No Foundations 11

No Foundations: An Interdisciplinary Journal of Law and Justice 11 (2014)

Layout: Pamela Arslan
Publisher: Samuli Hurri
ISSN 1797-2264

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Editorial

The eleventh issue of *No Foundations* is proud to publish five articles that cover a range of timely topics. In the opening article entitled 'Law & Society and the Politics of Relevance: Facts and Field Boundaries in "Transnational Legal Theory in Context"', Peer Zumbansen aims to contribute to a 'transnational legal sociology' fit for the changing environment of global processes of disaggregation of state functions. Since arguably no fixed point exists from which to treat law as 'given' and then to analyze how it changes under the influence of outside pressures, Zumbansen explains that 'transnational legal theory in context' emphasizes the need to engage in particular processes of 'translation' in order to grasp the dynamics, as well as the consequences, of allegedly clearly defined legal-regulatory fields.

Zumbansen illustrates his argument with two relatively recent fields of study: Law & Development and Transitional Justice. In a well-known legal realist vein, Zumbansen argues that the boundaries of, and within, these fields remain *political*, but suggests further that the critique of 'hidden politics' might not prove sufficient to grasp what lies at the centre of these relatively 'new' fields. In his view, underlying these distinctions lies a fierce struggle over competing and mutually exclusive models of society, and in fact about the very 'concept' of law, which cannot simply be grasped by the conventional lawyerly distinction between relevant and irrelevant facts. Therefore, attention to the politics of these demarcations must be accompanied with corresponding attention to the far deeper-reaching question of how law 'knows' the reality it seeks to depict and to regulate. This task demands both a radical self-reflection of law's historical and socio-economic underpinnings as well as a dialogue with those other disciplines that place the questionable, fragmentary and precarious nature of knowledge at the centre of their inquiry.

According to Zumbansen, this task of constant translation risks destabilizing established ways of seeing, understanding and judging 'the law', as well as losing the 'outside' position external to the sphere we are purporting to study. All the same, an awareness of the relativity and fragility of one's knowledge, coupled with an introspection into the presuppositions of all attempts at boundary drawing (both normative and epistemological), appears more pertinent than ever in the face of the dominant culture of expertise.

While Zumbansen sets limits to law's domain of exclusive knowledge, the following article by Richard Sherwin challenges the roots of law's legitimacy. In

'Law in the Flesh: Tracing Legitimation's Origin to *The Act of Killing*?', Sherwin pursues a question that has haunted contemporary theory since early modern times. According to Sherwin, 'fleshless' liberal-democratic theory from Hobbes to Rawls cannot account for the way states begin and end in history, nor can it account for the libidinal source that, in whatever form, drives and sustains fidelity to law. Therefore if we want to understand and revitalize the act of legitimate investiture we must return to the original scene—the primal scene of political violence and unstable desire—in order to explore, theorize and judge it.

In his quest, Sherwin turns to Joshua Oppenheimer's film *The Act of Killing*, which tells the story of a self-professed killer and thug in Indonesia, who actively participated in the killing spree that launched general Suharto's 'New Order' in 1965, after which more than a million people were massacred. The film's premise is an invitation of the filmmaker to one of the most ruthless killers, Anwar Congo, to film his own re-enactments of gruesome acts of torture and killing. In Sherwin's reading, Oppenheimer's movie takes us uncannily close to the political unconscious—or 'law in the flesh'. Under the skin of Anwar Congo we glimpse the usually hidden, even taboo site of origin (and end) of sovereign states, the stage upon which law's beginning and end are performed and judged. If the political challenge par excellence is to continuously seek to renew the binding power of foundational narratives, including the underlying desires and affects that constitute it, the question becomes: 'what form of meaning (if any) will it animate?'

According to Sherwin, disembodied concepts, descriptive categories, and models of rational choice theory cannot adequately capture the way political beliefs are formed, sustained, and/or fail. In their stead, experience, desire and affect—the 'pulse of the flesh'—have yet to be adequately tapped as resources for understanding fidelity to law in the legitimation process, for which new interpretive and critical methods and interdisciplinary alliances are necessary (e.g., phenomenology, psycho-political theology, visual jurisprudence…). Absent these new methods of assessment and experience, liberal theory will continue to falter in a world of legal validity without significance.

Following Sherwin's interrogation of the primal scene of political foundation, the next two essays confront the very idea of philosophical foundations, though from slightly different perspectives.

In 'No Foundations?' Mark Antaki turns the ordinary trope of '(no) foundations' into a keyword, in order to spell out what we take for granted in the conventional use of the term. He does so by exploring James Boyd White's metaphor of a law as an inherently unstable structure built upon tensions, very much like a poem, which is interpreted as a subversion of the extended notion of the legal system as a structure or edifice. Rather than as outright rejection of foundations, however, to think of law as poem is to think of a structure we no longer use or utilize, but inhabit. Drawing a parallel with Heidegger, for Antaki the metaphor reveals how doing law involves *dwelling* poetically in language, which opens it up to the way law is experienced and lived.

This re-appropriation of the building metaphor deprives it of the stability and solidity of rules, doctrines, and principles, and resists reduction of law to a system of positive law, and its demands of coherence, systematicity and rationality. Thus beyond rejection of metaphysics, a further challenge confronts dominant legal epistemology. Away from conceptual and propositional knowledge, Antaki traces a movement from *ratio* to *logos*, from science to rhetoric, from theoretical episteme to practical deliberation, where the key human faculty is no longer reason but imagination, which is not asked to do the systematizing work of reason.

Moreover, while propositional discourse is structurally coercive in that it demands assent even of the unpersuaded and would make all exercise of translation unnecessary, the view of language presented here is understood as a series of gestures, like dance, and measured not so much by their truth-value as by their appropriateness to context.

Ultimately Antaki reads this movement from the solid and stable ground of foundations to the fluid and unstable musicality of language, as the act of uncovering something more originary than propositional logic: the unrepresentable grounds and musicality of speech. In his reading, 'No Foundations' emerges as neither a warning sign, nor as a rule for interdisciplinary engagement, nor as self-congratulatory celebration but as a poetic call, an invitation.

The editors did not plan the sheer coincidence of the next article also dissecting the idea of 'no foundations'. In 'Pots, Tents, Temples', Angus McDonald struggles with the twofold and seemingly contradictory commitment of this journal to a non-foundational view of law and justice, which can be recast as the classic debate between positive law and natural law over its concept. After underlining several of the problems intrinsic to the task of trying to make justice intrinsic to law but still with a contingent non-foundationalist theory, McDonald argues that what the debate requires is a shift of perspective beyond the dualism of either physics or metaphysics, either empiricism or idealism, either positivism or natural law. As developed further in the article, the issue is whether law can open itself to both the transcendent and the immanent and yet remain non-foundationalist.

McDonald pursues his query with the particular case of the UK constitution, wondering about an appropriate metaphor in which 'to house' law. Rather than the foundational monument of stone masonry imagined elsewhere, McDonald suggests that the English constitution might be better seen as a sort of tent, which he explores through a careful exegesis of the Biblical narrative of the Ten Commandments, with its false beginnings and violent pre-history. What McDonald mostly wishes to stress about this metaphor is its spatial mobility, that is, the ability of the tent to accompany the people in their nomadic wandering. The tent is also instructive in that its openness towards the transcendent appears solely as a fugitive gesture, towards values that are evoked but not defined, summoned up solely as a tentative equilibrium of forces in permanent tension. In this vein, McDonald argues for the need to resist an impelling teleology, present both in the biblical narrative and in current calls for written boundaries to the constitution, with the final aim of transforming the tent

into a temple. Contrarily, McDonald thinks, at a time of legal and political crises, the ability to develop images to express the juncture and interaction of the transcendent and the immanent might be more necessary than ever.

In the concluding essay 'Is Justice for Sale? Further Readings on Saramago and the Law', Joana Aguiar e Silva is concerned with the fate of legal studies in the context of the current economic and cultural crisis and the dominant utilitarian ideology of the university, where courses not matching the mercantilist model are replaced by their technocratic counterparts. According to Aguiar e Silva, by adopting economic efficiency as the criterion for law, not only is law unwittingly separated from its historical, ethical and cultural roots, but the fact that the evaluative issues that law has to deal with are irreducible to numbers and resist calculation is ignored.

While siding with those who wish to strengthen the cultural and humanistic aspects of law in legal education, Aguiar e Silva considers that such a path is no simple renewal of tradition. In her view, the intense scrutiny to which most recent studies have submitted the idea of culture may force us to abandon stereotypes such as coherence, homogeneity, stability, which are inadequate to understand contemporary culture as a controversial reality constantly created and recreated in particular settings, through constant movements of people, capital, and symbols. And yet the fact that culture is never entrenched in stable, uniform, or standardized frameworks does not prevent it from becoming a point of reference in the daily practices through which societies develop and circulate a world of meanings and values.

Aguiar e Silva closes her essay with a short story by Portuguese Nobel Prize winner José Saramago about a XVIth century Florentine peasant who climbs to the village church tower to toll the death knell for justice. She interprets Saramago's allegory not as the voice of a prophet pointing the path towards certain salvation but as a rhetorical device that incites our minds and urges us to rethink our actions. While law and culture, as justice and morality, may no longer represent universal or univocal truths, they may still convey a sense of collective living and thinking, complex enough to accommodate difference and change by way of argument, dialectics and rhetoric.

In addition to these five articles, NoFo11 also features three book reviews written in a longish essayistic style. Andrew Halpin reviews Hanoch Dagan's *Reconstructing American Legal Realism & Rethinking Private Law Theory* (OUP 2013). In turn, Leslie Moran offers a review of Gary Watt's *Dress, Law and the Naked Truth: A Cultural Study of Fashion and Form* (Bloomsbury 2013). Finally, Jack Sammons reviews Richard Dawson's *Justice as Attunement: Transforming Constitutions in Law, Literature, Economics, and the Rest of Life* (Routledge 2014).

Julen Etxabe & Mónica López Lerma
Helsinki, June 2014

Law & Society and the Politics of Relevance: Facts and Field Boundaries in 'Transnational Legal Theory in Context'

Peer Zumbansen*

1. Introduction, or: why most cases are not just a 'local' affair

Two recent decisions of the United States Supreme Court, handed down in June 2013, have been attracting considerable attention—most presumably because of their 'bigger picture' significance in the context of public political debate in the area of equal protection. The Court's pronouncement in *United States v. Windsor*[1] was concerned at its center with the contested constitutionality of the federal Defence of Marriage Act [DOMA] of 1996,[2] according to which marriage was defined as a 'bond between one man and one woman'.[3] The Court struck down sec. 3 of the Act, holding it to be a violation of the equal protection clause under the 5th amendment. Decided the same day, in *Hollingsworth v. Perry*, the Court ruled that a petitioner group that defended the constitutionality of a California constitutional amendment rendering same-sex marriages illegal had no standing, where the government

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** An earlier outline of this essay was presented at the IJGLS Conference on 'Regulatory Translations', Istanbul, 16–18 May 2013 and is part of larger research project on Transnational Sociological Jurisprudence, Knowledge and Methodology in Global Governance. The here published essay draws, in part, on my chapter in the edited collection *Law in Transition. Rights, Development and Transitional Justice* (Buchanan & Zumbansen 2014) under the title 'Sociological Jurisprudence 2.0'. I am grateful to Umut Turem, Andrea Ballestero and Fred Aman for organizing an inspiring interdisciplinary conference and to Priya Gupta, Anna-Katharina Kaufmann, Philip Liste and Jothie Rajah for very helpful comments and feedback on the earlier version and to Julen Etxabe and Mónica López Lerma for their wonderfully insightful and helpful comments and critique.

1 *United States v. Windsor*, 570 U.S._12 (2013), arg. 27 March, dec. 26 June 2013.

2 Pub.L. 104–199, 110 Stat. 2419, enacted September 21, 1996, 1 U.S.C. § 7 and 28 U.S.C. § 1738C.

3 Defence of Marriage Act, Sec. 3.

had opted not to stand trial to defend this amendment (the so-called Proposition 8).[4] These two decisions stand squarely within a much belabored context of legal, political and cultural battles over equal protection and privacy rights.[5] Yet, if we wanted to clearly demarcate different legal fields touched upon by these cases, we would very soon find ourselves enumerating one regulatory regime after another. As the author of the opinion in *Windsor*, Justice Kennedy, noted, the enactment of DOMA put into place a statute that would directly and indirectly have an impact on 'over 1,000 federal statutes', with the consequence that the decision, on its face concerned with a particular legal definition operated in fact in many different legal arenas simultaneously, ranging from constitutional to social insurance law, from housing to trusts and estates, from tax law to family and adoption law as well as landlord and tenant law. At the same time, all of these fields would be mobilized in a context, which gives rise to intriguing questions of procedural law and federalism.

It would seem, then, that both decisions are 'local' in that they arise out of a particularly U.S. American regulatory and adjudicatory context and can be read, understood and appreciated against this very background. And yet, taking just one step 'aside', we can see how the issues at work in *Windsor* as well as in *Perry* are by no means exclusively proprietary to the American constitutional discourse. Instead, we can easily discern a number of comparative connections to similarly situated legal disputes in foreign jurisdictions where the question of same sex marriage has long become a hot topic of legal and public deliberation. As becomes clear already in *Windsor* from the fact that the plaintiff, Edith Schlain Windsor, and her late partner, Thea Clara Spyer, had entered a relationship in the 1960s and then been married under newly enacted law in Ontario, Canada in 2007, they had 'shopped' for a legal regime that would accommodate their aspiration for formal legal recognition of their relationship before such norms would become available in the U.S.[6] The case arose out of the tax levied onto Ms Windsor to whom Ms Spyer had bequeathed her entire estate, a tax that the IRS had justified with reference to DOMA, despite the fact that the state of New York had formally recognized the legality of the marriage concluded under Canadian law, when Windsor and Spyer returned to their residency in New York—two years before Ms Spyer deceased in 2009. A growing number of other countries, then, including Canada of course, has seen comparable developments in the granting, expansion or limitation of equal protection guarantees in the area of same sex relationships.[7]

This observation would place the otherwise 'American' set of cases that we just referred to in a context of so-called comparative constitutional law, an area of legal research with a considerably young and yet already significant pedigree,[8] both as

4 *Hollingsworth et. al. v. Perry et al.*, 570 U.S.____ (2013), arg. 26 March 2013, dec. 26 June 2013.
5 See *Romer v. Evans*, 517 U.S. 620 (1996); *Lawrence v. Texas*, 539 U.S. 558 (2003).
6 For more background on the concept of 'shopping' for law, see O'Hara & Ribstein 2009.
7 See e.g., Kollman 2007; more recent data may be retrieved at: <http://en.wikipedia.org/wiki/Same-sex_union_legislation>.
8 Cappelletti & Cohen 1979; Das Basu 1984; Jackson & Tushnet 2006; Dorsen et al. 2010, 36 ff.

regards its impressive theoretical progress[9] as well as its practical-political importance in the context of transnational judicial dialogue (Slaughter 2000; Kemmerer 2003). Seen through the lens of comparative law, we are able to study a 'local' jurisprudential event such as the U.S. Supreme Courts' decisions of June 2013 as illustrations of a change in legal (political, cultural) perception under way in other countries as well. Indeed, many areas often considered exclusively in a local, domestic context, reveal their transnational dimension[10] once we begin to trace more carefully the trajectories and impacts of 'migrating' norms, principles and standards (Choudhry 2006). But, once we direct our attention to such changes in the law across a growing range of jurisdictions, we can begin to discern the particular nature in which such changes grow out of debates and legal, jurisprudential developments that are local and transnational at the same time.[11]

A 'field' such as comparative constitutional law or, as authors have convincingly been arguing, constitutional*ism* (Dorsen et al. 2010, 36 ff), appears inherently unstable, both as regards its substantive content and its analytical contours. Indeed, as we become witnesses of ever more proliferating ways and forms of legal 'transplants' in hard and soft, formal and informal shapes, it appears as if what we can here perceive resembles in many ways the types of a transnationalization of law, which in particular commercial lawyers have long been highlighting as a promising laboratory to study the modern evolution of legal norm generation and dissemination.[12] Likewise, as in our present example, in areas where we are concerned with sensitive societal questions of regulatory intervention, we will increasingly find dynamics of 'borrowing', 'mimicking', 'impregnation' and other forms of 'travelling' norms and principles, promulgated by courts in one country citing courts in other countries, by judges (and other officials) engaging in transnational judicial dialogue, or by a form of legal transplant that in itself merits very close attention.

Complementing, sometimes trailing, but most frequently driving states' action, private transnational actors can be seen to significantly engage in processes of norm development and generation. In the here used example of the Supreme Court's same sex decisions, the importance of the just announced business policy on the part of Wal-Mart to extend its employee-directed health care benefits package to same sex partners is of particular interest (D'Innocenzio 2013). Considering the fact that the country's single largest employer with about 1.3 million employees in the U.S. (with a total of 2.2 million worldwide[13]) adopts such a policy without a legal obligation to do so, points to the particular relations between 'public' and 'private' norm making processes. The sheer factual size of this regulatory program prompts a closer scrutiny

9 La Forest 1996; Arbour & Lafontaine 2007; Choudhry 1999, 888: 'A court's choice of interpretive methodology will affect more than the outcome the particular case before it. It will also likely affect the broader constitutional culture of the interpreting court's jurisdiction'.

10 For more background, see Zumbansen 2012.

11 This is the perspective taken by legal scholars and political scientists interested in the 'spatial turn': for an insightful illustration and engagement, see Liste & Wiener 2014.

12 See e.g., Dalhuisen 2006; Calliess & Renner 2009.

13 <http://corporate.walmart.com/our-story/locations> (visited 21 June 2014).

as to the 'legal' nature of such a set of self-imposed obligations. Closely related to such questions of how to demarcate the legal nature of the processes before the Supreme Court and the purported non-law character of Wal-Mart's newly enacted policy are concerns with the character of the institutions involved in norm-generation as such. To some degree, such questions are still hypothetical, as a corporation such as Wal-Mart is not considered an entity granted with the authority to issue binding legal norms. And yet, the tight integration of 'private' actors in various, wide-spread norm producing and implementing contexts in the area of environmental (Bartley 2007), commercial (Wüstemann & Kierzek 2007) or financial regulation (Bradley 2005) suggests that the lines between private actors (without law making authority) and public ones (with such authority) are not as neatly drawn as some might think. Depending on whether we would attribute a legal character to Wal-Mart the next question would be indeed to rethink the status of such a norm-producing actor or entity, its public or private character. As Legal Realists argued long ago, such a reflection is especially important where real social consequences follow from such 'abstract' legal categorization (Dewey 1926).

In this essay I am interested in this particular constellation of what I want to call a 'transnational legal theory in context'[14] and the today fast proliferating field of 'transnational regulatory governance'[15], both of which I hope to eventually integrate and conceptualize as a conceptual framework with the title of *Transnational Sociological Jurisprudence*. In the following, I argue for the need to engage in particular processes of 'translation', dialogue and reciprocal engagement in order to more adequately grasp the dynamics as well as consequences of allegedly clearly defined legal-regulatory areas with their corresponding epistemologies (captured through their depiction as legal 'fields'). In previous work, I have been interested in the identification of 'translation categories'—using the triad of *Actors, Norms*, and *Processes* (ANP)—to capture the theoretical and conceptual challenges arising in a context where we are called upon to offer legal analysis and doctrinal assessments in a framework very different from that of a (Western) nation state, marked by evolving conceptions of the state, the rule of law, notions of the separation of powers and a system of normative hierarchy, with some form of constitutional text or order at the pinnacle of the pyramid (compare Zumbansen 2013b, 54-60). In the present context, this *translation* or engagement is seen to occur in two ways: first in the form of the Legal Realist confrontation of legal norms with their invisibilised social realities, secondly through a close study of the ways in which the content and boundaries of legal fields are being drawn and justified. The key here is a contextualization of lawyers' demarcation discourses as concerns the function and boundaries of particular legal areas ('fields') in a never fully disclosed or disclosable realm of epistemological conceptualization. What—in the domestic context—would, for example, justify

14 Here, I am much inspired by Rudolf Wiethölter's longstanding analysis of the correlation between political, sociological and economic analysis of law. See e.g., Wiethölter 1986b and 1986a.

