were a problem susceptible to solution. However appropriate Dworkin's analogy of the chain novel might be to describe the progress of juridical science, improvised theatre might be a better analogy for the more general progress of law as a social fact; and better than to seek a solution to the dramatic tension that exists between law and life is to aim to appreciate it and participate in it.

If a virtue of internal integrity is that two wrongs can make a right, then a virtue of equity is that it intervenes when conduct is too right and therefore makes a wrong. When Cicero observed that the height of law is the height of injury—*summum ius summa iniuria* (Cicero, *De Officiis* 1.33), he was stating the universal truth that one can have too much of a good thing. Consider the example of music. The more sublime a tune, the more we listen to it, but there is no music so sublime that our appreciation of it is not diminished through over-exposure. Similarly with food, Shakespeare observes in *A Midsummer Night's Dream* that 'a surfeit of the sweetest things / The deepest loathing to the stomach brings' (2.2.137-8). And in *Twelfth Night*, famously: 'If music be the food of love, play on; / Give me excess of it, that, surfeiting, / The appetite may sicken, and so die' (1.1.1-3). Might there even be an excess of Shakespeare? It is a virtue to check an excess of vice, but it is also a virtue to check an excess of right. When the Old Testament book of *Ecclesiastes* cautions us to 'be not righteous over much' (7:16), it perhaps expresses a caution against a personal ethic which, in one's dealings with others, is overly insistent upon the rightness of a religious principle or legal entitlement. Aristotle certainly considered it unethical, as lacking the moderate quality of *epieikeia*, for an individual to insist strictly upon the application of strict law against another, and, by the same token, he considered it to be 'equitable to pardon human weaknesses' (Aristotle, *The Art of Rhetoric* 1374b).

The attribute of equity as I conceive it is close to Aristotle's concept of *epieikeia*, but whilst I agree with Aristotle that there is an error in behaviour that pursues any quality or anything to excess, I do not agree with his postulation that there is an ideal mean point between too much and too little of every quality or thing (Aristotle, *Nicomachean Ethics* 1106a-1107a). It will suffice to practice the art of moderating extremes without conceptualising that practice in terms of striving for a new ideal. Aristotle draws a distinction between true justice as a virtuous quality of character and formal justice as constituted by human institutions. Aristotle argues that formal justice ought to be moderated by *epieikeia*, but that true justice is a virtue that should be pursued absolutely without moderation. For Aristotle, there is an ideal mean in every branch of human conduct, but no ideal mean in qualities, such as 'temperance' and true 'justice' (Aristotle, *Nicomachean Ethics* 1107a20-25) that are inherently ideal.

That is fine in theory, but political justice will never be a practical reality in human society, for, as Aristotle acknowledges elsewhere, there can only be a 'simulacrum' of political justice in a society in which the citizens are not in fact all free and equal (Aristotle, *Nicomachean Ethics* 1134a26-8). It is submitted that when it comes to the practical reality of human interaction, even a perfectly temperate or perfectly just person must moderate the manner in which they present their perfection to others, lest they come across as unsympathetically humourless or strict. It may be desirable to moderate the social impact of one's moral perfection even as it is no doubt desirable to moderate the social impact of one's moral imperfection.

Related to Aristotle's notion of an ideal mean is his claim that there are many ways to go wrong, but only one way of being right (Aristotle, *Nicomachean Ethics* 1106b28-32), which Martha Nussbaum slightly modifies with a nautical metaphor: '[t]here are many ways of wrecking a ship in a storm, and very few ways of sailing it well' (Nussbaum 1992, 78). I prefer to say that it is always an improvement to moderate excess, so that even if there is only one ideal way of being right, there are countless ways of getting better. The absolutely crucial implication of all this is that it requires the human actor, which for this purpose could even be a lawyer or a judge or a legal academic, to acknowledge that they are indeed an actor in the sense of being a practitioner or performer of an ethical life.

With concern for the practical performance of equity in mind, it is now appropriate to recall the ethical dilemma presented in the contemporary French television drama *Engrenages*. The dilemma, as I enlarged it earlier, requires a strict judge to adjudicate between the internal integrity of his judicial office and the integrity of his paternal bond to his son. Can there be a way to exercise equity in such a case, whereby excessive insistence upon the integrity of the judicial office might be tempered with integrity to broader concerns of blood and social bond? I will delay my response a little longer with a brief diversion into the mythology of ancient Greece. The tale is told of a Greek lawmaker named Zaleucus who created a law to punish all adulterers by the gouging out of both their eyes. When his own son was caught in the act and brought before Zaleucus as judge, Zaleucus was faced with a stark choice between exempting his son from the legal rule or else enforcing the law and blinding his son. In many popular versions of the tale, it is reported that the Greeks thought that the bond of kinship should overrule the law (which, as an enduring instinct of the ancient Greeks, no doubt explains the popularity of the character of Antigone), but Zaleucus found a practical way to moderate the extremes of integrity to law and integrity to the bonds of kin. He had one eye removed from his son and one eye removed from himself. The judgment of Zaleucus indicates an equitable path for Roban, the judge in the *Engrenages* case, to follow. Instead of killing off the intern's career, the ageing Roban could have given the young man a solemn reprimand and warned him that in the event of any future infraction he would report the original offence to the authorities. Having thus imposed a sort of suspended sentence upon the intern, and in the process breached his strict duty as an officer of the court, Roban should then have confessed to his superiors that he

had committed an unnamed breach of his judicial duty and forthwith resigned from public office. He could have given an eye to save an eye.

2. Having gods

> 'The gods in our conception of them enjoy the most complete blessedness and felicity. But what kind of actions can we rightly attribute to them? If we say 'just action,' how absurd it will be to picture them as making contracts and restoring deposits and all that sort of thing!' (Aristotle, *Nicomachean Ethics* 1178b).

Aristotle poured scorn on the idea that we should consider respect for contract or restitution to be an attribute of the gods, but it is arguable that modern law has indeed afforded sanctified status to the internal integrity of its own system. No wonder, then, that Dworkin supposes that a judge must have the qualities of a Herculean demi-god if he or she is to succeed in relating the law to human affairs. Aristotle cited the examples of contract and restitution, but if he had been presented with the modern law of property in England and Wales (which I choose as an example I am familiar with; although it would no doubt work as well to take the law of any modern property jurisdiction) he would have observed that respect for property has in fact achieved the sort of normative status that one might attribute to a divine decree. Thus, in the early days of the modern English law of property, we find that Christopher St German (the Warwickshire jurist who introduced the Aristotelian idea of equity into English law) describes the law of property as having being posited with the sort of self-referential authority that one might usually associate with the authority of God or gods:

> It is in human law, duly constituted, that justice concerning the possession of lands and the ownership of chattels is made plain, and whatever is possessed in accordance with those laws is justly possessed, and what is held against them is unjustly held. (St German 1530, Prologue.)

There are strong ecclesiastical overtones to St German's discourse throughout his *Dialogue*, which is not surprising for one of the chief legal facilitators of Henry VIII's break from the Roman Catholic Church (Baker 2004), and it is tempting to suppose that in the passage just quoted he was alluding to the morality that is inherent in the Christian ideal of respect for earthly authority and, one might add, to the legal example of the Judeo-Christian God (who, in contrast to Aristotle's Olympians) makes covenants and redeems debts; but St German was not, as far as we know, an actual saint. It seems more likely, on the face of his words, that he has in mind the purely human virtue of respecting property law for its own sake—what I have called the virtue of internal integrity. Arguably it is this virtue which English jurists have prized above all others since the time of St German right up until the present day. Professor Harris, for instance, was adamant that ownership is 'a conception—or rather a battery of conceptions—internal to the law' (Harris 1996, 70). He was responding to A. D. Hargreaves, who had argued that:

> The problem of ownership remains, but it is not a legal problem; it is the concern of the politician, the economist, the sociologist, the moralist, the psychologist—of any and every specialist who can contribute his grain to the common heap […] The lawyer, naturally, has his contribution to make, but as the problem is not even fundamentally a legal problem, the final solution does not lie with him. (Hargeaves 1956, 17.)

Professor Harris called this 'patently absurd', but for all the bravado of that dismissal, it is clear—even on the face of Harris' own analysis—that Hargreaves was right to say that ownership 'is not a legal *problem*' (emphasis added). The nature of Harris' response betrays the fact that for him the idea of ownership has been rendered essentially *un*-problematic through the very process of containing it within the doctrinal categories of property jurisprudence. We might say, by the same token, that litigation is problematic for everybody except the lawyers. In litigation, lawyers are opposed to each other in form but in fundamental point of fact they are cooperating with each other (White 2012, 8). In Harris' scheme, ownership is unproblematic in the way that the rules of chess are unproblematic. He would not deny the complexity of the puzzles that might be thrown up by the rules of the private property game, but he would see no problem at all in the assertion that the basic rules of the game are simple and are properly to be set by lawyers and the law. Hargreaves, in contrast to Harris, seems to be suggesting (albeit in a somewhat over-stated style) that doctrinal problems internal to the legal idea of private property are minor compared to the social, political and philosophical problems that are perpetuated by strict respect for legal ownership. Read in this way, Hargreaves can be said to challenge the assumption that jurists should be the only ones permitted to set the rules of the property game and the only ones permitted to influence outcomes when property is in play.

So, in spite of Harris' protestation, ownership remains a bigger problem for non-lawyers than it is for lawyers; and arguably the less problematic it is for lawyers the more problematic it is for everyone else. When lawyers internalise the issue of ownership and treat access to assets as being wholly a problem of corrective justice based on entitlement, it is harder for the voices of distributive justice, still less any moral concern for 'right and wrong', to be heard. From the perspective of Hargreaves' 'moralist' (or 'moral philosopher') in what sense can the system of property law be regarded as inherently moral? As a legal doctrine, it has the virtue of internal integrity, but this is not moral in any categorical sense. It also has a customary status which takes it beyond the internal integrities of any particular groups (such as conveyancers, lawyers and judges) and makes it part of the *mores* of the wider society—it can therefore claim such moral status as is implicit in the idea of 'being Greek' as I use that term—but is there any *transcendental* morality in respect for the scheme of legal property rights? Certainly, most people would consider it immoral to steal property belonging to another, but is it *positively* moral to assert one's property rights against another? Whatever morality might be enshrined in a system of property law, it can hardly be said to transcend its context. Is it moral to step over a homeless person on the way to claiming rights to one's second home in court? Is it

moral to retain millions of pounds of profit from a loan contract with a bank when it later emerges that those millions had been paid out of funds defrauded from third parties? Perhaps it is, perhaps it is not, but the law will uphold the defendant's right to retain the wealth.[1] One cannot deny that private property law secures the political advantage of resistance to arbitrary powers of expropriation, but to say that private property rights protect us from expropriation is rather circular, if not tautologous, for it ignores the fact that the idea of private property creates the very possibility of expropriation. In any case, if there are transcendent moral virtues enshrined in the idea of private property, they are surely off-set by the selfishness that is inherent in the private aspect of property and the exclusivity which is the essence of what defines property as being mine and not yours. If systems of private property law derive any authority from transcendent considerations, one senses that those considerations are more pragmatic than moral. A moment's attention to English land law reveals that legal title is ultimately based on mere priority in time. Legal title is traceable back to military powers or the priority of hours—whoever possessed land first, or was born first (and for that matter born male), was deemed to be the owner of it. All other factors being equal, the first possessor has the right to exclude all-comers; and this quality of exclusivity continues to be the essence of the idea of real property in English law (Gray, 1991).

Far from enshrining transcendent and positive moral virtue, property law has shown itself capable of achieving the worse potential of any system created by humans, for it has achieved the denial of humanity. In ancient Greece, women had a status that in some contexts was little more than that of a proprietary asset of male relatives, and then there is the great evil of slavery (which even Aristotle condoned), that has always been conceived in terms of property law. When Shylock sought to defend his right to take a pound of flesh from his debtor Antonio in Shakespeare's *The Merchant of Venice*, his argument was framed in terms of legal right and property for his plea was that he had purchased his right no less than the hypocritical Venetians had purchased their slaves:

> You have among you many a purchased slave,
> Which, like your asses and your dogs and mules,
> You use in abject and in slavish parts,
> Because you bought them: shall I say to you,
> Let them be free, marry them to your heirs?
> [...] You will answer
> "The slaves are ours:" so do I answer you:
> The pound of flesh, which I demand of him,
> Is dearly bought; 'tis mine and I will have it.
> If you deny me, fie upon your law! (4.1.91-102)

Perhaps we can consign to history the great evil of state-sanctioned property rights in people, but let us continue to suspect that there is nothing in the internal

1 *Bank of Credit and Commerce International (Overseas) Ltd v Akindele* [2001] Ch 437, Court of Appeal.

integrity of property law that can protect us in the future from its worst mistakes. We can easily find modern examples in which courts have been content, indeed doctrinally required, to recognise property rights in morally dubious circumstances. *Tinsley v Milligan* is a case in point.[2] Tinsley and Milligan were two women who had purchased a house on the understanding that they would be joint beneficial owners, but they agreed that legal title should be vested in Tinsley's sole name. This was to enable them to defraud the Department of Social Security of certain welfare benefits. Subsequently the relationship between Tinsley and Milligan broke down and Tinsley left the premises. She then brought proceedings against Milligan claiming possession and asserting sole legal and beneficial ownership. Milligan counterclaimed for an order for sale and for a declaration that Tinsley had held the property on trust for the two of them in equal shares. The judge held for Milligan, and Tinsley's appeals were dismissed in turn by a bare majority of the Court of Appeal and a bare majority of the House of Lords.

The basic principle, their Lordships agreed, was that parties should be left to their strict entitlement in property law despite their illegal design. Where their Lordships disagreed was in their opinion as to which rights should be left undisturbed. Lord Goff (dissenting) was of the opinion that formal *legal* entitlement should be left undisturbed, following Lord Chancellor Eldon's longstanding exhortation to 'let the estate lie where it falls'.[3] Applying that approach to the facts of *Tinsley v Milligan* would have confirmed Tinsley's legal title to the land unencumbered by Milligan's claim to have an informal beneficial interest in the land. For Lord Goff, Milligan's claim to be entitled to a beneficial share ought to be denied because she had not come to court with 'clean hands' (that is, she had not come to court free from taint). In contrast, Lord Browne Wilkinson (with the majority) stressed that a transaction might have proprietary consequences without any need for the claimant to establish 'clean hands'. His Lordship reasoned that the arrangement between the parties in *Tinsley v Milligan* had been of this sort. Milligan had automatically acquired an interest under a trust (a resulting trust) on the basis of a property law presumption of general application (the presumption being that the payment of cash to assist in the purchase of land in the name of another person requires the latter to hold a beneficial share of the land on trust for the former in proportion to the size of the former's cash contribution). In *Tinsley v Milligan*, it was held that Milligan had no particular need to rely on the court's assistance to establish her interest under the trust and she should therefore be allowed to take that which she would have been entitled to as against Tinsley under the general law of property, quite regardless of the illegality of their joint design. Lord Browne Wilkinson applied the so called 'Bowmaker rule',[4] which provides that a party to a transaction tainted by illegality is entitled to that which

2 *Tinsley v Milligan* [1994] 1 AC 340, House of Lords.

3 *Muckleston v Brown* (1801), 6 Ves 52, 69. In this context, to 'let the estate lie where it falls', describes the court's passive conduct in permitting the present possessor of formal legal title to an estate in land to assert that title unencumbered by the claims of other persons.

4 *Bowmakers Limited v Barnet Instruments Limited* [1945] KB 65.

the law would bestow on her in a similar case not tainted by illegality, provided she at no stage pleads or relies upon the fact of her illegality. Thus the House of Lords reduced the issue in the case to an internal question of doctrine of precisely the sort that the late Professor J. W. Harris would have appreciated: whether to uphold legal title to the property based on the formal documentation or to uphold substantial beneficial entitlement to the property based on the claimant's cash contribution. That one or other of these alternatives ought to be upheld was readily assumed, and the suggestion that broader societal perspectives (such as potential public objection to the fact of the court's assistance in regularising the property affairs of a couple who had obtained state benefits by fraud) might be relevant was confidently dismissed. Indeed, as so often in trusts law, the recognition of the claimant's beneficial title followed no value other than the value of cash. It is not suggested that their lordships in this case reached the wrong decision, or even that they took the wrong matters (or failed to take the right matters) into account; it is only intended to demonstrate that the potentially manifold moral and ethical issues that might have flowed from the facts of this case were readily reduced to a doctrinal debate between senior judges, with the judges on both sides agreeing that the only real challenge was to find a solution designed to preserve the internal integrity of property law.

Very occasionally, when called upon to vary a trust, the courts have acknowledged that there might be more to the nature of a 'beneficial interest' under a trust than benefits of a financial nature. Megarry J once held that benefit is 'not confined to financial benefit, but may extend to social or moral benefit'[5] and Lord Denning MR confirmed that 'the court should not consider merely the financial benefit to the infants or unborn children, but also their educational and social benefit', adding that '[t]here are many things in life more worth while than money'.[6] And yet, however much these supremely capable judges might trust themselves to determine when a non-financial interest ought to outweigh a financial interest, it is clear that judges do not trust trustees to make the same calculation. Trustees are encouraged to invest the trust fund with the sort of care they would show for their own kin ('to take such care as an ordinary prudent man of business would take if he were minded to make an investment for the benefit of other people for whom he felt morally obliged to provide'[7]), but it is clear that they are required to invest in order to produce purely financial benefits. Trustees cannot 'make moral gestures'[8] and, on the contrary, in matters of investment they may 'have to act dishonourably (though not illegally) if the interests of their beneficiaries require it'.[9] Trustees are not permitted to pursue benefits other than financial benefits unless the trust instrument authorizes the

5 *Re Holt's Settlement* [1969] 1 Ch 100, 121D.
6 *Re Weston's Settlements* [1969] 1 Ch 223, 245.
7 *Re Whiteley* (1886) LR 33 Ch D 347 CA, per Lindley LJ at 355 (later approved in the House of Lords). See also *King v Talbot* 40 NY 76 (1869).
8 *Re Wyvern Developments Ltd* [1974] 1 WLR 1097, per Templeman J, 1106.
9 *Cowan v Scargill* [1985] 1 Ch 270, per Megarry VC at 287–8, citing *Buttle v Saunders* [1950] 2 All ER 193, per Wynn-Parry J, 195).

pursuit of other benefits[10] or the beneficiaries can be taken unanimously to approve the pursuit of non-financial benefits.[11]

The case of *X v A*,[12] demonstrates the courts' belief that trustees' should, in the final analysis, prefer money over morality (or treat money as if it were equivalent to morality for legal purposes) when it comes to the exercise of their powers. The trustees of a marriage settlement had exercised their power of advancement to give the life tenant (the wife of the settlor) £350,000 in 1996 and £500,000 in 2000, which sums she had given to charity in accordance with her Christian beliefs. The trustees subsequently applied for directions from the court as to whether it was open to them to give her a very substantial part of the remaining trust capital for the purpose of enabling her to devote it to charitable causes. The judge did not criticize the earlier payments, but refused to authorize any further exercise of the trustees' power of advancement on the ground that the sums proposed to be released were too large a proportion of the whole. Should we applaud the judge for restraining the beneficiary from being over-righteous? Was the judge exercising equitable restraint? Sadly, no. It is not equitable to use power to restrain others; it is only equitable to resist one's own power and the excessive integrity of one's own codes and modes of conduct. It is implied by the judge's judgment in this case that trustees can apply funds to discharge a moral burden on the beneficiary's conscience, but only to a limited extent. Far from exhibiting equitable restraint, this betrays the law's inherent bias towards maintaining material wealth at the expense of moral considerations. His Lordship, Hart J, said:

> How, as Mr Le Poidevin asked rhetorically, can the court assess the validity and nature of a moral obligation otherwise than by reference to the beneficiary's own views on the subject? That is certainly not a question to which the court can give an abstract answer, whether by reference to the Bible or to Bentham, to Kant or the Koran. The answer has to be found in the concrete examples provided by the decided cases and the reliance placed in them on generally accepted norms applicable in the context of dealings with settled wealth.[13]

His lordship does not look to God for a moral guide nor to the values established by Kantian or Benthamite morality, but he looks to the virtue of internal integrity that comes from deciding according to precedent. He pays lip-service to the morality of customary practice ('generally accepted norms applicable in the context of dealings

10 As Sir Donald Nicholls VC acknowledged in *Harries v The Church Commissioners for England* [1992] 1 WLR 1241: 'trustees would be entitled, or even required, to take into account non-financial criteria . . . where the trust deed so provides' (1247B-C).

11 *Cowan v Scargill* [1985] Ch 270 per Sir Robert Megarry VC at 288E–G. Although Lord Nicholls of Birkenhead, writing extra-judicially, has expressed his opinion that the range of investments available to trustees is sufficiently extensive to allow trustees 'to give effect to moral considerations, either by positively preferring certain investments or negatively avoiding others, without thereby prejudicing beneficiaries' financial interests': 'Trustees and their broader community: where duty, morality and ethics converge' (1995) 9(3) *Trusts Law International* (1995) 71-77, 71.

12 *X v A* [2006] 1 WLR 741.

13 *X v A* [2006] 1 WLR 741, paragraph [43].

with settled wealth')—which is the morality of 'being Greek'—but he will respect those norms only so far as they are evidenced in the decided cases, which really amounts to little more than the internal integrity of the judicial system and property law system in another guise. Ultimately, there is no morality in his lordship's idea of a beneficial interest; there is only money. I do not make this observation by way of criticism of, or approval for, the approach taken by the judge, but rather to clarify what it is that judges do. The internal integrity of law may or may not be a virtue when viewed from perspectives external to the law, but it is certain that lawyers' excessive confidence in the virtue of law's internal integrity should be tempered by the humility of equity. The law may be more secure with its doors and windows closed, but it will also be unhealthily isolated from its social and cultural context. The internal integrity of the law, as with the internal integrity of anything, cannot be considered meritorious in isolation. The internal integrity must be off-set by integrity to context; or, as I prefer to put it, internal integrity must be tempered by equity. In a cosmos of categorical absolutes, in which we could predict every wind of change, we should know to close the window against the weather or to fling it wide open on the world. Since we do not live in such a place, it is prudent to keep the window just ajar.

I have so far sought to describe equity in agonistic relationship to internal integrity and to that end I have aligned equity very closely with concern for external context, so that equity might be considered shorthand for a force of 'external integrity' that struggles to find a living and dramatic tension with the force of 'internal integrity'. As 'internal integrity' pulls in; equity pulls out. The necessary next question is how hard and far equity may be permitted to pull before it commits the error of replacing an excess of 'internal integrity' with an excess of 'external integrity'. To express this challenge in a familiar metaphor of law, we might ask how far equity may bend a rule without breaking it. Another way of expressing the same challenge, for some purposes at least, is to ask how far the normatively neutral attribute of law's internal integrity may be tempered by the normatively neutral attribute of equity without going so far as to supplant law with morality. In the next section, I will offer an answer to that question.

3. Being Greek—customary limits on the scope of unconscionability

> For forms of government let fools contest;
> Whate'er is best administer'd is best:
> For modes of faith, let graceless zealots fight;
> His can't be wrong whose life is in the right (Pope, *An Essay on Man*, 1732-4)

The basic idea of this section is one that I have rehearsed elsewhere (Watt 2009), but the present challenge is to elucidate the idea in connection with the morality of 'being Greek' and in connection with the agonistic relationship between internal integrity and equity. The quote from Pope's *Essay on Man* makes my point for me, for, as I read it, it says that having gods in the form of political ideologies and formal religions

is not the only way of living well. Another is the practical virtue of 'proceeding' or 'doing' (in Pope's term 'administering') well. Pope says 'best', but I will be content with 'better'. The practical virtue of proceeding well is a combination of many practices including the pursuit of the complimentary qualities of internal integrity and equity. That equity should resist extremes of internal integrity is straightforward enough to accept. The problem is to know to what extent equity can operate to challenge the internal integrity of a rule through attention to concerns (including social, cultural and moral concerns) that lie outside the nature of the rule as rule. Rules might need to be bent but they ought not to be broken. The appropriate response to an excess of internal integrity in a thing is not to disintegrate the thing, but to produce a new integrity by tempering internal integrity with equity. If a rule needs to be replaced, that is a function for general law reform; it is not a function for equity. The challenge for the equitable function, as indicated above, is to exercise equity without going so far as to supplant law with morality.

My proposal is that we should conceive equity as being the practical art of resisting strict insistence upon the rule when strict insistence would be inappropriate to the context in which the rule operates. Insistence upon a rule might be inappropriate due to any number of specific factors, but the historical development of the idea of equity in English law suggests that the oppression or abuse of the relatively weak by the relatively strong is a key indicator of inappropriate insistence upon a legal right or power. Consider again the example of the veteran who remains seated when the Queen enters the room. It would patently be inappropriate for any authoritarian to insist that the weak and vulnerable veteran should attempt to meet the demands of the rule. When a general rule, legal or otherwise, is asserted in a context that makes such assertion oppressive or otherwise inappropriate this is a special kind of wrong. In the language developed in the English Chancery jurisdiction the special wrong of contextually inappropriate insistence upon a general legal right or power goes by the name of 'unconscionability'. In this section of the essay, the challenge is to identify appropriate limits to equity's unconscionability-based intervention. Although we will be focusing upon equitable intervention in legal cases, the principle applies as well to equitable efforts to moderate excess of 'internal integrity' in other contexts. The key argument of the present section is that although we should identify conduct to be 'unconscionable' where it abuses a routine or a legal right or a rule in a way that is inappropriate in the particular context, we ought nevertheless to refuse to treat conduct as 'unconscionable' if it conforms to behaviour which is customarily considered to be appropriate to the context under consideration. In short, a person who is acting morally according to prevailing *mores* for the relevant context—that is, behaving morally in the sense of 'being Greek' (or, to put it another way, 'doing in Rome as the Romans do')—ought to be immune from the accusation that they have acted unconscionably. The communal morality of 'being Greek' trumps the activity of equity so far as the judgment of any court should be concerned, for, in Pope's phrase: '[h]is can't be wrong whose life is in the right'. Legal authority to the same point is found in *The Commonwealth v Verwayen*, in which Deane J opined that

unconscionability describes conduct that commonly entails 'insistence upon legal entitlement to take advantage of another's special vulnerability. . . in a way that is unreasonable or oppressive to an extent that *affronts ordinary minimum standards of fair dealing*' (emphasis added).[14] This *dictum* confirms that the label 'unconscionable' should not be applied to ostensibly oppressive and unreasonable behaviour if that behaviour is consistent with (or not inconsistent with) behaviour that is customarily considered, according to *communis consensus utentium*, to be appropriate to the context in which it occurs. 'Unconscionability' is apt to describe the equity I have in mind because it is inherently un-idealistic. There is no such state—indeed there is no such word—as 'conscionability'. So 'unconscionability' is committed to the practical project of avoiding the worst errors without ever claiming to direct us to a new ideal. Unconscionability is no doubt hard to define, but it is clear that it does not imply breach of any moral code and that it is a label that should not be applied to conduct that is consistent with a recognised customary, or otherwise 'moral', norm. Of course it cannot be denied that some customary norms of behaviour, which may be considered moral in the sense of popular *mores*, may be considered immoral by other standards. The widespread acceptance of slavery in ancient Greece is one example of this. Suppose that someone acted unfairly or oppressively in his dealings with a slave, should it be a defence to a charge of unconscionability that such such behaviour is routinely accepted? Because unconscionability is a contextually-specific complaint, I have to admit that the defence of customary practice should normally operate. Of course this does not prevent the judge from remedying the oppressor's behaviour on grounds other than the ground of unconscionability, where the oppressive behaviour can be shown to be wrong on other grounds and where alternative courses of action are open to the judge.