15 A landmark contribution to this debate continues to be Claire Cutler's study of the institutional and political dimensions of lex mercatoria (Cutler 2003).

a strict separation between labor law on the one hand and corporate law, on the other? We should know and did already know for a long time (Berle 1954), that the justification of distinguishing between these two legal fields, despite its 'functional' persuasiveness (Dewey 1926; Bratton 1989), is at its core *political*. As will be shown later in this article, similar justificatory moves occur in both emerging and maturing transnational legal fields: the here chosen examples of law & development and transitional justice do poignantly mirror the same thrust of arguments mobilized to distinguish their respective regulatory function. It is by approximating these fields that we can see more clearly how the construction of a legal field results in the creation of a tightly structured realm of purported internal logical coherence.

But, as I want to show in the following, this attention to politics does not go far enough. What today is most frequently being associated with the need to expand law's interdisciplinary capacity,[16] is in fact only the surface of a more comprehensive crisis of law's epistemological foundations. On the one hand, from a legal-sociological perspective, we find an increasingly fuzzy relationship between allegedly 'public' and 'private' actors involved in the formulation and implementation as well as enforcement of norms. But, while this proliferation of private regulatory actors is as such not a novelty given its historical precursors (see e.g., Jaffe 1937), its particular appearance in the context of the continuing crisis and transformation of the New Deal's and the post-war Welfare State's regulatory aspirations requires a comprehensive analysis that would effectively revisit and reinvigorate the Legal Realists' pondering on the hidden politics of de-politicizing markets (Hale 1923), contracts (Dalton 1985; Hart 2009) and families (Olsen 1983). The first strand of analysis in this article is thus an attempt to connect the contemporary politics over post-Welfare State regulatory governance with earlier contentions as to the ideological basis of market-state demarcations. On the other hand, such analysis must prove adequate in the face of a fundamentally transformed institutional environment as it presents itself in the form of today's 'disembeddedness' of the nation state's regulatory and adjudicatory apparatus (Zumbansen 2013b, 54–60). The disaggregation of a wide range of state regulatory functions and processes (Verdier 2009) presents, thus, a formidable challenge and laboratory for the study of the doctrinal, conceptual as well as ethical and political dimensions of norm creation and implementation.[17]

At the heart of this article is thus the correlation between a 'political' critique of legal theory and an analysis of the relationship between law and governance in a transnational context. It is through the mobilization of the idea of 'translation' that I hope to be able to show how contemporary calls for a more interdisciplinary study of law can barely scratch the surface of what is in fact a far deeper-reaching political crisis of law, a crisis that is one of law's epistemological basis. The here suggested use of the term translation, however, is not obvious and thus needs to

16 See e.g., NYU's 2012-2013 Hauser Colloquium program, focusing on an interdisciplinary analysis to place legal theory in the interdisciplinary context of global governance: www.law.nyu.edu/academics/colloquia/hauserglobal (last visited 28 August 2013).
17 See contributions to Scott et al. 2011.

be explained. For anyone working under the umbrella of 'law in context' or, 'law and society', the challenge of how to adequately correlate the complexity of social 'facts' (observations, judgments, perceptions) to the 'language' of the law (Constable 2012), brings together a wide range of epistemological and conceptual challenges. These can be looked at through the lens of 'knowledge', in other words, by asking the question of what the law 'knows' of the reality it seeks to depict. Another, related dimension of such inquiry is to ask what it *should* know, which shifts the attention to the problem that law might not be the appropriate tool to adequately represent social facts, conflicts, relationships, voices as well as silence. A further dimension, still, is to problematize law's translation capacity from a normative stance, which is to ask in whose name and to whose benefit a social constellation is turned into a legal 'case'. For the interest jurisprudes of late-nineteenth century Germany or the American Legal Realists of the early twentieth century, these dimensions were already present, in one way or the other. For the legal sociologists during the interwar period (Ehrlich) as well as the 1960s and '70s, they were amended and complemented by an emphasis on implementation and an investigation into the 'consequences' of legal regulation. And, during the latter part of the twentieth century, post-colonialism and literary criticism slowly began to influence legal theory and legal sociology, preparing the ground for a renewed, but now significantly interdisciplinary radical self-reflection on the historical and ideological underpinnings of law .

The following observations immodestly pursue the goal of keeping these three dimensions 'in play' while focusing, in the core part of this paper, on an analysis of two 'fields' in contemporary legal debate, 'law and development' and 'transitional justice'. Each of these can illustrate how field boundaries function as arguments to concretize and synergize ongoing and continuing discourses of legal theoretical and legal sociological inquiry against the background of the just alluded-to genealogies. As such, legal fields can be seen as 'law in context' or 'law and society' laboratories, in which the correlation of social 'reality' and law is problematized. At the same time, such laboratories are contestation sites for struggles over meaning, purpose and value orientation—just like 'labor law' or 'corporate law', alluded to above. By comparison to those, the here suggested fields have the advantage of being still 'new' in the sense that their 'tradition' is not yet canonical, and their trajectory particularly contested. They thus offer a formidable opportunity to engage with the way in which lawyers (continue to) debate over what it is they are doing, and what it can mean to apply legal language as well as the 'force of law' to social relations and phenomena.

Against this background, the agenda is an apparently straightforward one. Once the importance of the Realists' political critique of legal formalism is reintroduced, the task consists in reflecting on the challenges arising in the attempt to apply their lessons to contemporary arenas of transnational governance. The just described idea of translation will be unfolded in two ways: the first is to revisit the ubiquitous reference to 'public' and 'private' in a by now well-established 'law & society' mode, which builds on legal realism and places law as a social theory enterprise in an ever-further differentiated social science context. But, we need to look at the challenges

of a thus operating law & society approach that risks simultaneously fetishizing and diffusing the 'political' thrust that drove the Legal Realists' project. In light of this challenge, the present frontier of a renewed law & society approach in the light of already made advances in sociology, philosophy, and Science and Technology Studies (STS) lies, in my understanding, in how to more effectively engage legal doctrine and legal theory in a dialogue with those disciplines that place the questionable, fragmentary and precarious nature of knowledge at the center of their inquiry. This 'turn to knowledge' as a task for legal theory turns practical when we study the establishment and demarcation of legal fields in contexts that are above all marked by the absence of the earlier available reference points for nation-state embedded legal governance (courts, normative hierarchies, constitutional adjudication, etc.). In other words, to the degree that fields such as law & development and transitional justice are being constructed and distinguished from one another by using the old, traditional conceptualizations of (a-political) markets, (interventionist and, as such, market processes disrupting) states, (self-interested) individuals, (private) corporations and (contractualised) employees in the realm of the first field (L&D) and the rule of law, reconciliation, prosecution and healing in that of the other (TJ), a Legal Realist inspired critique of the 'hidden politics' might not prove sufficient to grasp what really lies at the center of these fields. Ultimately, I will argue that both L&D and TJ are mere facets of the way in which legal theory today engages with a complex regulatory as well as normative-ethical reality in a transnational context. Using the concept of translation will allow us to see more clearly how distinctions between public and private, political and non-political elements of this reality are closely linked to distinctions between legal and non-legal forms of social ordering. Underlying these distinctions is a fierce struggle over different utopia, over competing and likely mutually exclusive models of society and human community,[18] a struggle about the violence of which the lawyers' distinction between 'relevant' and 'irrelevant' social facts in court proceedings gives little to no indication.

A central contention of this article is that the future development of 'law and globalization' will significantly be shaped by the way that scholars in law and other social sciences are able to further integrate the respective investigations into foundations and methodology, that are under way in each discipline, as we speak. The prospect of updating and adapting a primarily nation-state focused legal discipline to its operation in a global context includes the initiations of concentrated thought exchanges about the different, recognizable approaches to verbalize, from a variety of perspectives, the challenges posed by globalization for law and other social sciences. For a conversation across disciplinary boundaries to start, it is advisable to give a better picture of the particularities and idiosyncrasies of law and the current state of legal research (and contemporary developments in legal education). The following list identifies a number of thematic clusters that capture the different aspects of contemporary debates around law and globalization. My contention is

18 For a brilliant depiction of this point, see Cotterrell 2009, and for an insightful engagement with Cotterrell's approach (building on Georges Gurvitch), see Dedek 2014.

that, taken together, these clusters constitute elements of an emerging *legal theory of global governance*. Such a theory, to be sure, is no longer a legal theory in its own right, but a particular segment of 'social theory'. In other words, building on Legal Realism and the sociology of law in this vein, we can hope to contribute to a social theory of law in a transnational context. And it is in that light, that we are now experiencing a strange mixture of both déjà-vu and innovation in the engagements between legal theory and social sciences. If we dared to apply a label to these developments, we could venture that of a transition from 'law & society' to 'law & globalization', with the term 'transition' marking less a substitute and replacement than an evolution, a maturing and continuing differentiation. That said, however, it is clear that the challenges arising from the first phase of law & society are likely to echo in the current iteration of law & globalization. In other words, the pressing questions as to the methodology to unfold the relation between 'law' and 'society' cannot be considered obsolete. What remains the same, is the need to demarcate and motivate the contours of each and the boundaries between them. This brings us back to the rediscovery of legal sociology in the 1960s and 1970s, the rise of a scientifically driven criminology as one of the launching pads and benchmarks for what result in a fast proliferating field of victimology, critical criminal law theory, implementation and context studies etc. At the same time, 'legal pluralism', while echoing a lot of the early legal anthropologists' and legal sociologists' interests in indigenous legal orders or customary law (Ehrlich 1962; Durkheim 1984), became a very ambitious theoretical and practical endeavor in the critical analysis of regulatory regimes in mature welfare states (Moore 1973; Teubner 1983). Today, the resurgence of law & society through the prism of law & globalization reminds us of these demarcation efforts while pushing us to recontextualise such concerns in a newly expanded environment—jurisdictionally and geographically (Ford 1999; Handl et al. 2012), geopolitically and from an epistemological standpoint (Sousa Santos 2007a, Chakrabarty 2007). What has changed in comparison between the 1960s/1970s constellation and the present time, is that the target areas of much of the just mentioned legal sociological, anthropological and critical work have become de-centred, as it were, shifting from a largely state-centred analytical universe to one of hybrid regulatory arenas, described, variably as international 'regimes' (Krasner 2001), transnational 'spaces' (Sassen 2006), fragmented legal orders (Koskenniemi & Leino 2002) or 'collisions' (Fischer-Lescano & Teubner 2004). This shift results in what might be called a 'disembedding' of nation-state or jurisdiction-oriented analytical and conceptual approaches. Explanatory frameworks employed to structure and analyze core institutional features of state-based legal regimes such as the 'rule of law', the 'separation of powers' principle or the ideas of a constitutional order or, simply, normative hierarchy threaten to miss the unique architectural structure of emerging global governance regimes. It is this disembedding of state-based conceptual toolkits that prompts not so much a full-blown crafting of a 'new'

language,[19] but a constant exercise in adaptation, building on reflexive exercises in (discourse-regime-system) translation,[20] as well as the continuing engagements with the tension between 'government' and 'governance' discourses in different social science disciplines.

Such developments form the backdrop for the next stages of 'globalization studies', which will in all likelihood lead to an ever higher degree of interdisciplinary pollination. For the purposes of the present project it is necessary to keep this rich background in mind, while continuing the efforts to draw more concrete lessons from this engagement for one's own discipline. This interest in 'one's own' may be justified in light of the consideration that disciplinary frameworks evolve both internally and externally and as such have an inherent quality of *instability* that needs to be kept in mind when employing its tools and concepts—however critically such employment may be occurring. What evolutionary theorists have referred as the tension between 'routine' and 'innovation' (see, for example, Luhmann 1975), legal scholars have depicted as a state of 'critical instability', for example in the case of a normative framework that is rich in its conceptual and, as a result, symbolic aspiration, while being under constant threat of being demasked as farcical or worse in light of the unlegitimizable environment its norms have helped creating (Pahuja 2011; Rajah 2012b). While this instability of theoretical frameworks which results from internal and external challenges might be identified and recognized, the necessary 'next' step is often much harder to formulate. Law's relationship to (global) society is one such constellation in which a crisis of law is widely acknowledged, yet nothing like a consensus is emerging in terms of how to *respond* to, let alone, conceptualize that crisis. Despite this, it is possible to identify a number of thematic clusters which are constantly recurring in related debates about law's status in a global context. These clusters are helpful in distinguishing different dimensions of the law-globalization relationship which the present article seeks to address. Among these clusters we find:

- the *state-law nexus* and the frequently associated distinction between a (legally structured and operating) state and a (purportedly self-regulatory) society.
- the alleged elusiveness of *transposing nation state-based concepts* such as the 'Rule of Law', 'Separation of Powers' or 'Normative [Constitutional] Hierarchy' into the global sphere [the distinction of domestic and global law].
- the *relationship between* (formal, institutionalized) *law and* (informal, 'social') *norms* [the law/non-law distinction].
- the fate of the concept of *legitimacy* in an evolving global legal order [the normative status of global law].

19 In this context, see the program description of 'Language and Globalization' at Tilburg University in The Netherlands: <www.tilburguniversity.edu/research/humanities/language-and-globalization/> (last visited 30 August 2013).

20 See e.g., Carayannis, Pirzadeh & Popescu 2012, esp ch 2 ('Globalization, Nation-States, and Global Governance').

- the *politics* of global law [e.g., the tension between progressive and conservative endorsements of concepts such as the Rule of Law].
- the legal-philosophical *foundations of law* in distinction from law seen through the lens of *sociological or regulatory theory* [the interdisciplinary understanding of law].

Bullet-pointed lists are always meant to reduce complexity by enumeration, yet omitting an explicit ranking or ordering by priority. The above list is just like that in that the different bullet points are meant to illustrate, in no particular order, the earlier observation that the relationship of 'law and globalization' is in fact a label for how law depicts and ultimately begins to translate a multi-layered and multi-tiered theoretical analysis of contemporary social order that is offered by a host of disciplines other than law, into legal language. This translation bears tremendous risks for the translator—as well as for the translated. As for the lawyer as translator, the risk is one of destabilization of learned and established ways of seeing, understanding, judging. And it is this dimension I am here interested in. In order to trace such destabilization experiences in the law, some reconstruction of legal intellectual history is necessary. Thus, part II of the article will set the stage of the following analysis by initiating an investigation into the evolution of law and 'socio-legal studies'. Part III will build on this account and then look more closely at one of the currently most vibrant discursive playgrounds in socio-legal studies 'gone global', namely Transnational Law [TL], which is here studied above all from a methodological perspective. This means that the emergence of this 'field' is understood as an attempt to make sense of law's doctrinal, conceptual and interdisciplinary adaptations to globalization. The following two parts (IV, V) will then analyze the role of information and knowledge in the context of this emerging legal-regulatory concept of TL by looking more closely at both 'facts' and 'norms'. The core contention in this part of the article is that while there is an inherently *political* dimension to the identification and selection of relevant/irrelevant facts on the one hand and the recognition versus dismissal of legal/non-legal norms, on the other, it remains frustratingly difficult to adequately capture or address the nature of this political dimension. It is the ambiguous, elusive nature of both the political status and framework that I am here most interested in—an interest that is shared, obviously, with many others (Teubner 2012; Liste 2012). Part VI, then, will finally focus on the two, already mentioned legal 'fields', 'arenas', 'sub-disciplines'—'law & development' on the one hand, 'transitional justice', on the other—which may illustrate how law has become an increasingly interdisciplinary, 'unstable' discipline, the merits of which can be realized only in accepting its unstable nature as an unavoidable consequence from law's engagement with its environment. Part VII deepens this analysis by revisiting the earlier findings regarding the role of knowledge in legal governance, but now scrutinizing the particular role in these two overarching, dynamic areas. Finally, part VIII reiterates the argument for an understanding of TL not as a field, but as a contemporary methodological engagement. This, in consequence, leads to the emergence of a differentiated analytical framework—under the label of 'transnational legal sociology'—with the help of

which it might be possible to think further about the connections and intersections between legal doctrine, legal sociology and social sciences in the present era.

2. Strange bedfellows, or: a cohabitation with uncertain effects: 'socio-legal studies'

Under the constant nagging at the conceptual citadels of legal coherence and unity by social-scientific insights, law eventually morphed into an unbound universe of 'socio-legal' studies. Similar to other hybrid scholarly endeavors,[21] the ambiguity of the politics that are at work in the generation, formation and consolidation of such fields follows from the difficulty to identify clear reference points ('right' vs. 'left') on the one hand and something similar to traditional (to be sure, Western) hierarchizing categories ('state' vs. 'society'), on the other. More fundamentally, politics become ambiguous when it is no longer clear what they can be attached to, people, actions, and even things (Latour 2005). The here pursued interest in 'translation' is central to such a political perspective on socio-legal studies. Today, however, the translations between different realms and universes of knowledge have become especially complex, as the centrality of purportedly 'technical' knowledge in legal norm creation and decision making is likely to complicate otherwise well-reasoned attempts to separate doctrinal from 'ethical', 'moral', 'political' dimensions of law. With this in mind, the article is interested in both the trajectories and the politics of conceptual change in law's efforts to adapt to globalization. As such, our interest must reach beyond the obvious political categorization of assertions that globalization has (rightly or regrettably) put an end to state sovereignty. Instead, the more important task seems to be to better understand the discursive universe in which globalization is associated either with the death of law (as collateral damage from the decline of the state) or the resurgence of law as a flexible regulatory asset in globalizing markets. Such an understanding cannot be gained from a single vantage point. While the analysis of the contested status and role of law in global governance is partly an important concern of sociologists and political scientists, the *motivations* as well as underlying *assumptions* that guide regulatory scholars—as *de facto* political philosophers—in their confidence in law in a domestic context as opposed to the frequently voiced fear of falling into a global void might be better understood through the lenses of (however crude behavioral) psychology (Guzman 2008) or political philosophy (Pogge 1992). But only in a combination of these different disciplinary lenses does it seem possible to arrive at halfway appropriate observations of the emerging global regulatory order. That said, the contention here is that a legal theory of global governance cannot escape its interdisciplinary reformulation, precisely because its categories have come under such close scrutiny.

Meanwhile, the analysis of law's engagement with globalization seems to rest, at least for the time being, on a number of reference points. One of these is the distinction

21 The fitting example often being that of 'cultural studies', see e.g., Terdiman 2001; from the standpoint of legal sociology, see Nelken & Feest 2001.

between 'domestic' and 'international', which—despite its questionable explanatory status in the long run (Zumbansen 2013a, 506)—serves as a productive framework to identify differently bounded regulatory discourses. Against that background, it is possible to get closer to the 'politics' that accompany the emergence of legal fields, which are in themselves neither 'here' nor 'there', in that they are constantly transgressing the boundaries between the nation-state and the global realm. Two such fields will be in the centre of the forthcoming analysis, namely the in themselves unruly and seemingly boundary-less fields of Law & Development and Transitional Justice. By looking more closely at the continuing conceptualization of these areas, including their trials and tribulations as law school curriculum entities, it can be shown how the conflict between progressive and conservative politics, well-known from nation state-based disputes over the aims of legal governance in different regulatory areas, is repeating itself in the transnational arena. This *transnational replay* of domestic tensions between progressive versus conservative politics in the global arena short-circuits related debates within the nation-state context on the one hand and within transnational or global governance discourses, on the other. Because the latter is often described as distinctly different from the domestic sphere in light of the absence of a functioning, institutionalized rule of law, a normative-constitutional framework or hierarchy or an adequately designed system of norm-enforcement, the politics of global law are often depicted as being fatally troubled with questions of legitimacy, access to justice, or human rights universalism. Meanwhile, it is within the nation-state that the political dimension of legal theory is most frequently associated with crude demarcations of 'public' versus 'private' spheres of regulatory sovereignty or with claims over contested territory, associated either with state 'interventionism' or societal 'self-regulation'. Law reconceived as 'socio-legal studies' can be seen as a continuing effort to formulate this dependency of law's meaning (its 'politics') from the context in which it is being evoked. It is this sense of *embeddedness* that was crucial in the formation of legal sociological analysis of law over time. The task at this point in time is how to adequately capture the challenge arising from law's globalization, how to build on or reject categories and instruments internal to law as a scholarly discipline, how to relate and, possibly, adapt its conceptual framework to other disciplines' insights into the nature of global governance and what lessons to draw from such engagements for law—as a field of doctrine, practice, education and research.