Let us recall the metaphorical description of equity as the attribute of seeking to open up the doors and windows of a thing (such as a legal right) so as to prevent the thing from utterly sealing itself off from its external context and its responsibility to others. We can now extend the metaphor to say that there are times when equity finds that the door or window of a thing wants to close not merely because of the pulling force of the internal integrity of the thing, but because of the pushing force of the external context. To place this extended metaphor in a practical legal context, let us say that where a person insists strictly upon their legal ownership of land in a way that harms another person, one might be tempted to open the door of their property right to the interests of the other, but however tempted one might be, one is not permitted to do so where customary practice—that is *mores* or 'being Greek'—establishes that it is acceptable for the legal owner to insist upon his or her strict entitlement in the particular context.

The 2008 decision of the House of Lords in *Yeoman's Row Management Ltd v Cobbe*[15] illustrates my claim that custom in the relevant context (the *mores* of 'being Greek' or 'doing in Rome as the Romans do') places an outer perimeter on the ambition

14 *The Commonwealth v Verwayen* [1990] 170 CLR 394 at 441, High Court of Australia.
15 *Yeoman's Row Management Ltd v Cobbe* [2008] UKHL 55; [2008] 1 WLR 1752.

of unconscionability-based equitable intervention. The essential facts of *Yeoman's Row Management Ltd v Cobbe* were that a property developer entered into an oral agreement with the owner of a block of flats under which the developer undertook to obtain planning permission to demolish the block and replace it with new town houses. A formula was agreed on price and division of profits from the development. The developer spent eighteen months acquiring planning permission to demolish the block to build new town houses, but after planning permission had been obtained the owner of the block purported to withdraw from the agreement. In the Court of Appeal, a proprietary estoppel was recognised in favour of the developer, which was remedied by awarding the developer a share in the increased value of the property attributable to the planning permission, but this was overturned by the House of Lords. Their lordships held that the developer had acquired no property right in the land on these facts and the developer was accordingly awarded a mere cash *quantum meruit* (sum deserved) sufficient to ensure that the land owner would not be unjustly enriched by the time and labour expended by the developer in pursuing planning permission in pursuance to their informal agreement. It was held that the developer had assumed the risk that the owner of the block might withdraw from the contract and insist upon its strict legal right to absolute unencumbered ownership of the land. The fact that such insistence on legal title might be considered immoral in the abstract did not suffice to justify equity's intervention; for it had to be shown that the owner had behaved in a manner that was unconscionable in this context. The evidence was in fact the other way—the customary practice was to allow parties to withdraw from an informal contract in such a case. The claimant's argument that both parties considered themselves to be bound 'in honour' to perform the contract was rejected. Neither the contextual intervention of equity based on the restraint of unconscionability nor respect for an abstract morality of honour could be permitted to prevent insistence upon legal title where such insistence was justified not merely by the internal integrity of the right but by the *mores* of customary practice in the particular context. As Professor Wooddeson recognized more than two centuries ago: '[t]o rescind every contract incompatible with the nicest principles of honor and morality, tends to terminate all commercial intercourse' (Wooddeson 1794).

'In law context is everything'. This was the opinion of the Judicial Committee of the House of Lords for England and Wales, which it confirmed at least twice in the last decade,[16] and no doubt its successor, the UK Supreme Court, will not dissent from that view. Concern for context lies at the heart of the proposal that I have set out in this paper. In certain contexts we can observe an excessive insistence upon the integrity of a code of conduct or law or some other thing. Equity can temper an excessive of integrity by opening up the thing to the wider social and cultural context in which it operates or exists. However, equity cannot claim transcendent virtue. Equity cannot claim to have a free-standing or categorical moral status. The virtue of

16 Albeit in two very different legal contexts: *R v Secretary of State for the Home Department ex parte Daly* [2001] 2 AC 532 per Lord Steyn, paragraph [28]; and *Stack v Dowden* [2007] UKHL 17 per Baroness Hale of Richmond, paragraph [69].

equity, such as it is, is limited by the context in which it operates. Without an excess of integrity and related errors, equity would have nothing to do and equity would be nothing of good. Recall the image of the archer's bow, and the dramatic beauty that exists in the tense relationship between the bow and the string because they are tied together. Uncouple them and the wood will straighten out and be just a regular stick. (The stick will achieve extreme internal integrity as a stick.) The string will lose all its power, for its power is inherent in its relation to the wood. And sometimes, even when the arm of equity might want to pull against the excessive integrity of a person who harms another by insisting upon strict entitlement, equity must relinquish the struggle if such insistence is customarily permitted as being appropriate to the context. The clearest occasion for equity to withdraw its assistance is where there is a *de facto* equality of power between the relevant parties. Power is the perennial problem, of course; not least because the power ultimately rests in the hands of the judges to define what *counts* as a relevant context for equity's intervention in legal matters and what *counts* as a customary bar on equity's intervention in a relevant context. The power of the judge is inevitably influential where one is concerned with the exercise of sound judgement, but so long as judges remain human there is hope that better judgment will proceed from a better humane appreciation of how the agonistic dynamics of integrity and equity may be performed in dilemmas and other hard cases.

4. Getting better

> '"Trial and error" is not an insult. It is the difficult challenge and the difficult virtue of the rule of law' (Manderson 2012).

The project of engaging law with morality must be a modest one. We should never expect a perfectly integrated scheme that will dictate 'right answers' to hard questions, and the question of law's relationship to morality is one of the hardest. Lord Scarman, when he was a judge of the High Court, expressed very well the sort of modesty we need, observing that '[w]hen all is dark, it is dangerous for a court to claim that it can see the light'.[17] We cannot take a seat in the theatre and hope to discern a theory for reconciling all the tensions in the drama, but what we can do, indeed what we must do by our being placed as actors in the midst of life with all its conflicts and contingencies, is to perform one way or another. Certainly we can perform according to the moral script set down by our God or gods, but we can also recognise that integrity to the script, whatever the script, must be tempered in its extremes by respect for the present context of our performance. To live well and to play our part with respect and sympathy for our audience and our fellow performers, we must improvise; we cannot succeed if we adhere slavishly to the script of law and other codes. It is not wrong to be idealistic, but it is wrong in some contexts to insist upon an ideal. There might be perfect political justice and perfect

17 I*n the Estate of Fuld deceased* (No 3) [1968] P 675, 714E.

distributive justice one day, but today we can only begin by correcting the worst errors. As Victor Hugo wrote—the *first* equality is equity (*La première égalité, c'est l'équité*) (Hugo 1862, iv.1.4).

How are we to identify the worst errors of excessive insistence upon the integrity of law? The practical answer, however unsatisfying it might be in theory, is that we have to exercise the difficult art of humane judgment. In the case of *Binions v Evans* a property developer purchased an estate and promised the vendor that it would permit an elderly widow to remain in her home on the estate for the rest of her life.[18] After the purchase, the developer was perfectly entitled to evict the widow according to the strict rules of contract, for the contract had not been made with her, and the developer did indeed insist upon the right to evict her. Fortunately for the widow, the judge in the case was Lord Denning, then Master of the Rolls, and he recognised that she had a right in equity to remain in occupation for the rest of her life. There might be a customary norm of insisting on documentary formalities in land dealings between commercial parties, but there is no customary norm for evicting vulnerable old widows from their homes. Of course, the developer needs no defence unless there is a *prima facie* case of wrongdoing to answer to. Was the developer's behaviour wrong? Whether it was technically-speaking 'unconscionable' might be debated, but we know that the developer's behaviour is some sort of wrong before we have given our theoretical reasons. With the worst offences we still fit our reasons to our instinct. The abuse of the widow's vulnerability combined with the breach of promise might be the doctrinal reasons we feel for the widow in *Binions v Evans*, but the fact of a rich and powerful agent evicting a poor and powerless person is fact enough to identify a wrong before we have a full-blown theory to fit the facts. Even Aristotle, whose life was devoted to reasoning from the facts of nature, acknowledged that we should not 'demand in every subject an account of the cause or reason why it is what it is, for there are cases in which it is quite enough if the fact itself is proved' (Aristotle, *Nicomachean Ethics*, 1098a25-28). It is desirable to prove things in theory; it is necessary to improve things in practice. So, how shall we improve? In Aristotle's conception an ethical character is produced by repeated acts of virtue (Aristotle, *Nicomachean Ethics*, 1103a.14). We acquire habits by acting habitually. And what is virtue? In this paper I have argued that, in addition to the obvious virtues of acting in accordance with the norms established by the divine or by the *demos*—that is, by God or gods (or the otherwise transcendental) on the one hand and the social group on the other—there is merit of a less categorical, non-ideal kind in the behaviour of respecting such qualities as 'internal integrity' and 'equity'. Such behaviour, regarded in context, is not always positively virtuous, but in practice it can certainly be regarded as more desirable to respect the need to balance internal integrity with equity in one's conduct than to have no such concern at all. I will conclude, not prosaically, but with a quote from prose. The conclusion we reach is this: that neither equity nor internal integrity is a moral ideal in any categorical

18 *Binions v Evans* [1972] Ch 359, Court of Appeal.

sense, yet both may be considered to have merit in a non-ideal (which is also to say 'moderate' or 'qualified') sense. Both can help to improve law and lawyers in practice, because both help us to 'fail better' (Beckett 1983).

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The Ethics of Testimony: Trauma, Body and Justice in Sarah Kofman's Autobiography

Ari Hirvonen*

Parce qu'il était juif, mon père est mort à Auschwitz
Sarah Kofman

1. Maternal love

Leonardo da Vinci, *The Virgin and Child with St. Anne and St. John the Baptist* (1499-1500), charcoal, black and white chalk on tinted paper mounted on canvas, National Gallery, London.

In Leonardo da Vinci's cartoon *The Virgin and Child with St. Anne and St. John the Baptist* (1499-1500), the so-called 'Burlington House Cartoon', the Virgin Mary sits on the lap of her mother Saint Anne. Their widely spread knees form a firm ground on which Christ, who is held by the Virgin, rests. Christ blesses his cousin John the

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Baptist. In the background, there is a mountainous landscape. These two mothers smile blissfully. Their faces are turned towards each other. They mirror each other's eyes so that their gazes become one gaze. The gazes of Christ and John the Baptist repeat the gazes of their mothers. Saint Anne's finger points to heaven referring to Christ's destiny. The heads of the two mothers seem to arise from a single body.

In *Leonardo da Vinci and a Memory of his Childhood*, Sigmund Freud analysed da Vinci's cartoon and his later oil painting *The Virgin and Child with Saint Anne* (1508) depicting the Virgin Mary, Saint Anne and Christ. Freud related these images to Leonardo's own childhood. Leonardo had two mothers, his biological mother, Caterina, from whom he was torn away, and a step-mother, Donna Albiera, who was his father's wife. In his father's house, Leonardo found not only Donna Albiera but also his father's mother, Monna Lucia. In the cartoon and the painting Saint Anne seems not to be Christ's grandmother. She is, as Freud points out, portrayed as not being more mature than the Virgin but as a young woman of unfaded beauty. According to Freud, Leonardo gave Christ two mothers, the Virgin Mary and Saint Anne, who are representations, respectively, of Leonardo's stepmother and his biological mother. (Freud 1957.)

French philosopher Sarah Kofman (1934-1994) chose the 'Burlington House Cartoon' for the cover of her first book, *L'Enfance de l'art* (The Childhood of Art). In her autobiographical work *Rue Ordener, rue Labat*, she describes this choice by quoting Freud's claim that Leonardo's childhood was remarkable in precisely the same way as this picture (Kofman 1994, 73-74/63. The first page number refers to the original French text, the second one, after the slash, to the English translation). What is more important for us now is that Leonardo's cartoon represents, not merely Leonardo's, but also Sarah's story. Her book *L'Enfance de l'art* is thus not merely about the infancy of modern art but about her own childhood. Therefore, her first book is already an autobiography. What bind Leonardo's life and cartoon together with Kofman's life and autobiography is not merely the presence of two mothers but also the absence of a father, a fact which not even two mothers can hide.

2. Justice in/as writing

I met Sarah Kofman only once at the Brasserie Balzar in Paris. During this brief encounter she made a strong impression on me. She seemed to be both extremely strong and fragile at the same time. When some years later I read Jacques Derrida's eulogy for her, I thought that Derrida caught, or more properly touched, her paradoxical nature as he writes about her 'irresistible joy of uncontrollable laughter on the verge of tears' (Derrida 2007, 7).

I have often wondered who Sarah Kofman was, on what experiences of living and writing this combination of joy, laughter and tears, which as irresistible and uncontrollable are not merely matters of either reason and thinking or emotions, either the symbolic or imaginary body, but of the real body, was based. This is my attempt to answer, an answer that is not a biography—I merely refer to Freud, who once wrote, that 'anyone turning biographer commits himself to lies, to concealment, to

hypocrisy, to flattery, and even to hiding his own lack of understanding' (Freud 1975a, 430; see also McDonald 1998, 185)—but merely a reading of her autobiographical texts.

For some reason, I have always connected her writing with the concept of justice, which may sound strange to those who know her work for she did not write explicitly about positive law and justice, about the relationship of law and justice as her friend Derrida did. Then again, the Jewish law and the paternal law, that is, the law of the father, were important concepts for her as was the question of the possibility of post-Holocaust ethics. Despite this 'absence' of the concept of justice, I would claim that, and this is my main argument, justice was present in her writing, especially, in her autobiographical texts. How justice presents itself in her writing? How justice speaks without speaking? Perhaps, it is related to joy, laughter and tears, or to what they testify. This is a story about the ethics of writing.

3. Life and work

On Nietzsche's birthday, on 15 October 1994, Sarah Kofman, then a professor of philosophy at the Sorbonne, took her own life. Before her death she, who described herself as one of the 1968 generation, had written twenty-two books on philosophy, psychoanalysis, deconstruction, feminism, art, and literature, texts on Plato, Rousseau, Kant, Comte, Blanchot, Shakespeare, Diderot and Nerval, just to mention a few names.

We cannot think of her work without Freud and Nietzsche. Derrida says that she had read both Nietzsche's and Freud's bodies of work inside and out. 'Like no one else in this century, I dare say. She loved them pitilessly and was implacable toward them (not to mention a few others) at the very moment when, giving them without mercy all that she could, and all that she had, she was inheriting from them and was keeping watch over what they had—what they still have—to tell us, especially regarding art and laughter' (Derrida 2007, 7). She set out her reading of Nietzsche in a series of works such as *Nietzsche et la métaphore* (1972), *Nietzsche et la scène philosophique* (1979), *Explosion I: De l'Ecce Homo de Nietzsche* (1992), *Explosion II: Les enfants de Nietzsche* (1993) and *Le mépris des Juifs: Nietzsche, les Juifs, l'antisémitisme* (1994), which are among the most important 20th Century philosophical treatises on Nietzsche. Her works on Freud include *L'enfance de l'art: Une interprétation de l'esthétique freudienne* (1970), *L'Énigme de la femme: La femme dans les textes de Freud* (1980) and *Pourquoi rit-on? Freud et le mot d'esprit* (1986).

She wrote her thesis under Gilles Deleuze. With her friends and colleagues, Jacques Derrida, Jean-Luc Nancy and Philippe Lacoue-Labarthe, she was the editor of a philosophy publishing series, *La Philosophie en effet* for over twenty years.

However, she had a marginal position in the French academic world. Even after having published nineteen books, she had no position as a tenured professor. She was merely *maître de conferences*. One of the reasons was that French universities as institutions marginalize women philosophers. She experienced the same situation in psychoanalytical circles. There are, Kofman points out, few original women

philosophers and psychoanalysts. As regards to women authors, all possible originality is too often repressed. The difference between men and women philosophers and psychoanalysts is not due to anatomy. Instead, she says, it comes from the education women have received. They are, she claims, 'more submissive to what they have read, more repetitive than innovative, more imitative of the master whom they need to stimulate their research' (Jardine & Menke 1991, 107).

Another reason for her marginal position in French psychoanalysis was her resistance to Jacques Lacan. In her readings of Freud, she seldom refers to Lacan. In an interview, Kofman said that Lacan himself recognized the originality and importance of her work, but he remained surprised that she did not attend his seminars and was not a Lacanian. However, she added, that the French Freudian school dominated by Lacan had enormous editorial power and it eliminated her works that did not quote Lacan or were not Lacanian enough. (Jardine & Menke 1991, 109-110.)

Even if she had feminist views and arguments, she distanced herself from the idea of *écriture feminine*, women's writing as the inscription of the female difference in language and text, since she considered herself as a devotee of clarity, a partisan of rational and well-constructed texts, which *écriture feminine* aimed to subvert (Kofman 1986, 7). At the same time, she aimed to demonstrate how the rational thinking and writing, the logos, of the big names in philosophy—all men—was governed by their drive and desire, by their sexual economy, and not merely by their reason and rationality.

What she was after was thinking and writing that would undo the masculine authority and mastery, which were inherent in the philosophical tradition that pretended to possess ultimate truths (Liska 2000, 91). She wanted to discredit the tradition of metaphysics, which sustained the binary opposition between intelligible (associated with men) and sensible (associated with women), which male philosophy pretended to transcend. This is where her alternative conception of philosophical writing arose (Deutscher & Oliver 1999, 4). For her, writing was a rebellion against the authority of ultimate truths. The strange and uncanny disruption of writing effaces proper names and stable meanings. It undermines the tendency to speak once and for all. This is the reason why she praised Derrida's writing as *écriture parricide*, which 'indefatigably repeats the murder of the father' (Kofman 1984a, 113; see Liska 2000, 95-96). She liked, as Ann Smock says, 'to play the role of a mocking girl whose laughter interrupts the philosopher at his desk, scatters grave truths the better to greet in their stead beautiful fictions, uncanny signs, and figures "devilishly deceptive"' (Smock 1996, x-xi).

In *L'Enigme de la femme*, this 'laughing and dancing philosopher in the Nietzschean vein' (Conley 1993, 704), shows how Freud's theory of feminine sexuality, on the one hand, continues the masculine and metaphysical tradition that excludes women and, on the other hand, deconstructs this very same tradition with its hierarchical binary oppositions. According to her, Freud's theory is based on the idea of a woman as a criminal, who knows the truth but does not reveal and confess it. Freud did confront the primacy and domination of the mother and this woman is

behind his psychoanalysis. However, she claims, that Freud's fear of the woman as a powerful and self-sufficient criminal compels Freud to define the woman as a being that is marked by a fundamental lack.

However, she continues to follow Freud as she identifies three different versions of female sexuality. In the normal feminine sexuality the phallic activity is partly repressed and the passive tendencies take precedence. If the phallic activity is repressed excessively, we confront the neurotic female sexuality, which may also turn into the repression of passive tendencies, in which case all sexuality is repressed and sexuality returns in the form of hysterical symptoms. Finally, there is the affirmative feminine sexuality. Instead of accepting the fact of castration and sexual difference, the woman refuses them and affirms that the penis is (active, masculine sexuality) and is not (passive, feminine sexuality) there. This affirmative woman, who refuses not merely the castration complex but castration itself, is, so Kofman claims, present in Freud's psychoanalysis. In this way, Kofman shows how women's sexuality is bisexual: she is able to enjoy (*jouir*) in both passive and active ways. Her enjoyment may be both feminine and masculine. Because of this, there is nothing proper to her, since woman is non-generic and inaccessible. As Lacan says, *the* woman does not exist.

When she reconsidered her own experience of psychoanalysis in '"Ma vie" et la psychanalyse', she said that she always wanted to tell the story of her life. Alongside writing philosophy and theoretical texts about autobiography, she wrote her own autobiography *Rue Ordener, rue Labat*, which was next-to-last of the books written intensively from the beginning of 1993 to the autumn of the same year. Her autobiography tells of her life from the age of eight to eighteen. Mainly it is a story of a hidden Jewish girl in occupied France, which had been—Anne Frank's diaries being an exception—an untold story. She wrote an autobiography about her separations and losses, terror and scars, even though she had written in *Autobiogriffures*, that all 'autobiographies are false [*mensongère*], written as retroactive illusions for the aim of idealisation' (Kofman 1984b, 99), or as Freud wrote in a letter to Edward L. Bernays (10 August 1929): 'What makes all autobiographies worthless is, after all, their mendacity' (Freud 1975a, 391). We'll come back to this paradoxical possibility of the impossibility of writing an autobiography.

4. Jewish law as the law of the father

Rue Ordener, rue Labat starts on the last day Sarah, then eight years old, ever saw her father, Berek Kofman, a forty-two-year old rabbi of a Parisian synagogue. Caught by the Vichy police at their home at the Rue Ordener on 16 July 1942, he was taken to the Vélodrome d'hiver together with thirteen thousand other French Jews. From there the deportees were transported to Drancy, and from there they were sent to concentration camps. Berek Kofman was deported to Auschwitz, to 'the place where no eternal rest would or could ever be granted' (Kofman 1994, 16/10). He stayed alive a year. As one survivor told Sarah after the war, he refused to work on one Sabbath, since he wanted to pray to God for all of those people in the camp, victims

and murderers alike. Because of his refusal, he was beaten to the ground and buried alive by a Jewish *kapo*. This is how he died. His death—dying at Auschwitz—was, in Sarah's words, *violence infinie*, 'infinite violence' (Kofman 1994, 16/10).

In *Paroles suffoquées*, a prelude to *Rue Ordener, rue Labat*, Kofman writes: 'Because he was a Jew, my father died in Auschwitz.' 'My father: Berek Kofman, born October 10, 1900 at Sobin (Poland)' is written, she continues, in 'these columns of unending names' (Kofman 1987, 16). The columns to which she refers, and some of which are reproduced in her book, are Serge Klarsfeld's textual memorial to the French deportees killed in the concentration camps.

KALISZTEJN	CHAJATILLA	03.08.00	ANNAPOL	P	LEWINE	OSKAR	14.07.85	BIALYSTOK	R
KALMAN	JOSEPH	04.04.01	BUDAPEST	INI	LEWKOWICZ	RUCHLA	.90	KARZIMIEZ	P
KALMIC	SAMUELE	22.03.23	BELGRADE	Y	LEWKOWICK	SIMON	14.12.97	FRZEBORZ	P
KANE	ABRAM	25.01.03	CHARKOF	C	LEWY	BENCJAN	15.07.92	DROGIN	P
KANTOR	ABRAHAM	21.08.83	TANDOW	C	LEWY	ESTHER	.06	DROBIN	P
KANTOROWICZ	JOSEPH	23.11.85	VARSOVIE	P	LICHTBLAU	CHASKEL	03.09.08	TARNOV	IND
KAPLON	SZEJWA	06.03.03	VARSOVIE	P	LIEBEN	SARAH	16.11.91	FLEHINGEN	A
KARF	FRANIA	03.11.96	VARSOVIE	AUT	LINA	SURAH	24.10.94	VARSOVIE	P
KARSTEIN	EVA	06.03.88	STRASBOURG	A	LINDENBERG	ANNA	09.07.00	TIFLIS	A
KAUFMAN	EURA	.14	ZYRARDOW	P	LIPIEC	MIRJA	.13	PARZBON	IND
KAUFMANN	JANKA	11.07.06	BRATISLAVA	TC	LIPCHUTZ	MATZA	23.05.01	TOMATROW	P
KELBERG	EVE	19.04.96	KIEW	R	LIPNITZKY	BONNIA	14.04.04	OSTEK	R
KERN	SABINA	15.07.97	KROSNO	P	LIRUE	AHARON	30.08.00	WOLOGDA	R
KELTER	FANNI	20.09.00	VARSOVIE	P	LITCHES	ALINE	20.10.91	PAVONSKY	P
KIERSZ	MESCCZ	23.11.89	SALAGOW	P	LITMANOVITCH	RACHEL	24.04.91	KIEW	R
KIERZ	ESTHER	18.03.23	SULAGOW	P	LITWAK	JOSEPH	12.12.00	CHELM	P
KIERZ	FAYMET	18.05.95	SULAGOW	P	LIWER	SYLVIA	21.09.20	KEDZIN	IND
KIERZ	JURA	10.06.24	SULAGOW	P	LOBERSZTAJN	ICEK	.00	YELLSCOW	IND
KIERZ	SZEGNALA	.20	SULAGOW	P	LOEBINGER	GERDA	22.11.13	WROKLAW	P
KLAJMAN	CHANA	31.12.02	VARSOVIE	P	LOEFF	ALFRED	15.58.04	HOLLESEW	T
KLARFELD	ABIRA	26.04.26	HAIFA	P	LOGAK	DEBORA	09.12.96	MISGURZY	R
KLARFELD	CHANA	26.12.00	POLOGNE	P	MAIZMER	HELENE	08.11.92	WLACTANEK	P
KLARFELD	ICEK	31.01.99	GUSULMINKA	P	MALIC	NOEMIE	16.05.05	DWINK	R
KLEIMANN	MOISE	17.10.95	KAMENETS	P	MALINIAK	SALOME	20.08.98	VARSOVIE	P
KLEMPEN	SIMONE	15.08.02	SHESTECHEWA	R	MALMED	CHANA	.11	BREST LITOSK	P
KOFMAN	BEREK	10.10.00	SOBIN	IND	MALMED	JOSEPH	.11	BREST LITOSK	P
KOHN	GRANGE	03.09.03	ZEMOON	YU	MALMED	MADELEINE	.05	VARSOVIE	P
KOLCZYN	MONOLA	01.04.23	VARSOVIE	P	MALMED	SOREL	13.05.06	BREST LITOSK	P
KOLSKA	SARA	27.08.22	VARSOVIE	P	MANIS	ZELMAN	28.01.83	KAMENETS	R
KONSTANTINER	CHAIM	05.03.05	ESKAROFF	P	MANSFELD	LISA	10.07.05	KALISK	P
KOFELMAN	GISLA	22.02.96		P	MARGOLINER	DIVONIA	05.06.03	PLOCH	P
KOFELMAN	JESSA	26.10.21	PARIS	F	MARINKER	ANNA	17.05.89	VARSOVIE	P
KOFELMAN	MICHEL	09.06.99	VARSOVIE	IND	LOPATIM	ABRAHAM	20.10.85	KOSSOW	P
KOFER	FAJDA	15.02.00	ZAMVAF	P	LORINCZ	DESIRE	14.04.01	BUDAPEST	IND
KORENBLUM	JOEL	17.07.02	VARSOVIE	IND	LORINCZ	GUIDI	.07	KEDAIMAI	IND
KORNGALD	NESLA	20.03.12	VARSOVIE	P	LUBLINSKY	BERTHE	06.10.93	MOSCOU	R
KORN	ABRAHAM	14.03.86	WIELUN	P	LUBRANIECKK	LIWEYA	08.08.04	TOMASOW	P
KORN	MENDEL	12.09.84	LASK	P	LUKS	RACHEL	15.12.12	SOUNOVICE	P
KORNBERG	ELIE	15.05.96	LENENZO	IND	LURIE	JEANNE	01.09.27	LENINGRAD	R
KOUCHES	MERA	29.09.89	VILNA	R	LURIE	MARIE	20.12.09	PETROGRAD	R
KOUMER	MIHLIA	20.05.89		R	LUST	PRAULA	07.09.05	VARSOVIE	P
KRAMER	SAMUEL	28.07.26	ZOLKIEW	P	LUSTMAN	CHAIM	05.05.96	BARANOV	R
KRANOWSKI	MALA	01.03.07	VARSOVIE	P	LWOWA	ROSALIE	21.05.91	RISTCHIFF	R
KRAYETZKI	ROSE	26.03.23	PARIS	IND	MACHONBAUM	ESTHER	.99	VARSOVIE	P
KREMSKI	RUCHLA	17.11.95	LODZ	P	MAI	SOPHIE	10.04.88	VELICH	P