3. Transnational law as an engagement with globalization

In a recent chapter for an essay collection on 'Law and Social Theory', Ralf Michaels, a prominent participant in the discussions around 'global legal pluralism', surmises that globalization has become the definitive framing operative of the 'law of our time' (Michaels 2013, 1). An informed, cursory overview of the challenges arising for law and legal theory from globalization—above all law's ties to the concept and the institutions of the Western nation-state—then follows this assumption. At the end of the chapter, Michaels appears to simultaneously dismiss and endorse a reading of

'transnational law' [TL] as a theory or a methodological framework in its own right. Instead, he suggests that 'if anything, transnational law is a description of what we find empirically as law beyond the state, and a theoretical conceptualization of law after the breakdown of methodological nationalism. Transnational law describes a starting point, not an endpoint, of thinking about law' (Michaels 2013, 18).

I take the apparent ambiguity of this position as an expression of a dilemma, which we—as legal scholars and *de facto* social scientists—are facing almost at every turn in our attempt to adapt the conceptual and theoretical instruments of our discipline to the unruly phenomena of globalization. In turn, 'globalization', as Gunther Teubner noted almost twenty years ago, should rightly be seen as the ultimate deconstructor, which in fact turns every dearly held assumption and foundation of law as a discipline on its head (Teubner 1997). As Michaels observes, globalization 'has remained a remarkably vague concept in general discourse' (Michaels 2013, 1). While this observation seems to be on point when we take into consideration the wide-ranging assessments and appropriations of the term, conceptually, politically, theoretically, we still must ask whether the problem is this lack of definition. After all, if it is true, to the least, that 'we are all realists now' (Singer 1988), why then further invest our energy into definition games. We know well enough that these only raise further questions as to who does the defining, to which purpose and to which effect? In that light, it appears perhaps more productive to embrace the phenomena which are being associated, for a number of reasons, with 'globalization', as *challenges* to the foundations of established epistemologies and ways of seeing the world.

From such a starting point, Michaels' assertion of TL merely capturing what we 'find empirically' can be qualified further to hint at the very problem of *how* we ought to use frameworks such as a particular theory, an analytical concept or—as in the case of TL—a 'field' within a discipline, to describe (and, to construct) reality. Apart from the question of epistemology and the status of empirical socio-legal studies, the other part of Michaels' statement deserves equal attention, namely where he refers to 'law beyond the state' (Michaels 2013, 1). If anything, law's engagement with globalization has been determined by the category of the state and its significance for our understanding of law. That is precisely what Michaels depicts as (the need to question and, eventually, overcome) law's 'methodological nationalism'. So far, so good. But, now, where do we 'start', as Michaels suggests at the end of his paper, that we should?

I want to suggest that whether or not TL is a theory in its own right or whether legal pluralism [LP], that shares with TL a keen interest in social norms and in the tension between 'law' and 'non-law' (Moore 1973), should be seen as helpful (Michaels 2013, 14), we ought to acknowledge frameworks and approaches such as TL or LP as elements in what Michaels appropriately, in my view, describes as a *reconstruction*, of 'law as social science'. As such, the boundaries of law as a discipline tend to be drawn and redrawn in light of challenges, whose status is inevitably going to be as contested and open for further deconstruction as the *nature* of law itself. In other words—but it might just be a theoretically obviously and trite point—there is no fixed point

from which it would be possible to treat law as a 'given' and then to analyze how it changes under the influence of outside pressures. The problem of law's boundaries, its content, scope and nature has always already been part of law's definition. Michaels' suggestion to capture the scope of law as it unfolds under conditions of globalization through the study of three determinants or, anchor points—'territory', 'population/citizenship' and 'government' is well-suited to explore the inchoate ways in which legal categories become intertwined social scientific depictions. Building on these three mini-excursions, we are able to see how a set of reference points that play an important role in law, are revisited and, in turn, reconfigured and expropriated by an immensely rich assembly of non-legal analytics that capture their sociological, philosophical, political, anthropological or geographical dimensions. Again, the ensuing question is what the consequences are for law. That question in itself is new only with regard to the context, in which it is posed. That this context is labeled as globalization suggests that it is a different context from that (of the nation state) in which questions regarding the relationship between law and social developments or, more generally, between law and society, have previously been asked.

Globalization and the various conceptual steps that have been taken by lawyers and socio-legal scholars towards making sense of globalization's impact on law appear to place the investigation on an entirely new and distinct foundation. It is against such a background that we might be able to appreciate the anxiety that shines through proclamations such as 'If everything is transnational law, nothing really is' (Michaels 2013, 18). Michaels qualifies this statement by referring to a use of TL as encompassing 'all legal (and non-legal!) rules',[22] while underlining that his preferred reading of TL, as we alluded to earlier, is one of a description of empirically found instantiations of 'law beyond the state' and as a 'theoretical conceptualization of law after the breakdown of methodological nationalism' (Ibid.).

The problem with these qualifications is that they tend to abbreviate and curtail necessary inquiries rather than productively draw on the different already existing investigative strands that have been developing in recent years and that have been benefitting from an increasingly serious engagement across different disciplinary boundaries. The level of complexity that the work carried out under the label of 'socio-legal studies' has reached up to this point, strongly suggests that we should no longer hope for any 'easy scores' or apodictic truths in this theoretical game. In that vein, it is important to point out and to acknowledge that definitions of otherwise unbound, experimental frameworks—such as TL—always carry the risk of inadequately reducing complexity. But, they nevertheless have to be taken seriously as evolutionary steps in theory-building that is driven by a coalescence of factors. In the area of legal 'fields', such factors comprise the constant tension

22 Michaels 2013, 18 (emphasis not added). See the expression of a similar anxiety in Zamboni 2013, 2, referring to the 'black hole represented by legal globalization (and its legal pluralism), a black hole where the distinction between law and non-law (i.e. the major tenant of legal positivism and, I would dare say, of the modern Western legal culture) seems to vanish, putting the very existence and legitimacy of the legal phenomenon under question'.

between the 'law on the books' and the 'law in action' (see e.g., Pound 1910), the 'exhaustion' of conceptual, analytical and doctrinal categories and instruments in the face of competing interpretations of social 'facts' (Galanter 2006), as well as the recognized need to adapt or expand an existing legal framework to a burgeoning set of technological, social, cultural developments. Because law that does not adapt to its times will wither away, we can see these tensions as well as the attempts to address them to have been marking any field of law—including contract, tort, property or civil procedure: all of these have seen such sieges to their citadels of purported coherence and rationality. As keen observers have pointed out for example in the case of private law, the politics of this game of constant change were not first prompted by the emergence of globe-spanning regulatory regimes, but started long before (Caruso 2006). Against that background, who wants to still *define* what contract (property, constitutional law etc. etc.) law really are, aim for and are designed to demarcate, protect and empower?

Transnational law [TL] is just one result of such ongoing attempts to update law and its categorical architecture to fast-moving societal developments. From that viewpoint, the 'body' of TL is driven by the tension as well as by the co-existence of law [legal] and non-law [non-legal rules] as they characterize contemporary regulatory regimes. But that does not define TL; rather, it is but one element of the concept that gives rise to the field. Understood, instead, as a theoretical platform, or laboratory, TL allows us to study the ways in which this tension actually unfolds, the forms and instances through which this coexistence occurs and the instances where legal categories become infiltrated by meanings from other disciplinary discourses. In other words, TL should be seen as doing the exact opposite of equating or leveling legal and non-legal rules. The contention is that TL, instead, *problematizes* the correlation between both normative universes[23] in that it opens up an increasingly diffused and complex regulatory landscape to a comprehensive assessment of the status and the function of norms (legal or non-legal) inside but also outside legal doctrine. For example, rather than contending that the transnational law merchant—the 'lex mercatoria'—encompasses the entire universe of legal and non-legal rules in the field of transnational commercial regulation and governance, TL highlights the *interaction* between legal and non-legal rules in the governance of transnational societal activity, at the root of which lies nothing else but the challenge of the distinction itself.

4. The transnational law project scrutinizes law's 'knowledge' problem 1: *facts*

This leads us to the second contention: if TL is a framework to investigate the correlation between legal and non-legal norms, then it is not just more, but also something different from a mere 'description' of norms that can empirically be 'found', as alluded to by Michaels. TL problematizes the way in which such *finding*

23 See the fascinating engagement with these universes by Cover 1983.

occurs each time. For example, it is from this perspective that we can recognize the factor of agency in identifying and selecting 'applicable' norms in transnational constellations.[24] Meanwhile, from the perspective of TL it becomes possible to revisit established as well as emerging interpretations of jurisdictional norms: for example, the contested applicability of the U.S. American Alien Tort Statute of 1789 in the context of transnational human rights litigation is squarely situated in the nexus between 'legal' norms and TL's concerns with the identification and interpretation of norms in accordance to the transnational nature of the underlying issues.[25]

A further contention as regards the 'finding' of law's instantiation beyond the state can be made with reference to the ways in which judges in cases—be they domestic or involve transnational reach—distinguish between *relevant* and *irrelevant* facts. For example, Judge Posner's opinion in the 2011 *Flomo* decision is a case in point in that regard. Reviewing the applicability of several ILO conventions to the labor practices 'found' at the Firestone Rubber Plantation in Liberia, Judge Posner at various points acknowledged the lack of sufficient 'information' or 'knowledge' with regard to the labor practices on the ground, but did not hesitate to still decide on the inapplicability of the conventions.[26] From the perspective of TL the question of the factual basis on which decisions regarding the qualification of norms as applicable or non-applicable are made is crucial. The importance here lies distinctly no longer alone in the question whether or not a particular ILO convention is applicable, but how the decision of a norm's applicability is shaped by a more comprehensive and adequate understanding of the regulatory regime that in fact governs the scenario on the ground, which gave rise to the 'case' in the first place. In other words, the application of a legal norm never occurs in a vacuum, but instead must be seen as an intervention into an already existing normative system, made up of both 'official' and 'unofficial' norms. But, the significance of this rudimentary legal pluralist assertion becomes recognizable even from a cursory look behind the obvious facts in a case. In the example of the rubber plantation at the center of the *Flomo* decision, one quickly begins to wonder about the consequences for the legal assessment of the case's facts that follow from a consideration of the history of the corporate defendant's almost century-long involvement in the country. The facts about which the deciding judge recognized to know 'too little' were in fact available (namely who worked for the

24 For an illustration of such norm selection in the fields of consumer contract law and corporate governance, see Calliess & Zumbansen 2010, chapters 3 and 4.

25 Arguably, the U.S. Supreme Court's decision of April 17, 2013, has further decreased the likelihood of consolidating a transnational human rights jurisprudence in the tradition of the decision in *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980): see *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. ___ (2013). On Filártiga, see e.g., Aceves 2007.

26 *Flomo v. Firestone Natural Rubber Co*., 643 F.3d 1013 (2011), e.g., 1023: 'They can assure fulfillment by hiring other poor Liberians to help them; and because Firestone's Liberian employees are paid well by local standards, they can hire helpers cheaply. But alternatively they can dragoon their wives or children into helping them, at no monetary cost; and this happens, though how frequently we don't know'. See also Ibid.: 'We don't know how many supervisors Firestone has deployed on the plantation, and hence whether there are enough of them to prevent employees from using their children to help them. We don't know the supervisors' routines, or how motivated they are to put a stop to any child labor they observe'.

plant in which capacity and under which conditions), but only if one began to see the case at hand in a broader context, namely in a context that was rich in relevant *data* and *facts*. The crucial element of contrasting the *case* that the Judge had before him with a case 'study' of the actually existing context and environment of the 'case' lies in the recognition of the limits of the epistemological categories that informed the construction of the case. The case study, by contrast, does not simply apply established categories to first depict and then to legally assess the *interests* found to be in obvious conflict (as, for example, between employee and employer, worker and factory owner, or two contracting parties). Instead, its purpose is to highlight the gap between the categories (employee, worker, contractor) and the reality that shapes the case.

This gap has long ago been identified as law's legitimacy deficit from a range of theoretical-political viewpoints, with the Interest Jurisprudence's attack on legal positivism in late 19th century Germany and the Legal Realists' attack on legal formalism merely being early instantiations of such efforts. In the attempt to better understand this context it is necessary to begin to recognize it as being itself the result of both a detailed field study of work and life conditions on the ground and a comprehensive *reconstruction* of the historical, socio-economic as well as political factors that have shaped the 'conditions' of the existing labor practices. While this dimension encompasses what we might call the political economy of the company's actual operation in the region, the community as well as government and stakeholder relations (see e.g., Rodriguez-Garavito 2011), what also becomes visible then is how the labor practices at a plantation such as Firestone's in Liberia are shaped by a multitude of regulatory norms that shape the employees', their dependents', and their peers' relations with regard to the company. Without taking into account this reality of these complex relationships between the company and its various stakeholders, a label now attached to a group significantly broader than that encompassing the company's official employees, no adequate assessment regarding the 'labor practices' on the ground can in fact be made. As ethnographic and political science accounts have shown, the regulatory universe of multinational operations in certain locales is itself transnational in its reach and its local effects can only be studied by understanding this complex relation between the local and transnational normative sphere. Simultaneously, this is the reason why there is never a moment where we can refer to norms that we 'find empirically as law beyond the state'. While, on the one hand, we may identify, collect and categorize norms of different status and quality as shaping a particular regulatory area, the selection and ranking of those norms we find applicable and determinative in a given context, on the other, remains a matter of agency and choice.

5. The transnational law project scrutinizes law's 'knowledge' problem 2: *norms*

The previous section has ended in a reference to the intersecting local and transnational, official and in-official, hard and soft norms which characterize regulatory

arenas such as contemporary labor governance of multinational companies' operations in the third world. We have applied this lens to commence an investigation into the ways in which the lawyer in such situations can identify, choose and mobilize norms of different origin and status (compare Rodriguez-Garavito 2011). A striking feature of this selection process, however, is the effusiveness of the boundaries between (hard or soft) *norms* and the *facts* which constitute a social reality. The distinction between actual *facts*, allegedly standing for an objective materiality or a state of things, and norms and normativity, by which we refer to the idealistic and symbolic dimensions of the world, is always a constructed one: in pointing to a particular 'fact', selections and choices have been made, which ultimately rest on value judgments regarding the status being accorded to the 'facts' in question (e.g. Latour 2005).

In light of these observations, we now need to further flesh out the proposal in the previous section; the suggestion just made pertained to the development a richer concept of 'context' in order to gain a more adequate understanding of the complex qualities and dimensions of the *facts* that have given rise to cases such as the transnational human rights litigation in the Bridgestone or Firestone cases. Taking up the just made distinction between *political economy* and a *normative* dimension, we now need to ask about the nature of the relationship between both. The here made contention is that the former takes up the challenge of critically investigating the origin, the nature and selectivity of the 'facts' being considered in establishing the *factual* basis of a case, while the latter refers to the idealization and utopia of fact selection and establishment. The task becomes one of going beyond a narrow reading of the facts, one that is driven by incomplete testimony and typification, while avoiding to be lured down an alluring path that promises to lead us to what can only be an outrageously unbounded 'history of everything'. In other words, we need to identify the moment *when* and the ways *in which* lawyers, litigants and judges lose sight of the relevant facts and instead consolidate a manageable, i.e. justiciable factual basis, which from that point on serves as a complete snapshot of the 'facts of the case'. It is here where lawyers will increasingly engage with and allow themselves to be challenged by the advances made in anthropological and ethnographic methodological research, given that these areas currently display a forceful commitment to revisit and to scrutinize long established research routines and to update methodologies to new circumstances.[27] But such a perspective on engagement should not make us blind to the possibility that the goals of the lawyer may not only diverge from those of the anthropologist she 'relies' or 'draws' on, but that, in fact, the lawyer might entirely misinterpret the analysis offered by the anthropologist or the critical theorist. The task, then, for interdisciplinary analysis is to foster a mutual introspection into the starting points, normative (as well as theoretical, conceptual) underpinnings of this dialogue and engagement. When 'Waiting for the Barbarians' (Coetzee 1980), there must come the moment of realizing that it is no longer clear

27 See the contributions to Hardin & Clarke 2012.

who is who. A particular challenge for lawyers arises from the way in which they are now being pressured into acknowledging and processing numerous research that questions law's epistemological basis, but to do so without the proper awareness of the historical traits of this inquiry into the factual basis of legal notions. In other words, lawyers today are thrown into a legal sociological discourse that has greatly advanced from its early beginnings and is today no longer merely concerned with the sort of 'gap critique' (between law on the books and law in action), as it formed the centre of early 20th century legal sociological analysis. While much of early legal sociology aimed at showing how judges were prone to ignore both the (socio-economic as well as cultural) basis of legal norms and the effects of legal-regulatory intervention, the current reiterations of legal sociological analysis is distinctly more interdisciplinary and encompassing in nature. It is in that sense that we can speak of the challenge of *legal sociology 2.0* for the majority of lawyers, who were trained in either the Ehrlichian spirit of recognizing the undeniable parallels between official and in-official regulatory regimes or the Dworkinian mindset with an all-else dismissing focus on legal adjudication as key to unlock law's mystery. Moving beyond early legal sociologists' analytical interest in the politics of legal formalism and the rising importance of expert knowledge and scientific governance, intermediate legal sociologists between the 1960s and 1980s decisively pushed for an interdisciplinary re-orientation of socio-legal studies (Blankenburg et al. 1980; Nonet & Selznick 1978). A similar differentiation of a primarily social-justice focused legal critique into an ever expanding series of critical engagements with developments in race, gender, environment, science or international affairs was witnessed among schools of thought with a significant progressive and legal reformist orientation such as the Critical Legal Studies movement. In comparison, current legal sociology, if it even still exists in the form of designated law school positions or curricular components, is prone to form alliances with an increasingly far-ranging array of intersections between law and social, media, behavioral, environmental, indigenous, religious, or cultural studies. While it is impossible to fully capture the potential consequences of this development, it is obvious how the convergence of social science fields that gave rise to hybrid and 'cross-over' academic realms such as 'cultural' or 'media' studies cannot ultimately leave a discipline such as law untouched. Developments such as Transitional Justice, Global South Epistemology and Third World Approaches to International Law (TWAIL), illustrate these translation, engagement and introspection processes.

From this perspective, it appears as if a richer account of the *relevant* facts in a case will above all depend on a more contextual identification and reading of the data that can be accounted for as being of an explanatory nature for the case at hand. The bulk of this work still needs to be done in terms of showing how legal sociology 2.0 must now consist of lawyers' serious engagement with the advances in ethnographic research methodology, with the critique of facts and truth in 'science & technology studies' and with critical historiography as it has become pertinent in selected areas of law.