A part of Serge Klarsfeld's textual memorial.

At home Sarah's father carried out religious ceremonies and practised shofar. A religious and sacred atmosphere prevailed and Sarah's family rigorously observed Jewish law and all the kosher prohibitions. 'My father, a rabbi slaughterer, killed chickens in the toilet according to the ritual' (Kofman 1997c, 167). Sarah loved Jewish feasts, singing the traditional Hebrew songs, listening to the reasons for the kosher rules, her father dancing in the synagogue and lifting high the Torah scrolls, which she kissed afterwards. Her father functioned as the representative of Jewish law. This law can also be considered as the law of the father, the paternal law, which defined and sanctioned the symbolic order of Sarah's family. Moreover, it was a founding element of Sarah's identity, of her becoming a subject.

There was another conflict between paternal and maternal edicts. Her mother demanded 'you must eat' and she stuffed and stuffed the children. At the same time, her father, following the norms of Jewish law, commanded: 'you must not eat

everything'. She was not supposed to mix milk and meat or to eat just any meat, as she relates in 'Sacrée nourriture' (Kofman 1997c, 167). After the deportation of her father, she confesses, she had hardly any appetite, since she was afraid of transgressing the paternal law. 'I [...] resisted with all my might the maternal categorical imperative' (Kofman 1997c, 167).

However, the paternal law was also something that she was afraid of. She tells that the family lived in terror of breaking the norms of Jewish law. She also associated her father's razor, with which he slaughtered chickens in accordance with the law, with Abraham's knife, and the guttural sounds of shofar with the cries from the severed throats of the chickens. The sacrifice of Isaac often worried her since she thought of herself as occupying Isaac's place and that in doing so she too would be in the risk of being sacrificed by her own father.

On 16 July 1942 her father had left home early to warn Jews of the synagogue to go into hiding immediately because he knew that there was going to be a raid. Instead of going and hiding himself, even though he knew that the police were after him, he returned home to pray to God that he be taken as long as his wife and children were spared. He did not lose faith in God and Jewish law. When the police came, her mother lied to the police telling them that her husband was not at home and that she was pregnant, which she was not. However, he gave himself up: 'Yes, I'm here. Take me!' (Kofman 1994, 11/5). Her father turned out to be Isaac or, more properly, both Abraham and Isaac, but unlike Isaac he was not to be saved by an angel. He sacrificed himself so that his family would not be taken. Sarah compared the purity of her father's act of self-sacrifice to her mother's lies, which filled her with shame. Sarah had chosen sides: instead of the maternal pragmatic reasoning represented by justified lies, she turned to the father, the representative of Jewish law.

At Auschwitz, her father died because 'he was a Jew' (Kofman 1987, 15), which can be read as: he died, because he respected and followed Jewish law, which includes not merely the 613 commandments, *mitzvoth*, that God gave in the Torah (the Written Law), but also the Rabbinic law, the Talmudic literature, the post-Talmudic codificatory literature, regulations promulgated by rabbis and communal bodies, customs and customary law.

Then again, Jewish law does not require this kind of self-sacrifice. On the contrary, the principle of *pikuach nefesh* demands that one should save a life in jeopardy (Stanislawski 2004, 57). This principle of saving life is based on the commandment in the Torah which demands that one *live* by the statutes and rules of God (Leviticus 18:5). Thus, Jewish law does not demand that anyone die because of obedience to the commandments. In the Talmudic literature there are many examples where the commandments of the Scriptures become inapplicable and where the laws of the Sabbath can, and even ought to, be broken to save life. One is allowed to eat non-kosher food, when there is no kosher food available, to avoid starvation or when non-kosher food is needed because of illness or pregnancy. If one must choose between saving one's own life and that of another, Rabbi Akiva says that it is permissible to save one's own life. There are some commandments that cannot

be violated. The act of murder is prohibited, even though Jewish law permits killing in self-defence and in wartime. The defamation of God's name is not allowed even to save one's life. Thus, one should offer one's life instead of bowing to any other god than YHWH. Perhaps Sarah's father even considered that obeying the commands of the camp guards would be bowing to the Nazis, who believed 'themselves gods / In their insane will to power' (Kofman 2007a, 246).

Even though Kofman did not mention this principle, her father, as a rabbi, must have known it. One example Kofman mentions confirms this. During the war it was difficult to find any food and even more difficult to continue eating kosher. In a train, the Red Cross distributed ham and butter sandwiches. Her mother ordered, 'don't eat', but her father intervened, 'let the children eat, its wartime'. These sandwiches 'once decreed impure, I found delicious, now purified by circumstances and paternal authority'. (Kofman, 1997c, 168.)

In a more general sense, Jewish law cannot be considered as formal and categorical legalism. According to Rabbi Aharon Lichtenstein, ethics is included within the *halakhah*, Jewish jurisprudence, as a supra legal imperative: *lifnim mishurat hadin*, 'beyond the line of the law', according to which one must not take in consideration only the formal and strict commands and statutes of the law (Lichtenstein 1975). According to Emmanuel Levinas, this principle, which he translates as *derrière la ligne droit de la loi*, is about justice that summons one to go behind the straight line of the law, since behind it there is the land of goodness that extends infinitely and is unexplored (Levinas 1979, 245).

Thus, it is not Jewish law represented by her father that is unconditional and categorical. Instead, the maternal authority is, at least for Sarah, the categorical imperative, at one moment, a categorical prohibition (don't eat!), at another moment, a categorical demand (eat!), which does not allow any exceptions or interpretation.

What is more, even if her father's prayers for both victims and murderers may sound strange, it is in accordance with Jewish law, which is intimately linked to love (*ahavah*), to mercy (*rahamim*) and forgiveness (*selihah*). The duty of loving kindness holds for every other human being, since *rea*, neighbour, is not merely an Israelite but also every stranger, since the whole of humanity must be respected in its fundamental dignity. According to a rabbinic principle, the dignity of all human beings (*habriyot*) overrides every prohibition in the Torah. For Moses Maimonides, 'every single man among all creatures in the world' is sanctified as the Holy of Holies (Schwarzchild 1976).

Jewish law and the affirmation of life belong together. In her autobiographical texts Kofman does not speak of this connection but in her reading of Nietzsche, she stresses the common belonging of Jews and law to the affirmative and aggressive forces of life, because Nietzsche saw Jewish people at the same time both as the most affirmative of all people and the very people of the law. Law is not a reactive and inhibiting force but immanent to life. For Nietzsche, law is, she says, 'an inhibitor not of desire as an affirmative force but of forces of death and resentment', which the law dominates and holds at its mercy. The order of the law institutes the just

and the prohibited 'in relation to, and in conformity with, its own degree of power'. (Kofman 2007b, 130.) The Jewish law that her father followed seems to come close to Nietzsche's idea of law as the affirmation of life.

5. Torn between two streets, two mothers

After July 1942, the round-ups in Paris got worse, Sarah tells in *Rue Ordener, rue Labat*. No longer was anyone starred spared. Sarah's mother undertook to hide the family. Sarah, together with one of her sisters and brothers, was sent to Merville to be cared for by peasants. Sarah could not stand to be separated from her mother. She cried and refused to eat most of the time. She was taken back to Paris, where she stayed at home with her mother because she was no longer able to go to school. When the round-ups intensified, Sarah was once again sent to the countryside, to Picardy. After two days, she had to be taken back to Paris. There she was hidden in different places, but over and over again her mother had to take her back.

On 9 February 1943, a man warned them that their family was on the list for that night's round-ups. They ran away to Mémé's apartment that was on the Rue Labat. Mémé, 'the lady on the Rue Labat', who offered them a haven, had once been Sarah's parents' neighbour, who loved children, as Sarah's mother said. During the night, the Gestapo—six men, one for each child—came to their home. Next day they visited their home at the Rue Ordener for the last time. Never again, except in her dreams, was she ever to go back there.

In 'Sacrée nourriture' Kofman relates how she was saved just in time by a woman who kept Sarah in her home in the middle of Paris until the end of war (Kofman, 1997c, 168). The woman asked Sarah to call her Mémé, while she christened Sarah Suzanne. At first Sarah stayed with her mother, but after a while Mémé took more and more care of her. She showed tenderness toward Sarah, hugged and kissed her frequently, took her out, changed her kosher diet, which she declared to be unhealthy, changed her hair, revamped her wardrobe. She only sent Sarah to her mother for evenings and nights. 'She undertook to reform me from head to toe and to complete my education' (Kofman 1994, 58/47). On Sundays, Sarah went to L'Haÿ where she met the rest of Mémé's family.

Mémé had saved Sarah and her family, but she was not without anti-Semitic prejudices. She gave her a Christian name and taught Sarah that she had a Jewish nose and even made her feel the little bump that was the sign of it. According to her, the Jews had crucified Jesus Christ and they were all stingy and loved only money. She repeated over and over again that Sarah had been badly brought up. Instead of having moral principles, she obeyed ridiculous religious prohibitions. Mémé decreed her childhood food bad for her health and put her on a totally different diet, as Sarah tells in 'Sacrée nourriture'. Since she was '[s]ubmitted to "a real double bind"', she could no longer swallow and she vomited after each meal (Kofman, 1997c, 168).

Her mother had no power to prevent Mémé from transforming her, 'detaching me from myself and from Judaism. I had, it seemed, buried the entire past: I started loving rare steak cooked in butter and parsley. I didn't think at all any more about my

father, and I couldn't pronounce a single word in Yiddish' (Kofman 1994, 67/57).

There was not merely a conflict between the paternal law and the maternal imperative, but also between two mothers, one Jewish, one Christian. Mémé took the place of Sarah's mother and became the object of her desire instead of her mother. At the same time, Sarah became the object of Mémé's desire. There is a split between the good and the bad mother. Sarah identified with the good one, which she also invested with all that is positive. The bad one was associated with everything bad and corrupt. She could be discarded as easily as the food she vomited.

Then again, Mémé also said that Jewish people were very intelligent and that no other people had as many geniuses at music and philosophy. From Mémé's lips she first heard the names which were to become so familiar to her: Spinoza, Bergson, Einstein, and Marx. Thus, Mémé leads Sarah to her life as a philosopher, to her close reading of the great names in philosophy and her mimetic writing, in which she was able to identify herself with them.

One Mother's day, Sarah bought two postcards. The one she found more beautiful she gave to Mémé, but she immediately felt ashamed, because she had made her choice and declared her preference. One evening Sarah and Mémé missed the last metro. They had to stay at a hotel overnight. Her mother was waiting for them to come home, sick with worry, but Sarah had completely forgotten about her, as she was, quite simply, happy. Sarah confesses that Mémé had thus managed to detach Sarah from her mother right under her nose.

After the liberation, her mother decided to get all her children back. Sarah had to move with her mother to a hotel. Now she refused to eat and spent her time crying, because she had to be away from Mémé whom she loved more than her own mother. Because of these tantrums, her mother let Sarah visit Mémé, but only for one hour a day. She wished to get Sarah to get accustomed to the separation. Every time Sarah came back late, her mother beat her with a strap.

After a while, her mother prohibited Sarah to see Mémé. She ran away and decided to stay with Mémé. But French law required that she return to her mother—and her mother knew that law. Sarah's mother brought a suit against Mémé. In the trial, her mother accused Mémé of trying to take advantage of Sarah. In turn, Sarah accused her mother of beating her, which one witness confirmed. The court decided to entrust Sarah to Mémé. After the trial, Sarah felt uneasy, neither triumphant nor completely happy. Her stomach was in a knot; she was afraid and felt as if she had committed a crime. On their way back to Mémé's apartment, her mother, with the help of two men, tore her violently from Mémé. Her mother hit her and shouted in Yiddish, 'I am your mother! I don't care what the court decided, you belong to me!' Sarah's reaction was paradoxical: 'I struggled, cried, sobbed. Deep down, I was relieved.' (Kofman 1994, 71/61.)

Later, when her mother had to go to Nonancourt to bring Sarah's brothers and sisters back, she, despite everything, entrusted Sarah to Mémé. However, one day her mother came to take her to Nonacourt without giving Sarah the opportunity to say her goodbyes. She also prohibited Sarah from having any kind of contact with

Mémé. Before they got a tiny apartment, they had to live in a terrible hospital used as a hospice in Nonancourt. Sarah was sick all the time and was taken to hospital, where she was not too unhappy since she was away from her mother and could enter into correspondence with Mémé.

When they moved back to Paris, Sarah started to see Mémé again. She was sent to a Jewish establishment for the children of deportees in order to renew her attachment to Judaism. She stayed there for five years and learned Hebrew again and started to obey all the religious prohibitions of her childhood. When she came back from the establishment to stay with her mother, there were terrible fights. She often went on hunger strike. Her mother cut off her electricity early in the evening and she remembers reading Sartre's *Roads to Freedom* under her bed sheets by flashlight. Once again she gave up all forms of religious practice. Finally, she managed to move to a dormitory for high-school girls on the Rue du Docteur-Blanche.

Sarah's autobiography ends when she enrols at the Sorbonne, where 'another life begins', which explains why she started to distance herself from Mémé, who represented her previous life as a Jewish girl, who had adopted a gentile family as her own. During this conflict between two mothers, Mémé wanted her to bury her entire Jewish past, not merely her father and mother, but also the Jewish law that guaranteed her identity as a subject. (Kofman 1994, 99/84.)

The saviour turned out to be a figure of prohibition too. After this, she severed all contact with Mémé for several years because she couldn't stand hearing her talk about the past and calling her 'little darling' and 'little bunny'. Even later, she always visited her with a friend. When Mémé died seriously disabled in a hospice in Les Sables, Sarah recalls that 'I was unable to attend her funeral. But I know that at her grave the priest recalled how she had saved a little Jewish girl during the war' (Kofman 1994, 99/85).

Ultimately, Sarah also turns away from Mémé to become, once again, something else, to be able to create fictional genealogy in a Nietzschean way. 'Here another life begins', which means that from now on philosophical speculation was for her a mirror which deflected the all too horrifying and unbearable images of her time as a hidden child (Kofman 1985, 20). She turned away from her past to become what she was to be 'a secular intellectual celebrating Nietzsche and *écriture parricide*' (Liska 2000, 98).

6. Autobiography as a testimony

After reading her autobiography, we have to come back to the possibility of autobiography. For Kofman, there is no coherent and linear autobiography. Instead of a master subject, who would retrospectively reveal and represent the truth of one's life and self, there is the impossibility of consistent and coherent self-representation. This impossibility does not mean that autobiography is impossible. Instead, in its impossibility there is its possibility. Let us see what this possibility of the impossible means.

For Kofman, Nietzsche's 'autobiography' *Ecce Homo* is 'the most depersonalized

autobiography' (McDonald 1998, 185-186; Kofman 1992). Nietzsche turns against biological origins and genealogical determinations by an act of active forgetting and through the creation of a fantastic genealogy. Hence, Nietzsche succeeds in going beyond those elements that normally determine the identity of the subject. It makes an unfinished self-creation and a multiplicity of identities possible. This leads to the death of the stable and substantial subject of metaphysics, the *autos* (self), and to the end of the bios of the self.

Kofman also praises E.T.A. Hoffmann's *The Life and Opinions of Tomcat Murr*, a story of a vain and self-taught bourgeois tomcat, which sets out to write his own autobiography. Because of an error by the printer, Murr's story is accidentally mixed up with a book about the composer Johannes Kreisler. Two different characters are intermingled: Murr, who is a brawler, vain lover and confident scholar, and Kreisler, who is a moody and hypochondriac genius. For Kofman, Hoffman's story transgresses the law of the autobiography, subverts the coherence and unity of autobiographical narrative and disrupts the linear-progressive chronology and order of the authorial logos. (Kofman 1984b).

In her 'another life'—as she calls her life as a philosopher—she seems to be a combination of Nietzsche and Murr. From now on, her story seems to be an assemblage of the citations of diverse authors. It would be an illusion to believe that her autobiography could be anything other than that which emerges from those whom she had read and written about. Hence, 'there was no self "Kofman" except for the multiple authors with whom she identified and aligned herself', Penelope Deutscher claims (Deutcher 1999, 159). Her identity, according to Joanne Faulkner, is a 'pastiche lacking a substantial core', 'an accretion of identification with others' (Faulkner 2009, 43). This explains her preference for close readings, since she is able to lose herself in her interpretations but, at the same time, find her 'identity'. According to Faulkner, Kofman attempted to manage her anxiety about her Jewish identity 'by means of her interpretation of Nietzsche'. Because of Nietzsche's 'equivocal use of the trope of the Jew', he became for her 'a figure through which she could negotiate her own conflicted identification with Judaism'. (Faulkner 2008, 42.) This is not all. Through Nietzsche's conception of law as an affirmative force of life Kofman also negotiates her relationship with Jewish law that her absent father represents. Submitting to this law, she is able to, on the one hand, hang on to her Jewish identify, on the other hand, not to forget her absent father, who is internalized as law.

In her other life, philosophy protects her, gives her a voice and fluctuating identity as she identifies with the writers and philosophers she reads. Philosophy offers a protective discursive system that makes it possible *not* to confront the trauma that the memory of the body carries. In 'Tombeau pour un nom propre', she recounts a dream, where on the cover of a book read: KAFKA, translated by Sar...Ko(a)f. Kof made her think of *Kopf*, the head, which dissimulates what is low and dirty, her Jewish body, the anal ('a', which is enclosed in parentheses). This would give her a proper name as a philosopher and as a translator. She could hold her head high. But the last syllables of her surname that were cut off resist this possibility of sublimation. *Ah*,

which in Hebrew designates the feminine, and *Man*, which designates the masculine, signifies her double castration as a punishment for her denial of her blood and her body. Sar...Kof becomes a sarcophagus for her name, where 'I devour my own flesh (*propre chair*)' (Kofman 1997b, 170).

Rue Ordener, rue Labat begins with these words: *De lui, il me reste seulement le stylo*. The only thing she had from her father was a fountain pen, which she had in fact stolen from her mother's purse. She used this pen all through school, but it broke and thus failed her before she could bring herself to give it up. She still has it, patched up with Scotch tape: 'it is in front of my eyes on my worktable and it makes me write, write [*écrire, écrire*]' (Kofman 1994, 9/3). She has to write but cannot do that with the broken pen. The broken pen stands for the absent father, both of which would guarantee her an identity in the symbolic order if they functioned. Because of this, she is unable to put down in words the traumatic events of the loss of her father and being forced to dismiss the paternal law and her Jewish identity. The only words she has is a breathless cry between sobs: 'oh papa, papa, papa' (Kofman 1994, 14/7).

According to Ann Smock, an opportunity to tell her story allowed her to turn towards a knot in her past. This autobiographical book, to which all her other texts had been leading her, was, according to Smock, an opening for her, 'a sense of unexpected renewal' (Smock 1996, xi). Suddenly, it became possible for her to untie the knot in her heart. Thus, her philosophical texts were a preparation for the autobiography, in which she returns from 'another life', the life of the university and philosophy, to the earlier life dominated by the paternal law, the absence of her father and the fight between her two mothers.

Yet, one may wonder whether the realization of the impossible autobiography, the translation of her life, her body touched by this life, into language, was a cause of her suicide. Françoise Duroux claims that her suicide was somehow related to her move from philosophy to autobiography. Philosophy protects, but the 'autobiographical plunge, practised *in vivo*, undoubtedly provokes an earthquake', which explodes the philosophical position. This led to her suicidal plunge into her own melancholy and a creative block (Duroux 1993, 101). Having survived by, through and in writing philosophy, was Sarah Kofman now, after putting her story to words, compelled to give up surviving, finally wake up and escape from the nightmare by dying?

I would argue that her autobiography was an explosion that untied several knots. Perhaps *Rue Ordener, rue Labat* is a retrospective telling of her own becoming and identity formation, the idea and possibility of which both her philosophical considerations concerning autobiography and her life in philosophy resisted. Did she cave in at the end as she took the final step from philosophy to autobiography that gave voice to her life and her identity? This is not true because beyond the seemingly coherent narrative, *Rue Ordener, rue Laba*t deconstructs the law of autobiography.

On the one hand, she is able to construct her story from the first person position, tell of her experiences, which cannot be replaced by experiences others have gone through, and talk about what happened to her in an autobiographical voice. On the other hand, even though the autobiography seems to be a coherent narrative, it is

not the authoritative voice of the narrator recounting a singular experience. It is the trauma of her father's absence that speaks or tells its story. It is the paternal law that tells its story through her body as she desperately aims to hold on to Jewish law and her Jewish identity and yet give it up in the fight between two mothers. As her autobiography speaks of the experience of a trauma that is beyond symbolization, it provides testimony to that experience, which cannot—as non-symbolizable—ever be owned by an authoritative ego. To be truthful the testimony of an autobiography cannot claim to be truthful as the story of the ego, which would function as the guarantor of the truth of the testimony. As Jennifer Yusin says, testimony cannot assert its own truth, but rather 'announces its own inability to tell the truth' (Yusin 2004 142). Thus, it is not she that deconstructs the autobiography but the text deconstructs itself as a story.

In her philosophical texts, there are multiple voices that speak as she reads Freud, Nietzsche and others. In the autobiography too, there are others who speak: her father, two mothers, a witness recounting the fate of her father, her body and Jewish law. Even though she was, as an adult female philosopher, able to integrate her traumatic events into a narration, she was, at the same time, unable to do so. But it is exactly here where the possibility of the impossible rests. And not only that, the responsibility, the ethics of testimony is confronted the moment that instead of merely following the rules of law or autobiography, one chooses to do the impossible, to testify without being able to narrate one's own story. 'If no story is possible after Auschwitz', Kofman says, there remains a duty to speak, 'to speak endlessly for those who could not speak because to the end they wanted to safeguard true speech against betrayal. To speak, in order to witness, but how? How is testimony able to escape the idyllic law of the story? How to speak "the unimaginable?"' (Kofman 1987, 43).

7. The body never forgets

In '"Ma vie" et la psychanalyse', a title which she takes from Freud but in which she puts 'my life' in inverted commas, she recounts that at the beginning of her psychoanalysis she never lost the thread as she was telling a linear and continuous story. There were no breaks, gaps or slips of tongue in her speech. Nothing happened, since this kind of reassuring narrative was merely an attempt to master her life. 'Everything "started" when I had nothing more to say, when I no longer knew how to start or where to end' (Kofman 1997a, 171). After this, everything she had recounted came back to her in a discontinuous way and in different forms, as memories, slips, dreams and repetitions. She did not recognize herself. This uncontrolled discourse, where the body is allowed to speak, is not about truth or meaning. The body that speaks resists narration as it spills 'its offerings of semen', that is, externalizes what had been enclosed within (Kofman 1997a, 172). Her generous and closed mouth did not form meaningful signifiers but was 'a cave from which more or less articulate and intelligible words burst forth' (Kofman 1997a, 172). She gave her gifts to the analyst from her stomach and her merchandise was shit. Her imperious need was not that the analyst give meaning to and interpret her words but to establish an exchange

that would turn 'caca', shit, into gold, 'This allows me to get up, remain standing, and leave' (Kofman 1997a, 172).

As Kathryn Robson says, her story does not 'emerge from lived experience *per se*, but from the difficulties of articulating that experience' (Robson 2004a, 613). The broken pen, Robson says, refers to the fact that the story of the loss of her father and his death can only be told brokenly. Moreover, the figure of the broken pen stands in for a wounded body. The pain of loss and trauma 'emerges not from the story itself, but from the recurring bodily imagery through which its story unfolds' (Robson 2004a, 608). The story is told through bodily ingestion and expulsion, through eating and vomiting. Then again, she gives words and voice to her traumatic childhood memories rather through bodily imagery than through the body as such.