At the same time, while a more comprehensive approach to an analysis of the *facts* in a concrete case promises to assist in getting a clearer picture of the actual situation that characterized the conflict between the litigating parties, there will likely always remain a significant gap between a richer factual account of the actual interests and conditions present and the deeper structural frameworks of which a particular conflict scenario is part of. It is here, where for example scholars involved in the so-called Third World Approaches to International Law [TWAIL] have been able to unveil powerful connections between current governance conflicts and historical pathways, political choices and particular historical, socio-economic as well as geo-political circumstances—precisely by emphasizing that a critique of the facts employed in legal argument is inseparable from mobilizing a particular normative perspective. Contesting the facts, in other words, is a contestation, a struggle over values.[28] Another important development that promises to shed more light on the historically grown dimensions of the context in which many of the currently litigated human rights cases involving multinationals' operations in third world countries are unfolding, is the convergence of 'law & development' and 'transitional justice'.

6. Converging fields, intersecting epistemologies

Law and Development has always been an area which can neither be neatly and clearly defined nor boxed into clear-cut categories. The field has long been a battle field for opposing concepts of law, political and economic order and the role of institutional governance, and as such has always been a laboratory for audacious experiments with explosive material. Categories such as 'progress', 'development' or 'order' are invariably contentious, and in the context of L&D are employed as bargaining chips in a high-stakes game over political and economic influence, autonomy and, emancipation (see Pahuja 2011). While specific local contexts of L&D became the loci of such contestation, often enough under the magnifying glass of international and national development agendas, market integration and state reform, one of the most striking discoveries to be made here relates to the fact that the contentious items in the L&D context are also those which have long informed a critical analysis of law and governance in the context of the nation state. As such, the boundaries between the developing and the developed world, between those countries receiving and those exporting or providing legal (or economic) aid become porous, and a legal theory of L&D can fruitfully build on its older domestic sisters, such as critical legal studies, economic law, economic sociology of law or critical private law theory.

Among the important scholarly projects pursued by L&D scholars has been the discovery and analysis of the *legal pluralist* nature of the governance orders in the context of development. With a growing awareness of the different, existing ordering structures 'on the ground' in the development context came the realisation that *any*

28 See e.g., Sundhya Pahuja's critique of the Bretton Woods Institutions embrace of a political sovereignty of post-war nation states without duly recognizing the continuing unfulfilment of economic emancipation and sovereignty (Pahuja 2011); see for an insightful engagement with this analysis, Rajah 2012b.

legal order challenges the observer to acknowledge the parallels between and the co-existence of formal and informal, hard and soft law, of legal and non-legal norms (Arthurs 1985; Macdonald & MacLean 2005). This realisation prompted L&D scholars to acknowledge but also to build on the idea that many of the challenges pertaining to a law/non-law distinction that had been identified as specific to the development context, were in fact detachable from any legal governance framework. Indeed, the inadequacy of existing legal governance thinking pointed to the need for a different theoretical—but also, doctrinal—attention.

It is this realisation that allows for a better appreciation of the questionable foundations of a legal 'order', of the embeddedness of legal governance in a particular institutional setting (e.g., the 'state') and at a particular moment in (geo-political) time. To the degree that the struggle over law 'reform' in the context of development is seen as not entirely removed from contestations of legal (political, economic) order in the domestic context, L&D emerges as a field, which is just as much concerned with the relationship of law to its (particular, local) social environment and context as that has been the case for any other legal theoretical or legal sociological inquiry (Cotterell 1998; Zumbansen 2009a). But, accepting this perspective also implies accepting the loss of an outside observer's standpoint. Precisely, by acknowledging the inseparability of critical legal analysis in the domestic and the 'development' context, we lose the comfort of being 'outside' of the sphere which we are purporting to study and to examine in a disinterested manner (Trubek & Galanter 1974; Trubek 1972). Instead, the demarcation of the L&D context from that of one's home legal system and jurisdiction becomes questionable in itself, because the assertions of law's precariousness in the development context apply to the domestic home context with equal force. On that basis, the distinction between governance challenges 'there' and 'here' appears artificial. Indeed, the distinction seems designed to insulate the domestic context from critique while depicting the development context as deficient and requiring 'aid' and assistance. The identification of a series of legal governance questions as arising from within the context of a 'developing country' inevitably leads to these questions having to be seen as already pertinent much 'earlier', namely already present and evident in the context of domestic legal critique.

A striking feature of this contextualisation of L&D as part of a larger exercise in investigating law's relationship to and its role in society, is the way, in which the field opens itself up to an engagement and exchange with complementary discourses about regulatory places and spaces. Both legal scholars and sociologists have been scrutinising the conceptual and constituted nature of such regulatory spaces; spaces which escape a straight-forward depiction from a single discipline's vantage point. Just as this critique has become pertinent with regard to the analysis of different, specialised regulatory arenas, ranging from labour to corporate , from environmental to criminal law, altogether suggesting a methodological shift away from comparative and towards transnational law, L&D has become a very active laboratory for a renewed engagement with a critical and contextual analysis of law in a fast-changing and volatile environment.

This aspect can be underlined, perhaps most tellingly, by an approximation of L&D with the field of 'transitional justice' [TJ], in order to highlight the close connections between investigations into the 'legacies' of past injustices with programs of future-directed legal and economic aid (see e.g., Mani 2008; Greiff & Duthie 2009; Buchanan & Zumbansen 2014). Closely connected to and oftentimes overlapping with this very vivid scholarly engagement has, of course, been an equally vibrant 'literary'[29] and cultural engagement with 'transition' periods. After the seminal (inevitably colonial) portrayals by Joseph Conrad in *An Outpost of Progress* (1897) or *Heart of Darkness* (1899), 'post-colonial' novels such as Chinua Achebe's *Things Fall Apart* (1958) or JM Coetzee's *Waiting for the Barbarians* (1980) again poignantly scrutinised the slippery slope between 'us' and 'them' that inescapably pervades any 'intervention' or 'development' context. How in the context of public international law's attempts to address transnational military and civil conflict, this slope has become painfully obvious again, was powerfully illustrated in Anne Orford's critique of the hidden, hegemonic aspirations of recent instances of 'humanitarian intervention' (Orford 1999). Excavating the challenges of concepts such as 'change', 'reform' and 'progress', as they have been central to seminal transitional justice debates as those concerning South Africa (Corder 2001; Gross 2004) or Sri Lanka (Derges 2012), Achmat Dangor's *Bitter Fruit* (2001) or films such as Vithanage's *Death on a Full Moon Day* (1998), have become inseparably intertwined with the scholarly, 'expert' discourse around these instances of transitional justice.

But, what can this intersection of scholarly, literary, and cultural engagement tell us about the methodological challenges arising in the L&D (and, transitional justice) context? To the degree that we can already build on a host of critical work to scrutinise the orientation, method, and contentions of L&D and TJ theory, an additional aspect of this enterprise concerns the acknowledgement of and engagement with non-scholarly content. But, on whose terms? And, with which goal in mind? To the degree that a lawyer inquiring about the stakes in a particular conflict scenario 'reaches out' to non-legal depictions of the problem, s/he runs the high risk of assuming the qualification of the 'stakes' is the same for the legal and the 'other' perspective. But, should this be so? And what could law learn in fact if it opened itself up to the possibility that another perspective on the problem ends up defining the problem itself differently? The central contention here must be that a use of 'non-legal' materials as complementary or supportive of legal analysis likely results in a misreading and in an abuse of the literary text. Instead, the question must be how to create a dialogue and a better understanding between different reconstructions of reality, different narratives and determinations of meaning.

Another question concerns the demarcation of places and spaces in this context. What, we may ask, distinguishes the focus of Achmat Dangor's poignant analysis of family relations in post-Apartheid South Africa (Dangor 2011) from the haunting account of Mourid Barghouti's return to Palestine after an involuntary 30-year

29 See the insightful discussion of the prose/poetry debate in India around the work of Rabindranath Tagore, in Chakrabarty 2007.

exile (Barghouti 2004)? Emerging, from these accounts, is a powerful illustration of what we might call the 'transnational human condition', marked by multilayered and multi-tiered relations of belonging and 'citizenship'. It is this dimension of the 'human condition' that could arguably be seen as the fourth dimension of Hannah Arendt's depiction of labour-work-action (Arendt 1958), scrutinising the possibilities of political, social belonging in a post-national environment, which is marked by the fragility of political communities and, again, an increased precariousness of political voice (Cotterrell 2009; Fraser 2009).

Chinua Achebe, the author of the seminal novel *Things Fall Apart* (1958), recounts in his 2009 collection of short stories, *The Education of a British-Protected Child*, numerous instances in which he and the audiences he speaks before, are confronted with the porosity of the lines that divide 'home' and 'abroad', the 'here' and the 'there'. In Achebe's rendering, these experiences illustrate the tensions in people's lives when trying to make sense of their deeply felt attachments to places of origin, places of meaning, when, at the same time, they find themselves on an inchoate and often swirling trajectory, which takes them through different places, communities, spheres of interaction, places of engagement and confrontation with others, who have come to these places through similar patterns of predictable unpredictability. Achebe's stories recount numerous instances of frustration in the face of alienation, cliché and stereotype that seem to repeat themselves, over and over again. The author presents them in an uncompromisingly and tirelessly analytical manner, the various accounts underlining the importance of difference in that which seems to be the same, the varying conjectures of people's meetings, confrontations and clashes of viewpoints and observations that cannot be so simply traced back, as emerges from story to story, to one particular stance, one easily demarcated political viewpoint or a comprehensively founded moral choice. Instead, Achebe highlights the numerous cross-roads in people's perceptions and judgments, the complex overlapping of context and intent that shape the moment where one formulates and utters one's view. He seems to say 'Look again', 'Think again' and 'Look again', and it is this back and forth wandering of our gaze, which may help to better grasp the challenges in contemporary L&D and TJ contexts. These contexts are intricately marked by the simultaneous existence of the 'new' and the 'old'. And yet we are asked to reject this (overly neat) juxtaposition for the ways in which it imposes an evolutionary narrative of progress onto a sphere that needs to be studied through its complex relationship between local and global consciousness (Chakrabarty 2007). Similarly, both L&D and TJ become mere instantiations of a renewed effort to reflect critically on the methodological basis of legal-political governance.

As such, both L&D and TJ can be seen as efforts undertaken from within law as scholarly discipline and practical endeavour to illustrate how law is constantly prompted to adapt to its changing environment—both substantively and normatively. This adaptation of law occurs in often unmapped, unchartered and undomesticated 'spaces'. As in Achebe's accounts, these spaces are both geographical and intellectual, both real and constructed. And, as is highlighted by the scholarship in the areas of

L&D and TJ, the critical engagement with these allegedly *dividing* lines between 'real' and 'constructed', between, say, field work, empirical data, news reports and statistics on the one hand and description, critique, deconstruction, and argument, on the other, are at the core of what these two 'fields' are really all about. To both emphasise and simultaneously question the categories by which we draw lines between 'here' and 'there', 'home' and 'abroad', 'ours' and 'theirs', becomes an existential question for law and for the lawyer employing its label and toolkit. Seen, studied, theorised and practiced in this critical way, L&D and TJ become instantiations of a much more comprehensive engagement with the 'concept of law', with the categories by which in research and curriculum lines are drawn between 'domestic' and 'foreign' laws and legal cultures. Thus, the scholarship of L&D and TJ of such ambitious calibre is likely perceived as a threat to the standards and routines of parochially focused scholarship as it still dominates law reviews and conferences and as it, in myriad ways, continues to influence and shape law school course design and the programming of legal education. The particular approach here taken to defend L&D and TJ as both critical engagements *with* and representations *of* contemporary law threatens the daily routine of law schools that profess to teach their fee-paying clients to 'learn to think like a lawyer': the here embraced approach critically challenges this entire routine and suggests that it could all be in fact very different if only we cared to reflect more on the connections between 'here' and 'there'. In other words, are the legal conflicts we are concerned with domestically really so much different from the ones we identify in 'foreign' places? If that were true, then the question is how we can develop an adequate epistemological framework for law in a transnational context. As is clear from Achebe's stories, to think about these connections is a tiresome business, one that must remain cautious, self-critical and never-satisfied, one that continues to draw on a wide spectrum of information, data, accounts—in other words, on a complex body of 'knowledge', on which one draws and to which one already and constantly contributes.

7. The crucial role of knowledge in development and transitional justice

The vibrant and increasingly intersecting intellectual discourses around the conceptual and normative foundations of L&D and of TJ are increasingly complemented and contextualised by a critical engagement with the North's[30] legal regulatory as well as epistemological interventions in the 'South' (Sousa Santos 2007b and 2007a; D'Souza 2012). Arising from this attention to L&D and TJ is an intensified interest in the nature of *knowledge, perspective, viewpoint* implicated in these different engagements. Knowledge becomes a crucial variable as it applies to a host of divergent conceptual and normative programs. For example, *knowledge* is at the heart of the expertise and 'know-how' retained by a governing body or

30 This depiction is used to mark both economic and ideological characteristics rather than a geographic region.

drawn upon by governmental actors when crafting regulatory instruments and interventions. At the same time, knowledge as a variable and an unknown enters both sides of regulatory interventions—pertaining to what the regulator knows and what is known within the sphere acted upon. This double contingency of what law should know but can never *know* for certain, has long been a concern of legal regulatory theory, and of legal sociology and criminology in particular (Llewellyn 1940; Luhmann 1992, 389; Zumbansen 2009a). Given the complex interplay of domestic and transnational governance discourses and the centrality of knowledge in both, the intensified interest in scrutinising *what we know* when unleashing programs of aid, reform as well as 'technical' and legal assistance has to be central to any future engagement with L&D and TJ as part of a larger, interdisciplinary theory of global governance. At the heart of this investigation, then, is the realization that our interest in knowledge cannot be just 'practical' in the way that we seek to widen the basis and the origins of knowledge. Instead, we become aware of the relativity and fragility of one's knowledge positions and perspectives. One may then touch at the possibility that some knowledges are not just not translatable, but that they are incompatible. From the vantage point of such a self-critical engagement with knowledge, such an enterprise will seek to develop a methodology that is able to open up, rather than eclipse avenues of contestation and mutual learning, but it must do so with greatest humility and without hubris. We can already see, how the parallels and shared interests in contemporary L&D and TJ discourses are echoed by the connections between domestic and transnational governance discourses. Where we find that L&D discourses are inseparably intertwined with TJ-related questions regarding the appropriate and non-universalising, legal/non-legal *response* to legacies of suppression, exploitation and domination, we are confronted with the co-evolutionary dynamics of legal/non-legal, hard/soft, formal/informal. In short, attending to *knowledge* points us to the *legal pluralist modes of governance* characteristic in settings which we have hitherto tended to study through conventional notions of jurisdiction, that is, through legal *spatial* lenses. However, these co-evolutionary dynamics between L&D and TJ support the emergence of regulatory regimes which can no longer adequately be captured through categories of state sovereignty or jurisdiction. Instead, the emerging transnational regulatory landscape follows to a large degree the fragmenting dynamics of a functionally differentiated world society, prompting, in turn, an intensified investigation as to the legitimacy, that is, the normative and political implications of the systems theory's world society model.[31]

These debates provide a formidable background to the continuously evolving debate around L&D in that they complement and expand the highly charged economic and political stakes in this arena. 'Knowledge' occupies a crucial place in

31 This tension characterises the interchange between, say, Gunther Teubner and Emilios Christodoulidis. See Teubner 2010 and the contributions by Emilios Christodoulidis, Gert Verschraegen, Bart Klink, and Wil Martens in *Netherlands Journal of Legal Philosophy* (2011), issue 3. For Gunther Teubner's most recent, comprehensive attempt to engage with the challenge of normativity, see his monograph, Teubner 2012.

L&D scholars' longstanding, persistent engagements with bridging both national and development governance discourses. Taking a closer look at the role of knowledge in the L&D context promises important insights into the future trajectory of this field in the above-sketched context of interdisciplinary global governance studies. What drives and motivates developments such as the World Bank's self-description as a 'Knowledge Bank'[32] becomes a matter of critical concern, and prompts our reflection on the origins as well as the experiences that have already been made with such data-driven governance approaches in other places and times. In other words, the question regarding the role of knowledge in today's development agendas—in theory and practice—invites us to take a closer look at the connections and differences between the prominence of knowledge in this context and in domestic contexts in the past. To do so seems especially opportune in light of the crudeness of assertions, distinctions and categories that continue to characterise global governance discourses; particularly in terms of the descriptions and analysis of constellations that really deserve a more comprehensive and sophisticated conceptual treatment. Indeed, the persistence of inadequate analytic categories in the field of global governance is at considerable odds with contemporary analysis of knowledge-driven governance (Ladeur 2011).

The overriding challenge arising from a critique of knowledge in the development context, however, is how to choose a frame of reference. Every employed conceptual, analytical and doctrinal toolkit itself has a history of its own, the way it came to be put together, the order of instruments that are stored and arranged on its inside, and the use that has been made of them over time. The L&D context in particular prompts a host of questions regarding the origin, adequacy and transferability of regulatory models. Similar to the seemingly never-ending self-inspection and critique of comparative law (Adams & Bomhoff 2012), L&D is a field forever belaboured and challenged on a complex methodological basis, which underscores the relevance of approaching a study of a local regulatory culture from a more comprehensive perspective, eventually allowing for a scrutiny of the actors, norms and processes, which shape the development context.[33] But, how are we to account for inevitable baggage and background assumptions, that accompany and shape the governance as well as desired policy ideas transplanted from one context—which in the 20th century L&D context has been the post-Industrialist and post-Welfare constitutional state— into another context with institutional and normative dimensions which we might not be able to map with the cartography we are used to. This seems to be of particular importance with regard to the implicit assumptions informing an endorsement of regulatory models such as decentralisation, innovation and regulatory competition. In political and regulatory theory discourses of the last two to three decades, these terms emerged in an intricate intellectual space between economic and political theories and have by now attained an almost sacrosanct character, be that with regard to federal structures in complex polities

32 See <http://siteresources.worldbank.org/WBI/Resources/KnowledgeBankOct2004.pdf> (visited 19 June, 2014).

33 For more background on the A-N-P approach, see Zumbansen 2013b.

(Rose-Ackerman 1980; Howse & Nicolaidis 2001) or in the context of searching for growth models in path-dependent economies (Lazonick 2007; Murmann 2003). However, as examples of transatlantic transplants already illustrate, the effects of policies that endorse a fine-tuned subsidiarity-federalist framework and that place hope into the regulated self-regulatory dynamics of actors on different levels (Sabel & Zeitlin 2008) greatly depend on the historically and politically evolved context in which they are implemented. What might be in itself a very promising conceptual approach to the study of multi-level and multi-polar regulatory systems—and the EU certainly represents just that—will eventually unfold through highly intricate and unpredictable dynamics in a continuously evolving complex environment (Teubner 2001; Zumbansen 2009b).

To be sure, it is a no more than trivial insight that these experiences suggest the need to pay close regard to the locally existing rules and regulatory practices—the challenge consists in determining the form and process of 'context sensitive' regulation. It is with this challenge in mind, that we are finding ourselves torn between opening our toolbox of well-worn and tested tools and concepts on the one hand and starting 'fresh', with open eyes and without prejudice on the other. What is remarkable in this context is the impossibility of 'breaking free' even from the semantic and symbolic stronghold of certain categories, regardless of the degree to which these have been subjected to critique, deconstruction and demystification. This is as true today as it was in the 1970s: in our search for appropriate regulatory approaches to be taken with regard to development contexts (as well as other, similarly complex regulatory spaces, we strive to critically reflect on the usability of the rule of law, learned lessons with regard to democratic accountability, public deliberation or the separation of powers. Meanwhile, we realize how none of these principles can be lifted out of their context without losing some explanatory capacity, leading us back to the motivation of why we intended to draw on a particular regulatory experience in the first place. Again and again, we are confronted with the *particularity* of an evolutionary process in a specific space that seemingly frustrates all attempts at translation or transplantation. And yet, precisely because of this confrontation, we return, again and again, to a critical reflection on the categories through which we seek both to explain and to shape spaces of vulnerability and precariousness. There appears to be a crucial difference, however, between an earlier, progressive, critical exercise of such reflection and the more inchoate, interdisciplinary approach that seems to be forming today out of a combination of legal, political, sociological, economic and anthropological theory on the one hand and historical and linguistic study on the other (Rajah 2012a, 37-52, 58-60, 288). While this difference is still hard to pinpoint or to make fruitful, it becomes ever more evident that in close proximity to the continuing stand-offs between conservative and progressive struggles over development policies, the range of theory, vocabulary and categories, frameworks and imaginations is expanding. In that context, the astutely recorded accounts by Achebe of his interactions with 'third world experts' (Achebe 2009), the extermination of interview protocols and legislative materials of law-making processes in Singapore's

'authoritarian' Rule of Law (Rajah 2012a, 181-212) or the anthropological scrutiny of the World Bank's human rights programs (Merry 2014)—they are all and each one of them crucial elements that help draw a richer and more sophisticated picture of the development context today. In other words, we see a significant analytical expansion and deepening of our 'knowledge' basis vis-à-vis the developmental state and the transnational 'aid and development' apparatus that is staring at it. The challenge remains in understanding and drawing the adequate lessons from such an expanding epistemic framework.

8. En lieu of a conclusion: the surprise that is not: all law is transnational

In an effort to connect the preceding sections on the status of knowledge in hybrid legal fields such as L&D and TJ with the opening parts of this essay on law's general relationship to globalization, let us briefly come back to the idea that a project such as Transnational Law can function as a 'theoretical conceptualization of law after the breakdown of methodological nationalism' (Michaels 2013, 18). The contention here would be that such a characterization bears considerable promise. It is in that spirit that I suggest to re-open the discussion of concepts or proposals such as TL or LP, rather than dismissing them prematurely, and perhaps under the impression that their 'deliverables' are not yet as clearly defined as one would hope. My contention is that TL and LP are mutually intertwined precisely because both struggle with the 'how' of distinguishing between legal and non-legal rules. The answer cannot be a jurisprudential one alone. Instead, what appears to follow from discussions of TL and LP is, foremost, a growing awareness of the epistemological as well as normative fragility of any attempt at boundary drawing between different norm universes in the sense evoked by Cover (Cover 1983). This fragility has become a central concern in the context of debates around the 'whats' and 'hows' of global governance. In concluding, I want to suggest that proposals such as TL or LP should be seen as necessary steps in the development of theoretical approaches to a legal theory (or, *legal theories*[34]) of global governance [GG]. GG appears to operate in current debates as an umbrella term that is employed to capture the still open-ended and non-linear transformation of a nation state-based model of political rule. One way to address these changes with uncertain outcome has been through ambitious assessments of the nature and status of law and its tight linkages with Western notions of (different notions, stages and representations of) the state (e.g., Grimm 2010). One reason why TL appears to have gained temporary currency might relatively easily be found in the fact that it operates as a manageable label to depict, as suggested already by Jessup (1956), both overlaps of and blind spots between categorically distinguished fields (in that case *public* and *private* international law). Another reason can be identified to lie in TL's interdisciplinary nature, in that it operates against a variety of theoretical and disciplinary backgrounds precisely to capture a multitude of assertions relating

34 I am grateful to Morag Goodwin for her insistence on that point.

to the transformation of jurisdictional (geopolitical, geographical) boundaries (e.g., Harvey 2005; Sassen 2006), shifts in norm-making competence between nationally based and spatially operating actors, as well as the nature of 'communities', polities, and peoples (Berman 2012; Benhabib 2004; Dauvergne 2008). A similarly positive assessment seems to be in order with regard to LP, given that legal pluralists' concern with the demarcation and politics of as well as with the tension between official and in-official bodies of norms, rules, recommendations, guidelines and standards does not—arguably—result in placing 'everything'[35] on the same level, but seeks to expose, again and again, the often questionable and contestable basis on which the distinction between law and non-law is drawn in the first place (Galanter 2006).

While the apparent frustration among many legal scholars today with the slippery nature of concepts such as TL or LP is understandable, the task of making sense of this multidisciplinary and multi-vocal engagement with globalization will eventually get easier as we all move through such stages of trial and error, exploitation, application and engagements with theory. Revisiting established legal fields, mostly thought of in their domestic, nation-state context but now reflected upon against the background of a globalization of law, we can see that the above described dilemma is in fact inherent to every area of law, long before we began inventing new names and setting novel boundaries. Examples of labor, corporate or constitutional law illustrate legal fields as epistemological and normative laboratories, through the study of which we can shed more light on the way in which law can only be understood against the background of society. And as such legal theory is inevitably caught up in the multi- and interdisciplinary efforts to adequately depict the contours and nature of today's world society.

35 But, see Michaels 2013, 18: 'If everything is transnational law, nothing really is'.

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Law in the Flesh: Tracing Legitimation's Origin to *The Act of Killing*?

Richard K. Sherwin*

For in the exercise of violence over life and death more than in any other legal act, law reaffirms itself. But in this very violence something rotten in law is revealed…
Walter Benjamin

What is at issue here is […] not simply the question of the sources of legitimate political rule but, more profoundly, our capacity to feel represented in the social field, to experience those representations as viable facilitations of our vitality.
Eric Santner

The undying spirit of [Natural] Law can never be extinguished. If it is denied entry into the body of positive law, it flutters about the room like a ghost, and threatens to turn into a vampire which sucks the blood from the body of Law.
Otto Gierke

A proper respect for civil order does not mandate the elision of political violence. To the contrary, civility requires that we explore the exercise of violence at the beginning of state sovereignty. To forget, or repress, originary violence invites its return. That is why, with its insistence upon rational calculation and the neutralization of desire, the vast cleanup operation of liberal theory is bound to fail.

The exception proves the rule, and the state of exception, upon which the one who is sovereign decides (Schmitt 2005, 5), proves the rule of law. The state of exception is the moment that reveals the true source of state power, the ultimate source of law. As Schmitt writes: 'The exception, which is not codified in the existing

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** I wish to thank Paul Yachnin, Mark Antaki, Virginia Kartini Preston, and Amelia Jones for their generous collegiality during my residence as Fulbright Canada Research Chair in Law and Literature at McGill's Institute for the Public Life of Arts and Ideas in the spring of 2014, and for their stimulating conversations about many of the ideas discussed in this essay.

legal order, can at best be characterized as a case of extreme peril, a danger to the existence of the state' (Ibid., 6). By declaring a state of emergency, or by creating one, the sovereign makes clear where unbound power lies. We cannot but confront this distasteful insight: confront it, explore it, and judge it—particularly with regard to the expressive commitment to foundational narratives and symbolic representations that precedes, and that may or may not emerge from the state of exception. Fidelity to law, a key component of law's legitimation (see Hart 1961), originates in, and is constituted by, such a commitment. It signifies investiture: authorizing state violence through the convergence of power and meaning, a normative synthesis that aims to render law's authority worthy of acceptance.

In the state of exception foundational political meanings often fragment and grow incoherent. When power and meaning are sundered the ship of state loses both anchor and compass. Out of the crisis of belief that ensues we encounter an inexpressible excess, the inchoate source of the state's political vitality, what Schmitt calls 'the power of real life' (Schmitt 2005, 15), the body politic's libidinal flame.

Eros is the name we give to the creative force out of which political worlds are made, out of the political unconscious known as the flesh of the law. Here we find the originating impulse that is needed to invest in a world of meaning. That force surges forth in a liminal state, betwixt and between terror and enchantment. It is then that we ask, what symbolic social bond will be endorsed? What *nomos* will we inhabit? What links my body to another: what shared narrative of origin, or what collective terror?

With the general acceptance of state power as legal authority, based on uncoerced commitment to binding core values, the specter of violence recedes. The foundational story of the state takes over. Enchantment ensues. The liminal creature, in the bare flesh of his or her own being, decides to commit to a world of political and legal significance.

To invest in a proffered meaning, or not, to decide and to act, or not, culminates in the challenge of bare life at its most elemental: to be or not? And if it is to be, how does one acclaim a world of meaning? What does it demand? These questions coincide with the origin of politics (as the possibility of deciding on the reality of shared public life) and of sovereignty (as the moment of collective investiture): will we, and if so, how will we invest the world with meaning? How do we make politics happen? We witness this political drama in great literature, in the words and actions of characters like Hamlet and Caliban, and, in a more recent, but eerily similar vintage, in the words and actions of real world characters, like Anwar Congo, who appears in Joshua Oppenheimer's highly unsettling film, *The Act of Killing* (2012).

These works invite reflection and judgment: What does the inward state of lived meaning or, if meaning fails, of terror and paralysis, tell us about the outer state, politics writ large? There is no getting away from this vital link, the capacity to register the pulsations of law in the flesh both collectively (in the public rite of investiture) and singly (in the solitary experience of fidelity to what law demands). Here we discover the vicissitudes of bio-politics.

In the foundational moment that is the state of exception, creature and sovereign remain undifferentiated[1]: the reality of the one still depends upon the reality of the other. The fabric of being has yet to be woven. When that signification coheres the metaphysics of its world may be known (Schmitt 2005, 46). Metaphysics, understood here as the shared understanding of a newly emergent reality, is the offshoot of collective libidinal investment. We find the hidden poetic structure of the symbolic world in which we live by following the paths love travels.

Withdrawal of love from the world, the de-cathexis of libido that cast Freud's famous patient, Daniel Paul Schreber, the Saxon jurist, into a state of wild psychosis, is a form of destruction (of self and external reality). Writing about his descent into psychosis, Schreber described how he felt his body as rotting flesh. It is a story of unbearable excess—the mute trauma of the body in pain, a state in which one may be certain, but only of suffering. As Freud said of Schreber: 'The end of the world is the projection of [Schreber's] internal catastrophe. His subjective world has come to an end since his withdrawal of love from it' (Santner 2011, 22). This withdrawal of love, the process of retracting libido from the world, de-animates reality, emptying it of significance. In legal terms, we might call this 'dis-investiture'. It is enacted in the political dramas of dethronement (as in the beheading of Charles I) and revolution.

Investment of love in the world, commitment to its gifts and demands in the overflow of excess desire, creates an erotic bond out of which political life begins. The social contract arises from, and is sealed by law in the flesh. 'The sacral soma', Eric Santner calls it (Ibid., xv). It is this 'sublime substance' that constitutes the King's second, or transcendent body and, in the transition to modernity, from monarchy to popular sovereignty, it is this excess, this overflow of vitality, that the people inherit, and that sacralizes the people's transcendent body. The political event out of which sovereignty and law first emerge coincides with the birth of wild meaning—from out of the state of exception, when all is in flux and the mind gapes in fear and wonder, when beings are named as if for the first time, as if language and being were one, as if words were the very voice of what is (see Merleau-Ponty 1968, 155). That is when legal symbols and representations become real enough to live by, to bind the popular will, and warrant fidelity to law.

Legal theorists argue about fidelity to law. As the old positivist/natural law debate puts it: once you have a valid legal system does content matter? Must law be moral? (See Fuller 1958). If law is law simply by fulfilling the criteria for validity, isn't state power always already authorized by definition? But if that is so, if legitimacy

1 Julia Lupton's description of the character Caliban in Shakespeare's *The Tempest* conveys the sense of 'creature' I wish to express here, namely: an abject, thing-like being, of passionate passivity, who is also 'a remnant of the divine Logos in the process of still becoming' (Lupton 2005, 161). The creature is both resentful (of an external subjugating power) and filled with wonder (gripped by a different source of power that he senses within himself as a dreamlike possibility) (Ibid., 171). This tension reflects the Benjaminian sense of the *creaturely* as a quintessential aspect of the baroque soul: at once 'sullen angel' and 'pensive dog' (Ibid. 163-4). In one sense, the creature is the sovereign's creation; in another, it is the other way around. This restates the state of exception as a condition of the political event out of which new syntheses of power and meaning (new legal worlds) may emerge.

requires no more than validity, then legitimacy may come from the barrel of a gun, with the state acting as the gunman writ large. Requiring fidelity to law as a necessary element of legitimacy, beyond simply fulfilling the criteria for law's validity as law, overcomes the moral dilemma posed by recognizing all valid law as legitimate—even if it is based on terror or coercion. Requiring acceptance of law's authority as a necessary component of legitimacy (see Hart 1961), particularly *popular* acceptance (see Sherwin 1986), raises the question: Does the rule of law warrant obedience? Is it right to obey? In this sense, investiture, the public ceremony of investing power with meaning, signals a collective acclamation (see Agamben 2011): it is good and right to obey the sovereign.

But have you ever wondered what is it that makes a particular symbolic order (such as law) *feel right*? Have you wondered by what process a world of synthetic meaning acquires the characteristics of reality? (Santner 2011, xvi). How is it that a second-order reality, the created worlds of ideas and principles, symbols and norms, becomes the home we live in, our invisible 'second' nature?

To understand, and, yes, ultimately to revitalize, the act of investiture, to re-enact our investment in the founding political event, whose legacy we carry like a home on our backs, it is to the original scene of the political event—acclaiming the normalization of state violence (as 'legitimate')—that we must return, to explore, theorize, and judge. We do so as a prelude, most necessary, to taking responsibility for state power as legitimate authority, to re-acclaim our fidelity to law by way of the foundational, and subsequently ritualized, performance of investiture.

We risk this return to the scene of political and legal origin, of law in the flesh, because theorizing without the flesh, absent the originary violence and creative excess of desire, falsifies political and legal reality. It is like dancing without a dancer, like imagining law without the humanities, like aspiring to become a machine.[2] The political event cannot begin, or even appear to theory as such, without confronting the primal scene of political violence and unstable desire. It is the very scene from which enchantment arises—responding to the call of the world and others to invest Being in beings on the public stage of politics. Here is the original erotic bond, the covenant that constitutes our investment in, and commitment to, a world of shared meaning.

Fleshless, neutered theory, including the liberal-democratic theory of popular sovereignty, cannot fully succeed because it cannot account for the way states begin and end in history (investiture and dis-investiture), nor can it account for the libidinal source (in whatever sublimated form it may take) that drives and sustains fidelity to law. When the power of acclamation, in the committed practice of fidelity to law, fades into the perfect administrative state (in which 'things administer themselves' (Schmitt 2004, 5)) re-acclamation beckons. Failing that, the lingering sense of something rotten at the heart of the state persists. This is the way to Beckett's *Endgame*: in the kingdom of the undead, endless bare life in a perpetual state of

2 As pop artist Andy Warhol succinctly put it: 'Everybody should be a machine' (Warhol 1963, 116).

emergency. In short, political catastrophe.

Law on autopilot, like law as the sovereign's naked command, reveals a condition Gersholm Scholem hauntingly described as validity without significance (Scholem 1992, 142). This is Kafka's law: the functional mechanics of power without meaning or belief. In such systems, subjects are acted upon; they do not decide. They do not help to perform political or legal reality. Agency gives way to restless stasis. Restless stasis—Hamlet's state, a condition of intense distraction perpetuating indecision and paralysis of action—not a bad image for the predominant mood of baroque culture, including the neo- (or digital) baroque culture in which we live now,[3] a state of affairs in which representational forms proliferate wildly, online and in court. Rules, policies, principles, regulations abound, a profusion of legal forms and representations whose chief merit is that they maintain the status quo. It is enough, it would seem, simply to surf the surfaces of form on the surface of the media that host them. It passes the time[4] while we run in place. What could fidelity to law possibly mean under such baroque conditions? That, in a nutshell, is the challenge we face.

Political urgency intensifies when the most significant decisions have to be made and dispositive actions immediately undertaken. Like when the legitimacy of the state falls under a cloud. It is precisely this crisis of legitimation that Hamlet faces when the ghost of the recently dead king, Hamlet's father, appears to him, seeking rectification for regicide. The king's brother, Claudius, has usurped the throne and defiled royal investiture by murdering the rightful king, the specter announces. The state has grown rotten with illegitimate rule. And so a state of emergency exists, beginning in Hamlet's mind, then infecting the entire kingdom, once Hamlet is able to declare it, and take the required action, in blood. Which is to say, once Hamlet is able to find the resources to convert his state of restless stasis into violent political action.

It is then that the play becomes the thing—to make something happen, to shift

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3 Both seventeenth century baroque and contemporary neo-baroque culture show signs of a state of emergency in the soul that reigns in parallel with the political state of emergency without.

I have written elsewhere about the baroque condition as follows:

> Creation without grace assumed a ghostly appearance. As in a dream, discrete fragments piled up, concatenating on a landscape of ruin. And as yearning heightened, seeking escape from the corrupted state of worldly affairs, aesthetic forms proliferated. It was as if the desperate reaching out toward a distant heaven, as if to outrun an encroaching darkness, could only express itself in further decorative embellishments, like infinite folds within a compressed, but seemingly infinite, translunary space. In an effort to stave off the uncanny monstrousness of empty form, to tamp down the fear of Nothing, what Lyotard has aptly described as the fear of the non-occurrence of the event, the baroque imagination can only make more of the same, as if only this colossal profusion of expressive form could avert catastrophe. And so, like arabesques endlessly improvising their monadic design, baroque ornamentation proliferated. Dizzying, decentering, even nauseating in their spatial and visual onslaught. (Sherwin 2011, 107.)

4 This neo-baroque effect is nicely captured in the empty profusion of hyper-brief film fragments that constitute Christian Marclay's 24 hour long film work, *The Clock*. Go to: <https://www.youtube.com/watch?v=Y8svkK7d7sY> (last visited 6 May 2014). Ryan Trecartin's pop video images attain a similarly neo-baroque, albeit more circus-like effect. For a visual sample, go to: <http://vimeo.com/trecartin> (last visited 6 May 2014).

the mood from the subjunctive (anxious, thought-heavy dithering) to the imperative (Claudius must die!). That is the mood shift Hamlet must undergo. But to get there he first needs to experience what it is like for sovereign and creature to merge, to carry his country's fate on his back (Shakespeare, *Hamlet* I.v.190) whilst being reduced to flesh (I.ii.129), set naked (IV.vii.44), in a 'stale, unweeded garden', (I.ii.133)'rank and gross in nature' (I.ii.136), poised on the edge of the grave (V.i.72), peering in, to contemplate even the most noble conqueror in history (V.i.195) reduced to dust, which is to say, divested of sovereign power. Where is the King's transcendent body now?[5]

In the end, nothing remains but the legitimating story: how Hamlet has set things right, in the violent counter-stroke of rectifying regicide, to be recounted in a story whose very telling restores the vital conditions of legitimacy, including fidelity to sovereign rule. The very telling, and retelling, of this foundational narrative performs investiture. It establishes and preserves legitimate authority by the signifying force of the great beginning-tale of stasis and action, born of bare life, suffused with suffering and death, containing (even as it performs) the wild meaning of law in the flesh:

> Let this same be presently perform'd,
> Even while men's minds are wild; lest more mischance
> On plots and errors, happen. (V.ii.377-379.)

No sooner has the elemental political event occurred than it is to be symbolically re-enacted. The play—this foundational story, originating out of the primal scene of political violence, illegitimate on the one hand, re-legitimating on the other, this account that we witness, being performed before us, together with the one nestled within it (to test the conscience of the illegitimate King), this story of revitalized investiture which Horatio announces in the end, incarnates a new beginning-tale. Its public re-telling is now Hamlet's great legacy, and Horatio's sole purpose in life: to explain the prince's tragic death, how he set Denmark's affairs aright. The play becomes the thing that compels judgment in a performance designed to catch the conscience of the public, perhaps to dispel political stasis writ large, sparking an effort to renew state legitimacy, while the public's mind is wild—perhaps even stoking wildness in the retelling. Having thus brought its public closer to the state of emergency (within and without), the performative reality of law in the flesh may be grasped anew in its signifying glory. Grasped—which is to say, simultaneously understood and *seized*? As if the invitation to break with political stasis might purge the state of illegitimate violence even if by means of counter-violence?[6] How subversive to perform *Hamlet*

5 See *Hamlet* V.i.199-202:

> Imperious Caesar, dead and turn'd to clay,
> Might stop a hole to keep the wind away:
> O, that that earth, which kept the world in awe,
> Should patch a wall to expel the winter flaw!