Her trauma—as all traumatic emotional blows or wounds—is the loss of words. Instead of becoming part of language and signification processes, instead of being assimilated by the subject as a speaking being, instead of being integrated into an autobiographical narration, traumatic events remain inscribed in the body. The after-effects of the emotional wounds, which resist being resolved, are the silent cries of the body. Because of the lack of a resolution to the trauma, it continues to linger. However, it does not return as stories and words, but as bodily reactions and sensations. It is not confronted in the symbolic order. The body acts the trauma out and as it does so it repeats it again and again. Not being able to swallow and vomiting repeatedly bring Kofman back to the absence of her father. She has a compulsion to repeat the loss in and through her body. It overrides the pleasure she would get from eating, from forgetting, from enjoying the care of her two mothers. Thus, her act 'disregards the pleasure principle in *every way*' (Freud 1975b, 36). At the same time, she attempts to master the trauma by turning the passive situation in which she found herself when her father was taken away into activity. By repeating this event—even though it is unpleasurable—she took an active part in it since she was able to vomit and to refuse to swallow.

The realm of the trauma and its after-effects is not the symbolic or imaginary order, but the real of the body. For Kofman, the story of these traumatic events is the story of her body. Her autobiography seems to be a story about two addresses, two mothers, but actually it is the story of one person who disappears from the story almost immediately: the father. Her journey from the Rue Ordener (where her family had lived) to the Rue Labat (where they moved after fleeing from their home), separated by only one metro stop, is an infinite journey of the body. When they had to flee from their home, the Rue Marcadet, which was between the Rue Ordener and the Rue Labat, seemed endless for her and she vomited the whole way. The loss of the father is told as the loss of food: 'A few years later my father was deported. We would no longer find anything to eat' (Kofman, 1997c, 168). Later Mémé put her on a Gentile diet of red meat. She was now caught between two mothers representing different rules and practices. Eating this nourishing food would mean to forget her mother. But this is not all. It would also mean accepting her father's death, which her body refuses to do. She cannot swallow anything and what she ate she vomited.

Eating would be the renouncement of the law of the father and her Jewish identity. Moreover, by refusing to eat her body imitates the fate of her father at Auschwitz.

According to Robson, her body is a site of resistance. Her bodily rejection of food is a refusal and inability to forget the loss and law of her father. Robson claims that vomiting highlights the difference between remembering and not forgetting. For Sarah, remembering, retaining the past, even if only in the form of partial memories, is impossible. What she vomits is neither preserved nor externalized as meaningful internalized memories and stories. Vomit is what is discarded as unrecognizable and fragmentary in form. (Robson 2004a, 614-615.) Tensions between the need to accept the loss and the impossibility of doing so, between ingestion and expulsion, between her two mothers, between her Jewish and non-Jewish identity, are figured through her body. Instead of remembering the loss of her father as something belonging to the past, she, as Freud writes, 'is obliged to *repeat* the repressed material as a contemporary experience' (Freud 1975b, 18). She cannot remember the trauma as something belonging to the past. Still, she is not able or allowed to forget it. The truth of trauma is in her symptoms. The body cannot forget and in this sense it is the embodiment of the ethics of testimony.

Rue Ordener, rue Labat is thus a story of the body, or more precisely the bodily memory, the body that does not forget since it *must* return, again and again, to the loss of the father, to the event that cannot be remembered through language and narration, to which her father's broken pen, her breathless words, her vomiting body testify. Her—or her body's—autobiography discloses the after-touch of the loss and absence persisting in the darkness of the immanency of her singular body. It opens up the silent, but painfully loudly resonating, memory of her body. The absence of the father is not the absence of absence, but the unbearable pressure of the presence of absence.

As an autobiography of bodily functions and sensations, it is not merely the repetition of the traumatic events in and through the body. Instead, as Robson says, it is about the adult Kofman giving 'voice to her childhood memories through bodily imagery', as she tells of her eating disorders, and thus, she has succeeded 'to some degree in figuring her loss through language' (Robson 2004a, 616). She is now able to remember how her body could not forget, feel the immanent touch that suffocates and translates her vomit to writing. The first steps in this remembering had already taken place in her psychoanalysis, when she stopped telling stories and gave her traumatic events a fragmented and discontinuous voice as her opening and closing mouth vomited words and devoured the silence of the analyst. Below the surface of her story about the war between two mothers, she tells the story of her body that could not forget.

In her last text, she analyzed Rembrandt's *The Anatomy Lesson of Doctor Nicolas Tulip*. She shows how the book, wide open at the foot of the deceased, replaces the body (Kofman 1995b).

Rembrandt, *The Anatomy Lesson of Doctor Nicolas Tulip* (1632). Oil on canvas, Royal Picture Gallery Mauritshuis, The Hague.

This did not take place in her case. Her autobiography did not displace her body. On the one hand, it was a moment of *ekstasis*, standing outside oneself. She, at last, stood outside her body and testified to its story, but, on the other hand, as she translated her wounded body into language, she affirmed that the body never forgets. For her, there was no way out of the immanency of the body even if she was able to tell its story. We could say that *Rue Ordener, rue Labat* is between the body and the book. It is, if I may use Derrida's words, 'the third, the witness, the *terstis*, testimony, attestation, and testament—but in the form of protest or protestation' (Derrida 2007, 2). The autobiography of her body is a protest that testifies to both the loss of the father that one cannot forget and the body that resists giving up the father.

8. Duty to speak

Her testimony—and her testament—in the form of a protest was made possible by a philosophical text, in which she prepared the ground for the possibility of writing about the bodily trauma that had resisted symbolization. Kofman's *Paroles suffoquées* (1987) is dedicated to three people: her father, Maurice Blanchot and Robert Antelme. Originally, the book was supposed to be a homage by a Jewish girl to Maurice Blanchot. Kofman reads Blanchot's writings on the possibility of writing after Auschwitz. However, she turns to an analysis of Robert Antelme's concentration camp memoir, *L'Espèce humaine* (1947), in which Antelme outlines a vision of human species that is based on his concentration camp experiences.

Antelme, a member of the French Resistance, was arrested and deported on July 1, 1944. He was at Buchenwald, then at Bad Gandersheim and finally at Dachau. During the liberation of the camps Jacques Morland (François Mitterrand's nom de guerre) found his old comrade in the Resistance suffering from typhus. Mitterrand arranged for his return to Paris. In *La douleur* (1985), Marguerite Duras, Antelme's wife, describes his return.

Kofman does not merely read Antelme's book but reads it through Blanchot's reading of it, which he had set out in his *L'Entretien infini* (1969) and *L'Ecriture du désastre* (1980). At the same time, her book recounts the story of her father's death. Kofman's intertextual book includes multiple voices and layers, her own narration, citations, analysis, close-readings and a part of Klarsfeld's columns of names.

Kofman herself describes *Paroles suffoquées* as partly an autobiography. This may be peculiar, Eilene Hoft-March says, if one considers how little of it represents her life. Instead, she uses second– and third–hand narrations (Antelme and Blanchot) to authenticate her father's vacated position (Hoft-March 2000-2001, 110). Thus, it seems to be more like a philosophical treatise about the narration of survival. However, I would argue that *Paroles suffoquées* is an autobiography. It is *her* narration of survival, her story 'as a Jewish woman intellectual who has survived the Holocaust', even though she confronts her traumatic past through Antelme and Blanchot (Kofman 1987, 13). On the one hand, it deconstructs the idea of an autobiography of a subject with a stable identity that would turn its life, its wounds and traumas, into a consistent and coherent narration. The subject is always already split, divided, and it owes its position as a subject to the other. 'Through its fragmentary structure and numerous citations—or the introduction of different voices which are not often clearly differentiated—*Paroles suffoquées* continually displaces itself, becoming "other" to itself' (Dobie 1997, 336; see Robson 2004b, 152). On the other hand, it is a desperate attempt to address the trauma of the loss of her father by translating that loss to philosophical language. It is impossible to give voice to the atrocities of the Holocaust, so this is the only possible way. Her writing repeats Antelme's situation as he told how the survivors of the camps were seized by delirium: they wished to speak and to be heard, but spoken words were impossible for them, because soon after they had begun to speak they began to choke. She has to mediate her testimony through other discourses on the Holocaust: 'Her individual loss cannot be articulated or defined without mediation or deviation. This suggests that the text cannot contain loss within its limits, but can only point outwards, towards other discourses' (Robson 2004b, 152). This testimony through other discourses was a 'failure' that forced her to write her 'real' autobiography. According to Kofman, after *Paroles suffoquées* she could no longer write didactically and philosophically. She had to turn to quasi-poetic language (Kofman 1995a, 5).

Let us return to Klarsfeld's columns of names. This sublime memorial, with its lack of pathos, its sobriety, the neutrality of information, takes, as Kofman says, her breath away and obliquely summons her. These columns make you doubt not merely your common sense but all sense. It makes you 'suffocate [*suffoquer*] in silence'. The

French verb *suffoquer* refers both to suffocating and to choking, so the silence is also due to the fact that all words choke in one's throat. (Kofman 1987, 17). She is left without a voice in a silence which is like a cry without words. It is a mute cry, a body that cries endlessly (Kofman 1987, 16-17).

Still, she must repeat her father's act: even though he was buried alive, even though he lost his breath, even though his words stuck in his throat as he was suffocating, his refusal to work, his protest in the name of the law on which his identity, not merely as a Jewish person, but as a human being, was rooted, lasted out as an ethical act that resisted the annihilating desire of Nazis. The reason why Kofman found it impossible not to forget the loss of her father and her inability to express this deep emotional wound otherwise than in and through the body is not merely melancholia, in which she is unable to finish with the loved object, her father, and release herself as a subject, which is the result of the lack of a proper work of mourning. It is also related to the ethics which Elie Wiesel spoke of in his Nobel Peace Prize Lecture. 'When day breaks after a sleepless night, one's ghosts must withdraw; the dead are ordered back to their graves. But for the first time in history, we could not bury our dead. We bear their graves within ourselves. For us, forgetting was never an option', even though 'language failed us' (Wiesel 1986). For Kofman, forgetting was not an option even though language failed her. Instead, not forgetting was an ethical act that repeated her father's protest.

The Holocaust inflicted a decisive blow on the whole of humanity which left nothing intact. According to Kofman, the Holocaust produced knotted words, words, which are both demanded and forbidden, since they have been internalized and withheld for too long. These words asphyxiate one, since they stick in the throat and cause one to suffocate. They take away the possibility of even beginning. She wonders how one is able to speak of the Holocaust before which all possibility of speech ceases. There, nonetheless, remains the duty to speak out, to speak endlessly for those who could not speak since they wanted to safeguard true speech against betrayal to the very end, as Sarah's father did. One feels 'a strange *double bind*: an infinite demand to speak, the *duty to speak infinitely [un devoir parler à l'infini]*, imposing itself with irrepressible force—and, at the same time, almost a physical impossibility to speak, a *suffocation*' (Kofman 1987, 46). For her, as for Blanchot, there is an obligation to speak especially at times, when one lacks the power to speak. She adopts Blanchot's double question: how can it not be said and how can it be said? As a survivor, she has an infinite duty not to forget the infinite violence her father suffered. To be able to present her testimony, she has to survive, to live on and to affirm life. It is her duty to continue, to go on. This testimony she finally manages to bring into language and translate into words in *Rue Ordener, rue Labat*. The impossibility of speaking has turned into the possibility of speaking the impossible. She had fought with the abyss which Hannah Arendt referred to when she learned about Auschwitz in 1943: 'It was really as if an abyss had opened. [...] Something happened there to which we cannot reconcile ourselves. None of us ever can' (Arendt 1994a, 13). What is tragic is that at this very moment of testimony that remembers and brings this trauma into words,

she is no longer able to survive, to go on.

Her poem 'Shoah' begins with a citation from Hegel's *Elements of the Philosophy of Right*, where he speaks of the right to pardon criminals that derives from sovereign power; 'for it alone can realize this power of the spirit that makes what has happened un-happened and nullify the crime by forgiving (*Vergeben*) and forgetting (*Vergessen*) it'. For Kofman, Shoah compels us to silence. Scha!, one says in Yiddish; Schh!, one says in French. 'Shoah makes all voices stop speaking.' It 'bears witness, while suffocating / To the unnamable, to the ignoble immensity / Of this event without precedent, Auschwitz'. In 'their insane will to power' the Nazis, who believed they were gods, aimed at 'elimination without trace', at the final solution, *Vernichtung*, which is 'the diabolical will': 'It is wanting to make the Jew's existence null, to make them / un-happened / … / It is wanting to erase, as fast / As a gas jet.' 'We will not pardon the Nazis for this crime. / Render it null, make it un-happened, / Nullify it in forgiveness and forgetting.' 'Let us not forget this event', she demands, so that the memory of those who died at Auschwitz 'may not be murdered'. (Kofman 2007a, 245-246.)

9. Humanism after Auschwitz

Paroles suffoquées begins with suffocation. From this suffocation, no words, no testimony, no community and no ethics seem to be able to emerge. The evil of the murderous Nazi system and ideology is a rupture with the European juridical, political and philosophical tradition, which, at least from the Enlightenment, had praised human dignity. Neither the idea of universal human rights nor the fundamental rights of the Weimar Constitution could do anything to prevent the Holocaust. Moreover, morality and ethics were powerless in the face of this unprecedented evil. There was a total collapse of moral standards in public and private life, as Hannah Arendt points out (see Arendt 1994b).