6 As suggestive of the force cultural productions, such as plays and popular films, may have on the political stage, we may recall the many Occupy Wall Street protesters who wore 'V for Vendetta' masks—invoking the spirit of insurrection that suffuses James McTeigue's 2005 film of that name (based on a story by the

in a state that has already begun to fail. Danger remains close when the state of emergency is evoked. For when the flesh trembles no one can predict what will come next.

The foundational story simultaneously invests political violence with meaning while documenting it, serving simultaneously as repertoire and archive, mimesis as imitation and mimesis as performance (see Spariosu 1985). But in order to perform the political event, first light and dark must be torn asunder. And the multitude (whether stationed by the stage of political theater or on the brink of action in the public square) must behold their heterogeneous power, to appear to themselves in the mirror of art, theater, dance, or film, as actors on the stage of politics: destroyers and creators, creatures and sovereigns, at once.[7] Before art's shimmering mirror we (as cultural spectators and political subjects alike) shudder, and struggle to decide whether there is a need to act, and if there is whether we have the resources to decide, and act correctly. As if the state of exception were always there, waiting to be proclaimed (and seized) as such, to be remembered in the excess of immanence, in the overflow of desire, in the political event par excellence, from law in the flesh to political theater, the public domain of political action, performatively constituting the people's second (transcendent) body, even now.[8]

And yet, an ever-protective impulse quickens to drop a veil over such beginnings. Form conspires to conserve form. The jurisgenerative gives way to the jurispathic: law founds law, and then kills it, to save itself from change (see Cover 1983).

Is that the pact, the great political contract, the secular covenant that Hobbes famously held out, as the catastrophic violence of sectarian civil war and plague swirled around him? Yield up your wild desire in exchange for survival? Sacrifice its unwieldy excess on the altar of secular conservation; seek hope in stasis? In Hobbes' archetypal early modern Liberal blueprint for secular investiture, by stark contrast to the Elizabethan drama of Hamlet, we witness the state's sanitized,

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Wachowsky siblings).

7 As in the epilogue from Shakespeare's *The Tempest*, spoken to the audience by Prospero, as he passes on to them (the sovereign people?) his spell-(un)binding powers, asking that they, by their own breath and hands, re-enact the play's restoration of legitimate sovereign authority in the spirit of compassion, mercy, and love—as if to say, it is the people's task now to perform their acclamation of, and take direct responsibility for, legitimacy's narrative:

> But release me from my bands
> With the help of your good hands:
> Gentle breath of yours my sails
> Must fill, or else my project fails,
> Which was to please. Now I want
> Spirits to enforce, art to enchant,
> And my ending is despair,
> Unless I be relieved by prayer,
> Which pierces so that it assaults
> Mercy itself and frees all faults.
> As you from crimes would pardon'd be,
> Let your indulgence set me free.

8 See Lupton 2005, 196 ('The decision of the judge refers the order of law back to the founding trauma of creation *ex nihilo*').

'rational' beginning, and glimpse how the seeds of its terrifying end may have been sown. For in the Hobbesian fantasy of origin, composed in the spirit of geometry and the instrumental triumph of rational calculation, Liberal theory's foundational text colludes with a reckoning to come: the price to be paid for violating the reality principle of desire, for promulgating a positivist (and nominalist) shift from excess vitality in the event of jurisgenesis to mortification of the flesh behind the mask of rational necessity.

Where now are the remains of the King's transcendent body, its modern trace beyond noble dust, in the political excess of popular sovereignty, that transcendent investment we carry on our backs if not under our skin?

The flesh waits to convulse again, to rise up from under the deadening load of formal validity without significance, beyond bare Hobbesian law, beyond the naked power to enforce commands (Hobbes 1985, 188). Of course, masking the vitality and dangerous volatility of the flesh behind the undoubtedly more palatable appearance of cool rational calculation has its merit, along with its distinctive logic.

It was a timely strategy, and a compelling logic: holding out, between the forces of Reformation and Counter-Reformation, an as yet unsullied third way, a 'neutral' science that might rise above the internecine civil warfare sparked by irreconcilable religious passion. But Hobbes' rhetorical gambit, successful as it was, is a Faustian bargain. Its sleight of hand suppression of desire spawned a ghost that haunts the legal machinery that it helped to build, a ghost that just as surely haunts the founding texts of liberal theory itself.

The great Liberal cleanup operation[9] begins here, with the neutral logic of clear and distinct ideas, objective calculation, and rational necessity. Perhaps that is why Hobbes the rhetorician, the brilliant stylist, obscures his rhetoric, hiding it in an anti-rhetorical animus that masked the foundational irrationality of pain and desire, violence and love, in the utterly dispassionate rhetoric of geometry. With but a handful of natural laws, the human drive to survive chief among them, Hobbes invokes with cool precision the logic of rational choice. Never mind the rhetorical power operating behind the scenes, the anti-rhetorical rhetoric that generates the style of geometric reason in the first place: in Hobbes, the force of rhetorical seduction lay hidden behind the mask of geometric formality.

The hidden seduction of rhetorical enchantment is desire's agent. It is a restless spirit,[10] a symptom of dis-ease that is bound to return, to have its tale told anew, perhaps in order to have its claim set right.

Kant and Rawls were no more able to bury that restless spirit than was H.L.A.

9 I am indebted to Mark Antaki of McGill Law School for pressing this idea upon me in the course of discussions at the 'Law in the Flesh' roundtable on April 2, 2014 (sponsored by McGill University's Institute for the Public Life of Arts and Ideas).

10 A 'ghost' in Hobbes' own terms:

And for the matter, or substance of the Invisible Agents, so fancyed […] call them Ghosts; as the Latines called them Imagines, and Umbrae; and thought them Spirits, that is, thin aereall bodies; and those Invisible Agents, which they feared, to bee like them; save that they appear, and vanish when they please. (Hobbes 1985, 170-1.)

Hart, who sought to hide it in his descriptive sociology of positive law's 'minimum conditions of natural law'. Hart, too, wanted to naturalize the prescriptive demands of valid (positive) law (see Hart 1961),[11] to neutralize the frightening mess of desire that inheres in the original scene of politics. If only we could forget such wild times, when 'wild minds' host wild meanings (*Hamlet* V.ii.377-379). If only we could hide the danger of desire's excess, perhaps behind a Rawlsian 'veil of ignorance', so that natural necessity, or the cooler logic of disembodied rationality might prevail. But calculative reason is not what inspires political subjects to become co-makers of political reality at the risk of pain, imprisonment, exile, or perhaps even death, whether it is in Tiannemen Square in China, or Sidi Bouzid in Tunisia, or Tahrir Square in Egypt, or the Occupy Wall Street protests that began in Zuccotti Park in New York and soon spread around the United States and the world. As Emerson wrote on the eve of America's great civil war:

> Ideas make real societies and states. […] It will always be so. Every principle is a war-note. Who ever attempts to carry out the rule of right & love & freedom must take his life in his hand. (Emerson 2010, 726.)

Right, love, freedom: in fidelity to formative ideas such as these even life itself may not be too high a price to pay. Believe that, and the political event, in the state of exception, is no abstraction. These foundational ideas (and others besides, ugly as well as noble) are the vestments of investiture, the expressions of significance that invest power with meaning. When they are real enough, when the soma shudders and shakes off the living death of bare life, for love of the world (that one commits to be in) one realizes: 'There was never any more inception than there is now' (Whitman 1982, 190). 'Urge and urge and urge, Always the procreant urge of the world' (Ibid.). Vitality, excess desire, law in the flesh—that is what moves political subjects to action, to a vital commitment to symbolic forms of expression that constitute a living *nomos*.

In the midst of bare life, urgency is all, even if we can never be sure where it will lead: violence, death, freedom, vassalage, love, destitution. From de Sade to Artaud, to Von Trier, erotic urgency gambles with death and destruction. History teaches that politics is hardly immune to the vicissitudes of desire.

Is there, then, no reliable compass to guide us beyond bare life in the state of exception? It is in search of guidance, in response to this vital question, that we turn to Joshua Oppenheimer's extraordinary film, *The Act of Killing*. In keeping with the times we live in, Oppenheimer's film is an appropriately baroque tale, blending genres (is this a documentary? A drama? A tragedy? Farce?) even as it seamlessly blends reality and fantasy in its uncanny return to the primal scene of political violence.

The film's main protagonist is Anwar Congo, a killer, in Indonesia, who served the needs of state terror in his youth, brazenly, cruelly. A self-described gangster, a thug, who has modeled his persona on Hollywood killers, dressing like them, raffish,

11 See also Leiter 2007. I take issue with Leiter's 'naturalization' of jurisprudence in Sherwin 2011, 122-49.

a lady's man, who learned from the silver screen the art of killing with a strand of wire, openly praising the efficiency of strangulation, how it avoids the stench and mess of victims' blood, although of that, too, he has learned much, while performing the state's bidding.

The massacres in Indonesia began in 1965, and continued on through the next year. Over a million people were killed. No one knows the exact number. It was said the Communists had masterminded a *coup d'état* that allegedly began when a group of military officers belonging to the elite guards of President Sukarno killed six important generals. To repel the threat, or so he claimed, Major General Suharto, commander of the army's elite Strategic Forces, launched a counter-attack. The mutineers in the army were crushed, and the army-controlled media immediately began a campaign against the Communists, asserting that they were behind the attempted coup. Members of the Communist Party and alleged collaborators (which meant anyone who opposed Suharto's rise to power) were swept away in a torrent of violence, targeted for execution. The Indonesian army could not perform all that killing alone, and so Suharto, who was now calling the shots in Indonesia, recruited a civilian force, made up of killers like Anwar Congo, who was one of its leaders in the heyday of the massacres.

It remains unclear whether the Communist threat was real or a pretext used by Suharto to stage his own *coup d'etat* to overthrow his predecessor, President Sukarno. In any event, Suharto's Indonesian 'New Order', aided by its military and civilian-manned machinery of terror and death, not only triumphed over its foes, but also managed to remain in power for 32 years, from 1966 to 1998.

The official state story of political origin, the foundational narrative of Suharto's sovereign rule, was repeatedly rehearsed in an official propaganda film, which the public, from young to old, was compelled to watch on television and in movie theaters around the country throughout Suharto's rule, thus enacting what one might describe as a coerced ritual of simulated investiture. 'Simulated' because coercion compels only the formal gestures of normative investment, not the authentic acceptance that comes of freely committed belief.

The images that Indonesians were compelled to watch during the Suharto regime were meant to foment terror, in the face of a grotesquely violent enemy (the 'Communists') and a perhaps even more terrifying state apparatus of organized violence. Civilian killers like Anwar Congo were depicted as national heroes. Indeed, more than four decades after having played his part in Suharto's victory, we see now (in Oppenheimer's film) Congo still being celebrated by Indonesian officials. We also see an organized civilian militia of fascist thugs parading before an adoring (or are they simply a terrified?) public. Oppenheimer captures some of the current civilian leaders nonchalantly reminiscing about 'the good old days' of 1965, when rape routinely accompanied the killing.

We also see in Oppenheimer's film common thugs as they make their rounds in the marketplace, crudely shaking down (mostly Chinese) merchants for payoffs. Violence and terror have become routine. One elected official openly recounts

the names and business ventures of politicians in high places who are on the take: corruption, bribery, and graft are rampant. The ethos of political decadence is so normal that one political wannabe, whom we see buffoonishly campaigning among voters who openly besiege him for larger payoffs in exchange for their vote, describes his chief political idea as coercing money from merchants by threatening them with zoning violations.

It is against this backdrop of pervasive corruption and terror that Oppenheimer's film unfolds. Its premise may be easily stated, though what ensues is anything but simple. What would happen, the filmmaker posits, if he gave one of the most fearsome gangsters from the time of the massacres the technical means to make a film, to tell his story, any way he wants, about what it was like back then, and how it feels now, to have participated in the massive killing spree that launched Indonesia's 'New Order'?

The Act of Killing is the product of that invitation (though we do not know the full extent of Oppenheimer's edits and staging decisions versus those of his alternate, killer-director Anwar Congo). The images on the screen are simultaneously fascinating, frightening, bizarrely humorous, canny (reflecting Congo's grasp of film aesthetics), bewilderingly surreal, self-lacerating, and almost unbearably poignant.

In the course of the film Congo oscillates between the swaggering bravado of his youth and (real or perhaps feigned) physical and emotional suffering as the magnitude of his sins begins to dawn upon him. We learn that Congo's past acts haunt him. He cannot sleep, and when he does nightmares descend upon him—like the recurrent dream in which he sees the severed head of a victim, impulsively decapitated by Congo with a machete, whose eyes remained open, eyeing its killer from the ground where it fell. This image, it seems, is too much even for Congo. He returns obsessively to that scene, wondering at one point why he never bothered to close those vacantly staring eyes—as if so slight a gesture might have saved Congo from the suffering that has plagued him since.

In the film, he attempts a number of gambits to ease the weight of oppressive memory. They span the gamut from ludicrous to horrific. At one point, for example, Congo stages a bizarre fantasy of redemption—complete with beautiful dancing girls set against the backdrop of a majestic waterfall, in which one of his victims respectfully places an ostentatious medal around Congo's neck as he thanks Congo for bringing him to heaven. But for the greater part of the film Congo's fantasies take a much darker turn, depicting re-enactments of gruesome acts of torture and killing featuring Congo as the victim. Congo stages his own violent interrogation and death by strangulation. We also see him buried in the dirt, being fed (and gagging on) what is supposed to be his own raw liver, presumably ripped from his body, while in yet another scene we see him lying on the ground beside his own decapitated head.

It does not take much in the way of psychoanalytic speculation to discern here the return of the repressed, as if these role reversals might somehow purge from Congo's tortured mind the pain of such recurrent traumatic memories, to drain away the haunting violence that roils within him, or at least to find some semblance

of significance, to assign these recollections a name so that their meaning might be palpably grasped once and for all, perhaps as the first necessary step toward their purgation.

But if that is his goal, Congo does not visibly succeed. He remains not purged but in purgatory, on the bare threshold of insight,[12] driven by forces he can neither name nor understand. How else could he roust from bed his two young grandchildren to watch some of the preliminary images that Oppenheimer has provided, gruesome images of grandpa, hands tied behind his back, his face bloodied, as he is being brutalized by knife-wielding interrogators? Why is Congo smiling, with his grandchildren on his knees, coddling them in his arms so close, as he says, 'See? Look at grandpa, how he's being tortured by that fat guy […]'. What does he expect from these innocent children who seem so dear to him, that they might watch and understand his confession to them? That these young innocents (perhaps they alone, since they alone might embody the last remains of Congo's capacity for love) are still invested with the curative power, love's privilege, to forgive their grandpa for the evil he has committed? Though surely they are hardly old enough to comprehend much less forgive what they see on the screen before them. Such is Congo's confused and destitute state.

Amidst the fantasies, the mystifications, and gross self-deceptions, however, images of a reckoning of sorts also emerge. As in the film's final scene in which a physically frail, white-haired Congo returns to the rooftop where so many of his victims were tortured and killed. It is nighttime, and Congo paces the roof in silence, pausing to gag, again and again, his body repeatedly wracked by dry heaves, from deep within. Heaving, as if to purge himself of an unnamed suffering, Congo only underscores his emptiness, for nothing comes of the act. He is already empty. Repulsed, the viewer might well think, yes, this is bare life. The purgatory in which Congo dwells cannot be dispelled. He remains in exile, a liminal creature in the grip of ghosts from his past, the victims who leave him no rest. Or so we may be led to imagine.

To be sure, there is nothing redemptive about this final scene. Justice remains far off. The perpetrators of terror are still free and remain unpunished (see Meister 2012). The victors remain in power, and many still enjoy the material rewards and even the public adulation (though most likely feigned) of their past deeds as gangsters. For his part, Anwar Congo has barely begun to articulate the full extent of his crimes, nor do we know if he ever will assume full responsibility, or seek forgiveness. No, there is nothing redemptive here, but that is not to say Oppenheimer has not achieved something remarkable, something altogether unparalleled in the history of cinema, testing its boundaries—the lines between memory and fantasy, truth and fiction, politics and spectacle.

If we acknowledge there is such a thing as the political unconscious, what I

12 'Maybe I sinned, Joshua?' Congo says at one point to an off-screen Oppenheimer, as if, notwithstanding the incredible insouciance of his tone, after having repeatedly replayed his acts of torture and killing, admittedly undertaken hundreds of times with innocent victims, any doubt about the matter could remain.

have been referring to as the primal scene of political violence, or law in the flesh, I would say Oppenheimer takes us uncannily close. Under the skin of Anwar Congo we glimpse the usually hidden, liminal, even taboo site of origin (and end) for sovereign states, which is also to say, the stage upon which law's beginning and end are performed and judged. In the person of Anwar Congo we witness the quintessential creature of political terror: at once the maker (as agent of state violence) and the one who (as abject subject) is made (by internalizing state violence shorn of meaning). Anwar Congo is Hamlet bereft of the cultural and psychological resources needed to become anew—to escape the intensity of his paralysis in the face of injustice. Here is a living image of law in the flesh suited to a failed political state under neo-baroque conditions: mute, heaving, destitute, empty. In short, Congo remains trapped in a perpetual state of emergency. No matter how many representational forms or visual images may be placed at his disposal the result remains the same. *Endgame*. Political and psychological catastrophe.

In baroque and neo-baroque states, laws (like all baroque representational forms) proliferate, but their formal validity cannot provide the normative significance that legitimation requires. The intensity of their endless production (and reproduction) may distract us from the emptiness at their core, but this is only a delaying tactic.[13] Fleeting intensities may postpone but they cannot avert collapse into mute terror in the baroque process of evacuation that Walter Benjamin described as 'clean[ing] an ultimate heaven, [and] enabling it, as a vacuum, one day to destroy the world with catastrophic violence' (Benjamin 1998, 66).

'Sovereign is he who decides on the exception' (Schmitt 2005, 5). So begins Carl Schmitt's *Political Theology.* Here is an addendum. Declaring the state of exception may pinpoint the immediate source of state power, but its true origin precedes and may yet overtake it. The zero time of the political event, the big bang—that incoherent convulsion of violence, like the body in pain—is the moment when worlds, and the symbolic representations they are made of, may or may not come into being. This is when law in the flesh trembles and asserts itself anew.

The body in pain, mutely closed in on itself, struggles to move beyond violence, beyond wordless pain, to something formative. Here is the genealogy of law in the flesh. In the moment after the big bang of political violence, longing begins. Longing to close the wound of traumatic violence, to overcome the lack of form, the refusal to signify.

To have pain is to have certainty, according to Elaine Scarry (Scarry 1985, 13). And certainty is most coveted in times of crisis, when belief in symbolic forms contracts to the vanishing point. That is when violence, as origin, comes into its own. We recognize it (from Hamlet and from Anwar Congo) as the state of emergency within.

That violence, that pain, may be 'appropriated away from the body', as Scarry

13 It is the same logic of diversion that generates the need for enemies of the state in order to distort, or conceal altogether our responsibility for violence by directing responsibility outward through collective fantasies of the hated Other (Žižek 1995, 1529-30).

puts it (Ibid., 13). Its certainty may be invested in a symbolic form. Violence and pain bring a feeling of realness to world making, a living vitality, out of the animation of the flesh. Law originates with these worlds. Law empowers their creation and seeks to guarantee their continuity—to the extent that the fleshly bond of fidelity to law persists.

Law quickens in the political unconscious. But longing is anterior to form, including forms of law. The expressive forms that longing inspires can never master their source. It is that inexpressible excess which we experience as a lack, to which we return in the crisis of belief, and the contraction of symbolic forms that such a crisis entails, perhaps to form's political and legal vanishing point.

Anwar Congo's story is the story of that descent into violence and its aftermath. Without love, and its chief agent, which is justice,[14] to re-invest desire in the world, or in the self for that matter, nothing coheres, nothing flourishes. This is bare life, a restless stasis that will not resolve.

The flourishing of the Liberal state, and of the psyche that suits it, requires love because love is stronger than fear, stronger than death, stronger than the Hobbesian state could ever allow. Hobbes cannot go beyond fear, but fear cannot build a sustainable future. Love, on the other hand, is beholden to futurity, as it is to otherness; fear retracts from both. The legal machinery of Hobbes' *Leviathan*, in its effort to overcome the fear of death, mortifies the flesh of the law, repressing violence and desire behind a veil of rational necessity. That blow against desire paradoxically fashions political subjects in the image of the living dead, the image of their fear, as creatures who face a perpetual state of emergency under conditions of bare life.[15]

In confronting violence and terror, love seeks to exorcise the ghost that haunts the Hobbesian legal machine, a legal system that is valid but lacks significance. It is not enough to bind the body politic by fear. Fear may prompt obedience, even acquiescence, but it will never inspire love, or fidelity. Which is why legal validity standing alone is bound to decay, to fall back into the nothingness of bare life. That is the 'ontological vulnerability' (Santner 2011, 6) of the Liberal state devoid of flesh.

Terror provokes form and intensity, in excess, to disguise the emptiness at its core. This is the tell-tale sign of the baroque (Benjamin 1978, 286), including contemporary neo-baroque cultural and legal representations (see Sherwin 2011). Baroque social constructions stake their survival on form-as-distraction, but distraction will not hold in times of crisis. Only love willingly binds, only love will sacrifice the immediate for the future's sake.

The political challenge *par excellence* is to continually seek to renew the binding power of foundational narratives. Optimally, at least according to the aspirations of

14 For a recent exploration of this idea, see Nussbaum 2013, 15 ('[A]ll of the core emotions that sustain a decent society have their roots in, or are forms of love….[Love] is what gives respect for humanity its life'.).
15 The image of the living dead speaks to the accuracy of the original Egerton frontispiece from Hobbes' *Leviathan* (which appeared in the manuscript, but was abandoned in the published version) depicting the monstrous Leviathan made up of skulls that ghoulishly peer out from the regal body. (See Goodrich 2014, 119.)

liberal democratic states, this means using power to check power, for freedom's sake, for the sake of diversity in plurality, and autonomy among equals, so that conditions hospitable to love may prevail, conditions that nourish the political subject's free investment in the binding force of law so that fidelity to law, as the promise of justice, may persist. This is what it means to cast hope in the form of redemptive justice: love as fidelity to a perfectable future.

Turning away from suffering, pain, and death will avail nothing on the path to justice. Fidelity to redemptive possibility requires just the reverse, namely: the will to test the vitality of extant foundational narratives against the conditions of their birth in order to risk judgment, and the actions that judgment compels.

There is no vision, no future, in jurispathic stasis. In this sense, the Hobbesian promise of 'survival' posits a false hope. Vitality potentiates hope in the flesh as the currency of fidelity and the price of legitimation. The sovereign's two bodies, from Kingship to multitude, capture our oscillation between fear and love, power and meaning, jurispathic stasis and jurisgenerative vision, legal validity and the promise of redemptive justice. Bare life in the state of exception exposes the original condition, in all its violence and danger, from which the political event springs. To risk that knowledge, and the responsibility it generates, is to expose fidelity's true worth, and the price that must be paid for it, for ultimately, fidelity to law must be staked in blood.

Here the spirit of the law is laid bare along with the process that binds us to it. It reflects a people's collective capacity for transcendence, not to deny violence, but to acknowledge and struggle to overcome it (see Girard 1987; Santner 2005,102-3).

Under baroque and neo-baroque conditions, which coincide with the collapse of symbolization, in a time when transcendental references seem all but obsolete, reflections upon bare life and states of emergency naturally arise. They are what baroque and neo-baroque cultures are all about, symptomatically speaking.

Signification marks, even as it constitutes, our bond to the world. The body expressively projects aspects of itself into the world, animating it with meaning. But sometimes that capacity fails. We experience that want as longing. The lack in the world is the flesh echoing back to us its incapacity to signify. Fidelity to law, legitimate authority, depends on regaining the capacity to reinvest this drive (the excess immanence of desire) back into the world. This, typically, is what poets are for: to make possible by naming (or renaming) that investment or (in politico-jurisprudential terms) that investiture which gives rise to the *nomos* we live in.

Being without love is destitution, exile, worldlessness. Anwar Congo takes us there. His dry heaves at the end of *The Act of Killing* personify the effort to evacuate world loss. It avails nothing, as we see, since the means of expressive re-cathexis are lacking. This inchoate state brings Congo in touch with a tear in the fabric of being, a state prior to political and psychic order. To extrapolate from that experience, to construe it as a state of bare life writ large, is to ask: Is this the legacy of the founding terror that lies at the rotten core of Suharto's Indonesian 'New order'? A warning for other states, other political subjects? An invitation to ponder what would it take for

a nation, a sovereign people, to extricate itself from perpetual terror, or the threat of its imminence?

Here, then, is the decisive moment, the compass point, just after the big bang of convulsive violence when we ask: to what network of meaning will the urge to transcend the originary lack attach? What form of meaning (if any) will it animate? How will the body in pain signify? Or will it?

There is no future for the legitimation of state power without love. Absent the bonding power of love we lack that which binds us to others, to ideas, narratives, and institutions, and, above all, to the future.

Here is law in the flesh: seething, trapped within itself, heaving, gripped by the pain of a great wound, the wound of unsignifying violence and terror. And here, too, is political ontology as symptom formation. Here is the lack, the urgent longing that sets the political unconscious in motion. Here we meet the most decisive question, the one we do not hear from Carl Schmitt, or from Heidegger for that matter. It is the ethical question *par excellence*: What will law in the flesh make of otherness: the otherness of sovereignty, the otherness of law, the otherness of the subject?

When power is homologous to the subject's will, it is perceived as efficacious. When power confronts heterogeneous subjects as an Other, it is perceived as the great master. Friend or enemy? So we ask: what is Otherness to power within sovereignty (in the language of power's exchange) and what is Otherness without (the subject's power that is either served or thwarted)?

From the King's two bodies (from the secular corporeal one, and the one that exceeds corporeal immanence, that transcends the material body) to the secular modern emergence of what Santner calls the People's two bodies, sovereignty bears the phantasmic traces of its origin: the lack, the originary trauma of violence, and the ensuing drive to heal the wound of finite being.

And so, once more, we ask, what are our cultural resources today for expressive significance, for investiture, for fidelity to law? For example, do Americans still hear its national vitality resound, say, in Walt Whitman's songs celebrating the ideal of popular sovereignty, in fraternal love for the democratic multitude? Songs like *Starting from Paumnok*, in which Whitman (1982, 179) writes:

> And I will make the poems of my body and of mortality,
> For I think I shall then supply myself with the poems of my soul and of immortality,
>
> I will make a song for these States that no one State may
> Under any circumstances be subject to another State…
>
> I will sing the song of companionship,
> I will show what alone must finally compact these,
> I believe these are to found their own ideal of manly love…
>
> I will write the evangel-poem of comrades and of love…

Here is *Eros* springing forth, even from the political unconscious, seeking attachment in the multitude.

Of course *Eros* need not express itself as love. It doesn't do so in the pornographic imagination of de Sade, for example, or more recently in Lars Von Trier's film work, such as his recent *Nymphomania (Parts I & II)*. There the conflation of flesh and animal life culminates in undifferentiated materiality. This is Deleuzian immanence and the baroque logic of sensation as pantheistic animality, *Eros* as the longing to shatter the bond of form that constrains it. As in Shakespeare's *The Tempest,* when we witness the longing to dissolve, like the spirit, Ariel, into the air or, more to our purpose, like the witch Sycorax dissolving back into the earth, for that is the secret wish of the pornographic imagination.

This is Deleuze's great desire, to give up our creaturely nature by dissolving it into the pulse of the universe (Santner 2011, 136). Here is *Eros* mutating into *Thanatos*.

From the imagination comes the power to make images, to project the workings of the mind outward in a physical, active form, to actualize ideas, to conceive actions, to construct a world, a *nomos*, to which we are bonded. We encounter this in the Elizabethan staging of power and sovereignty, against the backdrop of violent usurpation, in baroque masques that perform the will of the King, mirroring his mind. As Stephen Orgel puts it: 'Imagination here is real power: to rule, to control and order the world, to subdue other men' (Orgel 1975, 47).

Power to order the world—but on what basis, and to what end? Is it the absolutizing force of fear, as in Hobbes' *Leviathan*? The sado-masochistic imagination of terror, as in the obscene violence (see Oppenheimer and Uwemedimo 2012) of Suharto's and Anwar Congo's Indonesia? Or is it the spirit of popular sovereignty, as in Whitman's *Eros* of companionship and the heterogeneous yet equal freedom of the multitude?

What Oppenheimer has left us with is a genealogy of the political unconscious. Reliving Anwar Congo's fantasies and terrors, identifying with the heaving body in pain, we revert to the state of exception. Here is the perennial origin point for all political creation: law in the flesh, when one regime comes to an end, and another one rises. This is the time when the flesh of the law, in its uncanny excess, is poised to project its vitality into some symbolic representation. This is the time of world making, or not, if like Daniel Paul Schreber or Anwar Congo, love is withdrawn from the world.

If there is to be a world, there must be a symbolic form to constitute and contain it. A political narrative must follow forth, but a narrative that will always bear the mark of its traumatic birth, the unutterable lack that drives and animates it. As Martha Nussbaum suggests, the emotions that shape and inform that narrative will also constitute its nature.[16]

16 See Nussbaum 2013 (though, in the end, her modernist, neo-Kantian mindset, in alliance with abstract Rawlsian principles, may outstrip her grasp of law in the flesh, with its unpredictable danger, manifest in the excess desire of bare life in the state of exception).

Will it be the Hobbesian fear of death? The gangster's disgust for the Other? Whitman's fraternal love for the multitude? Nussbaum's aspiration to justice as love's agent? We do not know. But regardless of the social and political meaning it contains, there is one bond, the strongest of all social and political forces upon which meaning can rely, and that is the bond of love. As Giambattista Vico wrote: 'The soul of man must be enticed by corporeal images and impelled to love, for once it loves it is easily taught to believe. Once it believes and loves, the fire of passion must be infused into it so as to break its inertia and force it to will' (Vico 1990, 38). To will that the conditions of civility be preserved, not just peace, but the capacity to flourish, which is to say, to will the conditions necessary for meaningful freedom we willingly submit to the bondage of love, the love that binds us to what is other (while preserving it), an act that in thus limiting our power constitutes a world, a multitude, and a future.

Eros is the name we give to the creative force out of which political worlds are made, from bare life, out of the political unconscious known as the flesh of the law. Political states begin in an excess of desire, an explosion of violence and death. For what is desire if not the unthinking impulse to fill the non-signifying void of mortality?

Is it our denial of that stark reality that causes 'a sacred veil' to be drawn over the beginnings of all governments (Strauss 1965, 310), from Rawls's veil of ignorance, with which he seeks to neutralize (or perhaps 'neuter') liberal theory, to the anti-rhetorical veil of 'rational choice' with which Hobbes seeks to hide the binding force of desire? No matter. Law in the flesh will tear away that veil when the tension of restless desire reaches its limit.

Then the play becomes the thing, compelling judgment and action, forcing the ultimate political question: what counter-factual reality must we animate now to dispel restless stasis and realize the future we desire? Thus does the prospect of redemptive justice, in love's name, continue to haunt the legal and political imagination.

Epilogue: but will love triumph over catastrophe?

Terror has no future, only perhaps an intensified now. But what constitutes that 'now'? The right of enjoyment (and what is that if not a milder form of the will to power aspiring to the same forever)? The right of orthodoxy (and what is that if not the positing of a timeless now that dissolves temporality itself in the form of some supreme metaphysical principle)? Or might it be understood in terms of love, as an aspirational ideal, as our commitment to a future on loan from our children (Dupuy 2013, 62)? These possibilities, among others to be sure, constitute what might be described as the post-secular condition of contemporary neo-baroque politics and law (see Lupton 2000, 23; Santner 2005, 133; Sherwin 2011).

Global catastrophe, the likes of which we have never known before, manifest in the spiraling danger of climate change, may force our hand in this matter (see Latour 2013a; Dupuy 2013, 18, 47). Decisions must be made. Do we choose the immediacy

of survival now, at all costs, even at the cost of futurity? That is the state of emergency in which we live today.

Merleau-Ponty, an early explorer in the realm of the flesh, called flesh an element of Being: 'not matter, not mind, not substance' but a 'general manner of being' (Merleau-Ponty 1968, 139). He attributed to the flesh that which 'makes the facts have meaning' (Ibid., 140). In the flesh we are 'caught up' with other beings, in an *experience* of 'co-radiance', the visible relating to itself ('animating other bodies as well as my own').

This kind of experiential approach, so brilliantly practiced by the great pragmatist William James, is far from exhausted. To the contrary, it is precisely what is needed to animate and ground anew the different ontologies that may be linked to disparate political and jurisprudential values (see Latour 2013b). Likewise, exploring Merleau-Ponty's notion of 'cohesion without concept' may prove to be of particular worth in addressing the challenge of law's binding power as it emerges from the state of exception. Standing alone, disembodied conceptual ideals, descriptive categories and typologies, and the cramped behavioral models used to configure rational choice, cannot adequately capture the way political beliefs are formed and sustained (or fail) in practice. In this respect, experience, desire and affect have yet to be adequately tapped as resources for understanding fidelity to law in the legitimation process. It is here that we encounter the original ground of wild meaning—the conditions under which political meaning is born anew (as 'an expression of experience by experience' (Ibid., 155)).

The pulse of the flesh may be taken in the emanations of political and legal perturbation—protests, occupations, signs in popular culture of shared anxiety or shame or anger. These signs point to something deeper, something that the state of emergency exposes: bare life. Here we glimpse the conditions that constitute sovereign power, and the significance we assign to it. Agamben refers to our affirmation of that significance as 'acclamation', though he acknowledges the extent to which public acts of assent (in apparent fidelity to law) may be subject to manipulation, particularly in the hands of those who control the operation of mass media,[17] or outright coercion, as occurred under Suharto in Indonesia (and continues to occur in authoritarian states around the world).

Yet, if Merleau-Ponty's insight into the nature of flesh as a manner of being in the world is right, its authentic co-radiance with other beings will signify actual states of affairs, prompting some to utter (as the ghost of Hamlet's father prompted Hamlet to say): 'This bodes some strange eruption to our state' (I.i.69). Or as Otto Gierke expressed it: 'The undying spirit of [Natural] Law can never be extinguished. If it is denied entry into the body of positive law, it flutters about the room like a ghost' (Gierke 1957, 226).

If contemporary neo-baroque cultural conditions implicate post-secular possibilities, we will need new interpretive and critical methods and new

17 In 1940, the German Minister of Propaganda, Joseph Goebbels, stated: 'We must give film a task and a mission in order that we may use it to conquer the world' (Rentschler 1996, 215).

interdisciplinary alliances to explore their meaning and their scope in regard to contemporary politics and law. Phenomenology, psycho-theology, political theology, visual jurisprudence—these are just some of the emerging categories (or perhaps re-emergent fields) that present themselves to us for further consideration.

The founding moment of political and legal investiture haunts the baroque and neo-baroque mind, from *Hamlet* to *The Act of Killing*. In the former, Prince Hamlet finds the resources to decide, and to act, in the face of injustice; in so doing he precipitates a transformative political event that renews the rightful basis for state legitimacy. In *The Act of Killing*, by contrast, restless stasis remains unaltered from beginning to end. It is a state of affairs well suited to neo-baroque conditions—a time of distracted paralysis, when the availability of the cultural and psychological resources needed to go beyond terror and its purgatorial aftermath remains uncertain.

The massive cleanup operation of liberal theory will continue to falter, and will ultimately collapse under the weight of law in the flesh in the state of exception, unless it is shored up with new methods of assessment along with new sources of experience. What is rotten in the heart of the state will not go away. It is invulnerable to the sword (*Hamlet* I.i.144-146). But it may yield its secrets to a braver mindfulness.

Absent such a re-invigorated interpretive approach, informed by the epistemology of flesh and the ontology of collective political life, the reflective practice of assessment and prescription cannot productively proceed. It is difficult to say how we will fare under current neo- (or digital) baroque conditions. But what remains certain is that political and legal perturbations will continue; the flesh will tremble anew. Wild meanings will shake the status quo: more signs of the ghost in law's machine.

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‘No Foundations’?

Mark Antaki*

1. Live structures

The relaunch issue of *No Foundations: An Interdisciplinary Journal of Law and Justice* (2012) fittingly opened with an article by James Boyd White, one of the founders of law and humanities scholarship, entitled ‘Justice in Tension. An Expression of Law and the Legal Mind’.[1] If ‘one is to talk about justice in the law’, says White, ‘it must be in light of’ the reality that ‘law is not a set of rules at all, but a form of life’ (White 2012, 1). Here, we find the claim that for law to be a home for, or hospitable to, justice (and, for example, not simply a *means* by which justice is or is not obtained or produced), for justice to be *in* the law, we must see law differently than we usually see it. On the way to making this familiar claim (see e.g., White 1990), White turns to the metaphor of law as a building—evoked by the idea of (no) foundations—in a brief but thought-provoking way. He writes:

> 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. (White 2012, 1, my emphases.)

Law as an inherently unstable structure built upon tensions. Even if the ‘structure’ White writes of may not be analogous to a bricks and mortar building, this phrase

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** I am grateful for the support of the Social Sciences and Humanities Research Council of Canada. I would like to thank Ian Dahlman, Mireille Fournier, Catherine Le Guerrier and Jessica Magonet for their thoughtful assistance as well as Alexandra Popovici for her helpful comments. I would also like to thank the editors and an anonymous reviewer for their constructive engagement with the piece.

1 White’s article was part of the relaunch special issue, ‘Law’s Justice: A Law and Humanities Perspective’.

calls to mind such a building and draws its telling power from that metaphoric resonance. Of course, we certainly do not find here an embrace of rock-solid foundations—think for example of Peter as the rock on which Christ's church is to be built (see e.g., Matthew 16:18; Matthew 7:24). But nor do we find an outright repudiation or dismissal of foundations. Rather, White appears to play with the usual building metaphor and to subvert it by making it resonate differently. Does law's inherent instability mean it is always on the brink of collapse? That cannot make for a good structure, can it? But if law is inherently unstable, are different or better foundations an option? Will law ever benefit from foundations that assure the soundness of its structure?

White's apparent subversion of the metaphor is tied to his adoption of a viewpoint 'internal' to one who is 'doing' law (White 2012, 5). Other so-called disciplines[2]—read: the social sciences—may wish to solidify law, objectify it, even turn it into rules.[3] But to do law is to experience the inherent instability, even the 'liveliness', of its structure. According to White, law is both, and at once, a living structure and a structure for living. As he says, the dynamic and dialogic tensions he describes[4] are 'the life of the law itself'[5] and not 'as some might say, "noise in the system"' (Ibid., 16).

White's appropriation of the building metaphor is bound up with his understanding of law as 'an art, an art of language and judgment, an art of the maintenance and repair of human community' (Ibid., 17). Law as a structure and, simultaneously, its maintenance and repair—this is law as 'constitutive rhetoric' (White 1985, 28). Indeed, in what might be taken to be a (further?) strange metaphorical turn, but one which flows from White's understanding of law as laid out in the first few pages of the article, it turns out that White's use of 'structure' and 'built on' leads to his explicit assertion not that law is like a building but that it is 'like a poem' (White 2012, 5)—and judges and lawyers like poets (Ibid., 15). As he says somewhat autobiographically:

> 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 (Ibid., 5).[6]

2 On law as a 'discipline', see Dedek forthcoming.

3 It may be striking that White says 'law as a structure of rules' is a view of law 'from the outside' (2012, 5). But, in his seminal work, H.L.A. Hart himself (who famously writes about an internal standpoint) wrote that his *Concept of Law* 'may also be regarded as an essay in descriptive sociology' (Hart 1961, vii).