One cannot avoid the provocative question whether humanism and human rights were destroyed at Auschwitz, whether ethics is impossible after Auschwitz. 'Can we speak of morality after the failure of morality', Emmanuel Levinas asks in an interview (Levinas 1988,176). Should we merely accept nihilism after the disastrous events of Nazi totalitarianism, after such disillusion with European humanist tradition?

I do not consider nihilism as a satisfactory ethical and political answer, even though we are not able to return to a pre-Auschwitz humanism, because Auschwitz gives its name to the caesura in European legal, moral and political history. Instead of the end of humanism, the infinite duty is to address the possibility of a post-Auschwitz humanism. According to Levinas, 'It still cannot be concluded that after Auschwitz there is no longer a moral law, as if moral or ethical law were impossible, without promise' (Levinas 1988,176). There is—still—an urgent duty to speak, to write, to think and to 'found' a new humanism. What is it to be a human being sharing the world with others? One must do something that seems impossible: not to disavow humanism but to affirm it.

This is what Kofman attempted to do. She wants to conserve humanism and its ethical task by transforming and displacing it, by giving it a completely different meaning. For her, it is necessary to invent and to open a new space for a new humanism to come after Auschwitz. Humanism must be something other than the metaphysics of the subject of the old humanism, which turned out to be the regime of violence, exclusion and negativity. As John Dalton puts it: 'Between the old and the new humanism lies the monstrosity of the inhuman', the Holocaust, the camps, the crimes against humanity (Dalton 2005, 151). This new humanism may be merely 'a cry of need or protest, a cry without words, without silence, an ignoble cry', which is at the most 'a written cry' (*le cri écrit*), according to Blanchot (Blanchot 1969, 392). Dionysos Mascolo, who was accompanying Antelme back to Paris from the camp, witnessed this cry as he listened to Antelme's almost non-audible voice, his testimony, where his residual humanity resonated, where he, in a small voice, affirmed *I* who had survived (Crowley 2002, 480).

For Kofman, Robert Antelme opens a path towards a new humanism. He founds the possibility of a new humanism and a new ethics. In *L'Espèce humaine*, Antelme did something unimaginable. He did not merely describe his own experience but also presented how the murdered and the SS murderers were part of the same humanity. Against the dehumanization that was taking place in the concentration and death camps, Antelme adhered to the indivisibility of the human race, which Kofman's father had also done when he prayed for victims and murderers alike. Antelme's story becomes a testimony to Kofman's father's death.

How can this ever be possible, since the victims of the Nazis suffered abject dispossession. They were not even considered as the subjects under Nazi law but reduced to non-human filth that was not considered to be part of the human race. According to Antelme, as they ate peelings in order to survive, their status as human beings was confirmed. Even torture did not destroy them, but instead reinforced their humanity. As Blanchot says, even if a human being can be destroyed, he is indestructible (Blanchot 1969, 192). The SS may kill, Antelme testifies, but their violence reveals at the same time the humanity they attempt to destroy: *on est encore là* (Antelme 1978, 57). It is still there. Humanity is an irreducible residue that remains even when everything else is taken away.

For Antelme, 'there are not several human races, there is only one human race' (Antelme 1998, 219). One morning, an SS guard from the Rhineland approached Antelme and another inmate in the factory basement storeroom and held out his hand to them. They shook his hand. The handshake was a sign of humanity that was shared by Antelme and the SS guard. It was a singular event, a singular testimony and statement of the universality of human existence. Against this handshake, Antelme writes, the whole apparatus of ovens, the SS troops, dogs, and barbed wire could not prevail. 'We had become accomplices' in breaking Nazi rules. This kind of human relationship, which the handshake represented, was a deliberate rebellion against the SS order, which had denied the status of the inmates as human beings and thus their being the subjects of ordinary human relations (Antelme 1998, 75).

This event showed that there was no substantial difference between prisoners and guards, since they were both part of the human race. What they share in their biological oneness is their belonging to humanity, their being together as finite beings in the world. Because 'we're men like them the SS will finally stand powerless before us' (Antelme 1998, 219). All exploitation and subjugation imply the existence of various species of mankind. The enormous destruction machine was built on the wish that '*thou shalt not be*' (Antelme 1998, 74). Nevertheless, the SS can never alter the human race and 'the executioner's power cannot be other than one of the powers that men have, the power to murder. He can kill a man, but he cannot change him into something else' (Antelme 1998, 220). Therefore, the absolute evil of these crimes against humanity affirms the indestructible humanity that the Nazi ideology and laws, its murderous technocratic, political, juridical and military practices aimed to destroy.

This does not exculpate the SS. 'But we cannot have it that the SS does not exist or has not existed. They shall have burned children; they shall have done it willingly. We cannot have it that they did not wish to do it. They are a force, just as the man walking down the road is one. And as we are, too; for even now they cannot stop us from exerting our power' (Antelme 1998, 74).

Antelme's testimony testifies to the indestructibility of alterity and the absolute character of otherness on which the possibility of a shared human race is based. For Kofman—at this point she follows Blanchot—Antelme's idea of humanity is based on a relation to the other, which is a relation that is not based on power and cannot even be measured in terms of power. This relation that cannot be overpowered by legal norms or police violence, by oppression and murder takes place both in Kofman's father's prayer and in the handshake between the inmate and the guard.

This relation to the other does not found a community based on oneness, similarity and identity, on being-in-common. It is not a relation like the one that is based on the same blood, race, religion or ethnicity that justifies the exclusion of others, those who do not share the 'purity' of 'our' being. It does not create the identity of 'we' based on our difference from 'them'. It is beyond the divisions between friend and enemy that Carl Schmitt spoke about (see Schmitt 1963). And yet, even today, not merely nation states but also the European Union is an essentialist community based on identity, on inclusion and exclusion and thus there is an absolute urgency to think about relations that would be more just, more inclusive, in other words, relations that would be non-essential, since essentialism always includes the possibility of racism.

The relation to the other, about which Kofman is speaking in her reading of Antelme, is about an open, untied and destabilised community of *we*, of the being-together of singular human beings in their singularity. *We* are in relation to each other through irreducible difference, otherness and alterity. This *we* is founded without founding, since as a community it is dissolved as it is founded. By responding to the suffering and horror and by establishing the possibility of a new kind of 'we', Antelme founds without founding a community, where 'we' is always already undone and destabilized. If the old humanism reduces differences in the name of universality,

then the new humanism, which comes forth in the face of disaster and suffering, may include the possibility to write and imagine a community without assimilation, a community of those without a community, a community based on irreducible difference. This community is something other than an idyllic community, which would erase all traces of discord, difference and, which rests on a fusion that confers immediate unity. This community is not haunted by totalitarianism, where prisoners construct their prisons themselves and which is the place of dying, of 'the forgetfulness of death' (Blanchot 1986, 17). If for Derrida, ash is a figure of trace, which undoes all ontology by its impossible relation to presence, for Antelme, it figures the paradoxical foundation of ontological solidarity in fragility and calls for a response from the future, which would affirm the humanity of which it is the last index (Crowley 2002, 479).

As I have already said, Kofman reads Anthelme through Blanchot, who defined the Jew as the emblematic figure, the Other—even if he is not only that, Kofman adds—and Jewish monotheism as 'the revelation of the word as the place in which men maintain a relation to that which excludes all relation: the infinitely Distant, the absolutely Foreign' (*l'infiniment Distant, l'absolument Étranger*) (Kofman 1987, 42; Blanchot 1969, 187). We could see her father as the emblematic figure, for whom Jewish law was the place in which he affirmed his relation with the absolutely Foreign, which is not merely a relation to a transcendent God but to the otherness of the other that is immanent in this world. This kind of relation was something that the Nazis could not stand, because no form of power could overcome this relation, which cannot be measured in terms of power.

Kofman's reading includes a risk, since Blanchot gives more importance to alterity than Antelme. Because of this, Blanchot's reading risks, as Colin Davis says, denying the importance of Antelme's book as a testimony of his concentration camp experience (Davis 1997, 173). Moreover, Kofman, traces how to use this fundamental alterity and relation to otherness as the basis of an ethical testimony to the Holocaust. Her reading of Antelme, however, is closer to Antelme's testimony than Blanchot's, since, as Kathryn Robson says, Kofman does not lose sight of this testimonial function and blur the question of how to bear witness to the unthinkable atrocity of the Holocaust. Rather, she uses Blanchot's reading 'in order to rethink the possibility of testifying to atrocity through a relation of alterity and difference' (Robson 2004b, 150-151). *We* of the humanist universals is, as Dalton says, attested to a critical responsibility, to an appeal to the instance that resist subordination: 'The figure of the "human" is the figure of justice, "humanism", before it is the determination of a taxonomy (race, species, a political group, etc)' (Dalton 2005, 155).

Therefore, I would argue, that the new ethics (*nouvelle éthique*) Kofman brings forth, which is based on this rethought we, is 'based' on Antelme's testimony, which she reads not merely through Blanchot but also through her own experiences of the Holocaust. The new post-Auschwitz ethics provides neither a model for the new humanism and its ethics nor a coherent system of universal moral norms on which one could found human rights or base her actions. This kind of system collapses as

it is founded. The ethical task of the new humanism is the responsibility of/towards being-human. I would say that this is the only possibility for the European Union if it is true to its founding principles of respect for human dignity and justice.

Actually, Kofman brings forth two ethical possibilities. On the one hand, there is the possibility of the community of *we*, who live on to testify about a shared humanity. On the other hand, there is the path of Sarah's father, who resisted the laws and orders of the totalitarian state in the name of Jewish law, which is a place where human beings hold themselves in relation to 'the infinitely Distant, the absolutely Foreign'.

Then again, the act of the father is an affirmation of a shared humanity that cannot be destroyed even in the concentration camps. It is a demand to speak and remember infinitely not merely the atrocities of Auschwitz but also, and more importantly, the possibility of being human. Moreover, his act did not merely follow the law. It was a singular decision to realize the law by sacrificing himself in the name of the law that reminds us of our humanity, that is, in the name of justice. This path is 'never traced in advance, always erasable, always to be retraced in an unprecedented way' (Kofman 1983, 18). Thus, these two versions of humanism and its ethics intertwine.

10. Laugh, Sarah!

According Françoise Proust, Kofman's philosophy was a philosophy of life, of surviving. She had to turn, again and again, against the forces of death—melancholy, anxiety, agony and distress—, which menaced her persistently. For her, philosophy, as the superior way of existence, as the intensification of the forces of life, made it possible to oppose life against death. (Proust 1997, 5.)

'Sarah *wrote for living*', Nancy writes, in his text 'Cours, Sarah!' (Run, Sarah!) (Nancy 1997, 29). According to Nancy, writing for one's living is how we describe those who make a profession out of writing, whether as an intellectual, a university professor, a poet, a novelist or a journalist. For Kofman, however, writing was never merely a question of ensuring subsistence but of attesting an existence. She truly wrote for living, since writing was her means to survive, to live on. 'For Sarah, writing was what it should be', since before being the inscription and transmission of a thought, it was 'an attestation of existence' (Nancy 1997, 29).

Thus, it was not merely her philosophical reading and writing but also her autobiographical texts that made it possible to oppose life against death. Her autobiographical texts that I have discussed here were not so much a narration of her life story. They give voice to her father and all those others—herself included—who were made voiceless, speechless by the machinery of infinite violence. They are refusals to forget. These testimonies are ethical acts, which do justice to those whose humanity the Nazis attempted to destroy. Her written testimonies are about survival, or more properly, they are surviving. Those who were murdered survive as long as they are not forgotten. Moreover, her autobiographical texts bear witness to the survival of humanity, of the impossible survival of human beings as hidden

children on the run or prisoners in the concentration camps. Her autobiography, like all her writing, was, as Nancy says, 'an attestation of existence' (Nancy 1997, 29), an attestation of surviving as a human being. And as such her writing is not merely a call for a new humanism and a post-Auschwitz ethics but also a realization of it.

This is why I see her autobiographical texts as announcements of justice to come, justice that is not powerless but beyond power, beyond positive laws backed by threats, sanctions and violence. This justice is not merely always yet to come, but it may have its singular realizations in various ways. Her autobiographies, her writing in general, is one way of bringing forth justice. We have to be careful here. Her writing is not *about* justice. The subject of her writing is not justice. Justice is what takes place in her affirmation of surviving, in her attestation of existence, in her insisting and affirmative laugh. Justice is not something given to the victims—in the form of human rights, compensations or punishments of the offenders—but an affirmative force that insists on surviving. This justice comes closer to Nietzsche's conception of law as an affirmative force of life than Derrida's justice-to-come.

She survived to laugh and cry, to testify, to do justice in, through and as her writing. When the testimony was finally written in *Rue Ordener, rue Labat*, she who wrote for living, had nothing more to write. Perhaps, philosophy did not protect her anymore when she had been able to bring her trauma in words, when she had made justice to the affirmative forces of life. However, at the very same time, the forces of life declined, because her writing declined (see Proust 1997, 5). Her running had come to end. I would like to share Derrida's touching words: 'I want to believe that she laughed right up to the end, right up to the very last second' (Derrida 2007, 7).

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