4 These are 'between language and ordinary language' (White 2012, 5), 'between law and other specialized languages' (Ibid., 7), 'between the opposing lawyers' (Ibid., 8), 'between competing but plausible readings of the law' (Ibid., 9), 'between substance and procedure' (Ibid., 11), 'between law and justice' (Ibid., 12), 'between the past and the present—and the future too' (Ibid., 13).

5 Compare with Holmes 1946, 1: 'The life of the law has not been logic; it has been experience'.

6 Here, as opposed to earlier in the text, 'inherently unstable' qualifies the tensions and not the structure itself.

Perhaps we ought to take this turn to the poem as an outright rejection of the building metaphor. After all, White previously wrote 'in this fluid world without turf or ground, we cannot walk, but we can swim' (White 1985, 40). No ground means no foundations and hence no building; the English 'ground' and the German *Grund* translate the Latin *fundus* from which we have fundament(al) and foundation(al). For most of us, swimming as opposed to walking would require constant—and deliberate—effort and care whereas walking—and ground—suggest security and comfort. Perhaps learning to swim, and learning to tread water, is learning to be self-grounding… although, as the editors emphasized in their comments on the piece, 'it is necessary for the water to make some resistance for us to be able to swim'.

However, treating the turn to the poem as an outright rejection of the building metaphor—and the work it can do—would be moving too fast. For instance, White thinks of architecture as an art akin to poetry. He writes:

> 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. (White 2012, 16.)

The poem does not mean we leave behind law as a structure; rather, it invites us to think of law as a structure we not only pass by or use but inhabit, and to consider the kinds of inhabitants we are. Like Martin Heidegger, White sees poetry —from *poiein*, the Greek verb to make—as a paradigmatic and revelatory human 'activity'. Rather than constitute an outright rejection of the building metaphor, the turn to the poem re-poses some of the important questions raised by the metaphor, questions relating to what it means to make, to build—even to dwell (Heidegger 1971a). This turn to the poem is a kind of homecoming[7] in which language and poetry, with all their fluidity and slipperiness[8] are experienced—as is fitting for a 'humanities' perspective *internal* to law—as our element, our home. As White says in many places, what we now know as law's so-called inter-disciplinary turn to the humanities is actually in our legal tradition 'something very old-fashioned indeed' (White 2011, 31).

What may strike some as a cavalier use of the building metaphor and its ultimate jettisoning in favour of the poem, turns out to be a subtle and revealing engagement with the name of the journal, 'No Foundations'. In the following pages, I attempt to draw out some of that engagement, to spell out a little bit the oft-used '(no) foundations', to transform 'foundations' from shorthand to keyword. To turn a

7 Heidegger writes '[l]anguage is the house of being. In its home human beings dwell' (Heidegger 1998, 239) but notes that '[h]omelessness is coming to be the destiny of the world' (Ibid., 258). In *The Legal Imagination*, in a section entitled 'the right relationship to language', White turns to Shakespeare's *Troilus and Cressida* and uses, among others, the example of Ulysses, 'the master of rhetoric, the great persuader' who 'stands outside the languages he uses' (White 1973, 44).

8 Elsewhere, White writes of 'the shimmering and fluid world of language' (White 1990, 35).

word into a keyword is to allow oneself to be struck by the word, to begin to spell out what we take for granted as we use it, even to allow it to open up or reveal a world for us.[9] Accordingly, I aim to articulate some of what is beautifully packed into both White's appropriation of the building metaphor and the name of the journal itself. In so doing, I consider not only the name of the journal but the original subtitle, 'Journal of Extreme Legal Positivism', before the re-launch with 'Interdisciplinary Journal of Law and Justice' as the new subtitle. I also reach out to White's work more generally as well as to Heidegger's thinking—but without seeking to rigorously present or re-construct these. 'No Foundations' emerges as neither a warning sign (as in 'enter here at your peril') nor a rule of engagement (as in 'leave the disciplinary foundations that provide you comfort at the door'), nor a self-congratulatory celebration, but as a poetic call, an invitation. The following pages attempt to let the call resonate, to attune us to the call such that we can accept the invitation, and dance to its tune.

2. Metaphysical architecture

'[I]nherently unstable structures' and foundations that turn out to be 'tensions' appear to subvert the building metaphor because of the dominance of its metaphysical version: a structure, particularly of knowledge, is to be built *for all times* upon 'unassailable' foundations (Seery 1999, 460). Political theorist John E. Seery tentatively and provisionally refers to this use of the metaphor as located in an '"Edenic" as opposed to "constructivist"' tradition of 'Western political theorizing' (Ibid., 470). In the Edenic tradition, foundations have the capacity to be unassailable because of their belonging to a 'separate spatial' and 'temporally prior realm' (Ibid., 470). Seery suggests that political theorists who use the term foundations 'as a virtual synonym for "metaphysical commitments", "unshakable premises", and "normative universality"', are, whatever their actual positions, playing into this Edenic tradition and its tropes (Ibid., 465). 'What carpenter has ever actually believed that one-size foundation fits all buildings?' he asks (Ibid., 465). And what kind of 'maintenance and repair', to borrow White's words, would such imagined buildings require, if any?

As a story about human beings building their way to or towards God, the story of the tower of Babel (Genesis 11:1) 'figures in Western philosophy as the first metaphysical interpretation of architecture', writes Daniel Purdy (Purdy 2011, 53). In his study of 'architectural metaphor in German thought', he notes that Peter Bruegel's 'baroque adaptation' of the myth of the Tower of Babel had 'glorified' the project. In reaction to this kind of glorification, the likes of Immanuel Kant turned Babel into 'an attractive metaphor with which to critique both metaphysics and absolute power' (Ibid., 53).[10] The tower is no longer to be celebrated but to be held up as an example, perhaps *the* example, of the finitude of human beings. Human and divine knowledge are irrevocably separated and human beings ought no longer to aim for

9 On 'keywords', see Williams 1976.

10 Indeed, the tower of Babel may remain an attractive metaphor. See e.g., Klink 2011.

the heavens. Certain kinds of buildings are not possible for human beings, who must attend to and use the kinds of plans and materials that are actually possible for, or available to, them. With Kant, the 'bourgeois house replaces the tower' (Ibid., 55). What is more, as Purdy notes, '[e]difices are always threatened with collapse; they are not unproblematic and secure. The construction of a foundation always entails the danger that it will fail to support the building raised upon it' (Ibid., 75). For Kant, suggests Purdy, '[w]ith the house metaphor comes the ruin, the destruction of a system of thought, and then again with the collapse there emerges again the potential for rebuilding, or at least reapplying portions of the collapsed structure for another purpose' (Ibid., 75-76). No human construction is everlasting.

On one reading of the name, 'No Foundations' is a refusal of *metaphysical* buildings and foundations. Indeed, the first sub-title of the journal, 'Journal of Extreme Legal Positivism' was presumably meant to shed light on the name. The *Extreme Legal Positivism* research group was created in 2005 and is the source of the journal's original name. The group distinguished legal positivism from scientific positivism,[11] and radicalized legal positivism, turning toward an extreme legal positivism, or even a 'critical legal positivism'.[12] According to the group, legal positivism holds the promise of escaping the limitations of scientific positivism; it does not even appear as a category of it. Legal positivism, when radicalized, made more extreme or critical, no longer mimics scientific positivism's demand for 'just the facts, please' by asking for 'just the law, please'. As the research group's web page relates, *Extreme Legal Positivism*'s project was to take a legal positivist insight—that law is a contingent, human practice—further than legal positivism does. How? By re-thinking the study of law out of a fresh re-appropriation of a 'conceptual scheme' organized around the 'norm'. Not by jettisoning the norm but by using the norm as a starting point so as to inquire into how legal practices construct so-called 'social reality'. In short, by taking further the 'constructivism' and 'relativist epistemology' of legal positivism.[13] Constructivism here, in the Kantian vein, suggests that there are 'no foundations' *other than the human, finite ones we give ourselves*.

3. Materials matter

The conceptual scheme of the norm determines what is knowable for jurists and legal researchers who ascribe to legal positivism. With *Extreme Legal Positivism*, it does not determine what is knowable but rather *how* so-called social reality is knowable as produced by law, even if produced as 'extra-legal'.[14] In any case, part of what is at

11 See <http://www.helsinki.fi/nofo/exlegpos/theory.html> (visited 15 June 2014).
12 See <http://www.helsinki.fi/nofo/exlegpos/researchers.html> (visited 15 June 2014).
13 See <http://www.helsinki.fi/nofo/exlegpos/theory.html> (visited 15 June 2014).
14 See Johns 2013 for a fascinating treatment of 'non-legality' in international law. As she writes, 'International lawyers make law as they go about their daily work, but they also make non-law. International lawyers, that is, routinely shape understandings of what stands opposed to or outside the reach of legal norms' (Johns 2013, 1). Johns examines selected 'international legal knowledge practices' (Ibid., 9) that produce extra-legality, pre- and post-legality, supra-legality, and infra-legality.

stake is thinking about the *form* of law, whether as presented by legal positivism, by those who wish to radicalize it, or simply by some general pre-conceptions about law.

In the building metaphor, legal form becomes the building materials, the matter with which foundations are laid and the structure itself is erected. In the common uses of the building metaphor, rules and doctrines are the 'matter' of the structure of law, which is built on principles, the matter of the foundations. Principles allow for the structure to be both stable and coherent. Law, on this understanding, is a set of rules but, thanks to its foundations, it is more than a sum or an aggregate; it is a veritable unified system. This understanding of law dominates much thinking, writing, and teaching about law. Myriad courses are named 'foundations of law', as are many books and even book series. According to White, this understanding of law is mistaken, not because it is completely wrong, but because it is incomplete and fails to bring to 'light' an important 'reality' about law. What appears to be the entire structure of law in the common uses of the building metaphor becomes just one part of the structure in White's use.

To take one example: James Gordley's *Foundations of Private Law* tries to identify 'the principles that underlie basic fields of private law' (Gordley 2006, 3). 'Fields' to be sure are not 'structures' or 'buildings'. However, *Foundations of Private Law* follows on his magisterial *Philosophical Origins of Modern Contract Doctrine* in which he explicitly adopts the building metaphor. In *Origins*, Gordley attempts to identify and articulate the common principles of contemporary contract doctrine that would allow its 'edifice' to be 'rebuilt' after its 'razing' by critics (Gordley 1991, 9). He finds the principles underlying private law in the work of the late Scholastics, who reorganized 'Roman law into a systematic doctrinal structure on the basis of Aristotelian philosophical principles' (Gordley 2006, 4). Gordley's account of private law, in my opinion, is more persuasive, more textured, more historically and philosophically sensitive than most doctrinal accounts. Moreover, his account, with its emphasis on Aristotelian 'prudence' [*phronēsis*] (Gordley 2006, 7), an ethical and not intellectual virtue, is congenial to White's understanding of what it means to do law. Nevertheless, Gordley, at least in these and like passages, swims in the metaphorical mainstream of 'doctrine' built on 'principles'. Again, this is significant because of those aspects of law the use of the building metaphor brings to light.

In order to bring something else to light, White plays with the building metaphor. He substitutes 'dynamic and dialogic tensions' for principles (the materials of the foundation) and 'thought and expression' for rules or doctrine (the materials of the building). These substitutions invite one to ask whether and how law rules through rules,[15] or resides in rules (as opposed to, for example, in examples or even paradigms).[16] White's appropriation of the building metaphor deprives law of the stability and solidity rules, doctrines, and principles are supposed to provide, thereby actively resisting the reduction of law to a system of positive law. Coherence

15 See e.g., Frank 1985 on Aristotle and the rule of law.
16 On the paradigm, see Agamben 2009, 9 and following.

and systematicity, demands of reason—or perhaps rather of rationality[17]—lose their pride of place, their pedestal. In undermining the demands of rationality, White reveals the metaphysical cast of much legal indoctrination,[18] even of those varieties that are apparently non-metaphysical. How does he do so?

White's appropriation of the building metaphor seeks to undo the 'metaphysical interpretation' of the human being as *animal rationale* by returning to Aristotle's *zōon logon echon*, the living being that speaks (Heidegger 1998, 245-246). The common uses of the building metaphor in law bring *ratio* (reason, but also another word for ground) to light whereas White's brings to light not *ratio* but *logos* in all of its richness. In other words, the move from *ratio* to *logos* is a move to a *logos* that still belongs to, and has not been severed from, *muthos*. This return to *logos* is more readily grasped when one sees that White's displacement of rules necessarily goes along with the displacement of propositional and conceptual speech as the key parts or kinds of speech. Law does not rule by rules, and truth does not reside or happen in propositions (White 1985, 127; White 1990, 28; Heidegger 2002). For instance, Marianne Constable shows how H.L.A. Hart, in *The Concept of Law*, presumes that rules 'are writable' (Constable 1991, 86) and thereby insists that '*a practical* knowledge' of '*how* to act' (internal standpoint) is reducible to 'statements of rules' or 'propositional knowledge' (Ibid., 87) (external standpoint).

The move from *ratio* to *logos* enlivens the building metaphor with the 'living material' (White 1985, 126) of 'living speech' (White 2006) and allows it to resonate differently, perhaps leading one to experience 'dissonance in the form one has become' (Connolly 1993, 151). With a building metaphor that brings *logos* to light, the 'structure' of law emerges as a (literary, poetic) 'composition' (White 1990, 4), which can be more or less harmonious and not simply more or less coherent (Ibid., 231). Precisely because of the substitution of materials, law becomes 'a process by which the old is made new, over and over again' (White 2012, 1). Linear building upwards yields to a (hermeneutic) circle and to 'autopoetic', self-making, even self-grounding, poems (White 1990, 6).[19] By playing with the metaphor, White makes it harder to think of law as a kind of doctrinal (and hence conceptual, propositional) construction precisely because he makes it more pressing to appreciate how doing law involves dwelling poetically in language (Heidegger 1971b). In Heidegger's terms, White may help us see language as 'the house of being' (Heidegger 1998, 239). As we shall see below, this change of materials invites us to re-think the very laws that

17 See Antaki 2014 for a discussion of 'rationalism' in the context of the rise of proportionality in the adjudication of constitutional rights.

18 See the introduction to Simpson 1996 on the invention of leading cases meant to help students identify and master the 'fundamental legal principles' of the common law. Simpson quotes Professor Edward J. Phelps of the Yale Law School: "'The very first and indispensable requisite in legal education […] is the acquisition of a clear and accurate perception, a complete knowledge, a strong and tenacious grasp of those unchanging principles of the common law which underlie and permeate its whole structure, and which control all its details, its consequences, its applications to human affairs'" (quoted in Simpson 1996, 4). Here, the principles are 'unchanging' but they need not be for the building metaphor to be deployed.

19 This is a different circle or cycle than the successive ruin and erection of philosophical systems Purdy (2011) refers to in his discussion of Kant.

govern the 'building' of all speech, including legal arguments and judicial opinions.

The shift to constructivism proffered by *Extreme Legal Positivism* could lead to a substitution of materials by de-centering the 'norm' so important to legal discourse and science. However, constructivism may not accomplish what White is doing here because the shift the Extreme Legal Positivists call for is grasped and presented as an *epistemological* shift. It is as if 'we jurists' choose to stand apart from and against our edifice of knowledge, bourgeois house or not, rather than accept that we dwell within it. White is prodding us away from seeing the building as a theoretical edifice of knowledge tied to 'conceptual schemes' and inviting us to see it as a place of language in which we dwell. So-called 'social reality' is lived before and as it is known or 'constructed' or built. Indeed, 'reality' is already 'social'. A *res*, a thing, is a matter of collective concern (see e.g., Heidegger 1971c, 172). As Heidegger says, dwelling is prior to building: '*Only if we are capable of dwelling, only then can we build*' (1971b, 157). Making epistemology primary inverses this relation, or altogether neglects dwelling.

White's playing with the metaphor may help us hear what we no longer hear: the 'to dwell' in 'to build'. To build says to dwell. The Oxford English Dictionary tells us that 'the two fundamental senses [of to 'build'] are "to construct a dwelling" and "to take up one's abode, dwell"'. Similarly, Heidegger points out that '[t]he Old English and High German word for building, *buan*, means to dwell' (Heidegger 1971b, 144). As he writes, '[t]he nature of building is letting dwell' (Ibid., 157). This primacy of dwelling over building (as commonly understood), which undermines epistemology's claims to primacy, is made even more explicit by Heidegger: 'The old word *bauen* [to build], to which the *bin* belongs, answers: *ich bin, du bist* mean: I dwell, you dwell. The way in which you are and I am, the manner in which we humans *are* on the earth, is *Buan*, dwelling' (Ibid., 145). The two-fold sense of to build also allows White's use of 'maintenance and repair'[20] to resonate back, so to speak, to the building metaphor. To repair is not just to fix something broken but also to 'make one's way', 'to return', 'to be present or assembled', even 'to stay, dwell, reside' (O.E.D.). Perhaps communities and structures of 'thought and expression' are both repair and always to be repaired.

4. Laws of building

The editorial of the second issue of 'No Foundations: Journal of Extreme Legal Positivism' hints at a further step, perhaps beyond constructivism, towards what White is accomplishing in his appropriation of the building metaphor. In this editorial, a 'classical' but 'unsatisfactory' answer to what constitutes knowledge proper is briefly recounted: knowledge as a 'belief with grounds (reasoning, justification, explanation)' is distinguished from 'opinion which appeals by way of persuasion' (NoFo 2006, 2). In short, knowledge is (well) founded whereas opinion is not.

20 Recall that White writes of law as 'an art of the maintenance and repair of human community' (White 2012, 17).

This answer, however unsatisfactory, to the question of what constitutes knowledge proper reflects the sway of the 'principle of sufficient reason' or 'the principle of ground', 'which among other things implies that every true statement requires its grounds' (Heidegger 1984, 5). However, more than requiring reason or ground, the principle requires that reason or ground be rendered, be re-presented or made present (Heidegger 1991, 22), hence the parenthetical reference to 'reasoning, justification, explanation'. It would seem that if one is to talk about justice *in* the law (White 2012, 1, my emphasis), perhaps if justice is 'to be seen to be done', as the adage goes,[21] then justification must be possible.

While White's de-rationalizing of the building metaphor need not be seen as embracing the distinction between knowledge proper and persuasion, it does invite a movement from *ratio* to *logos*, from science to rhetoric, from theoretical knowledge of unchanging things (*epistēmē*) to practical deliberation and seeking counsel regarding changing matters of human concern (see e.g., Smith 1998). It thus appears to de-throne the principle of sufficient reason tied to law as a science. Roger Berkowitz tells the story of Leibniz's codification efforts as the story of the rise of positive law, of law as a science. He writes, 'Leibniz's metaphysics, and specifically his embrace of the principle of sufficient reason (*nihil est sine ratione*), shifted the inquiry from a knowing of law itself to a knowing of the reasons, grounds, and justifications for law' (Berkowitz 2005, 7). White's de-rationalization of the building metaphor calls into question the very possibility of justification (the representability of ground or reason) though perhaps not justice itself (for example, judgment as grounded or well founded).

White engages with the question of the representability and representation of ground, for instance, when he says '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' (White 2012, 11) and '[t]he 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' (Ibid., 11, footnote 11). Whatever properly grounds (or 'springs') judgment generally, including the judicial decision, is ultimately un-representable and, as White's use of 'spring' reflects, beyond human will and mastery. Of course, this ultimate un-representability does not mean we ought to dispense with judicial opinions and judicial reason-giving; rather, it invites us to read judicial opinions as poetic compositions and not as demonstrations, as well as to keep in mind 'the limits of expression and of our minds' (White 1985, 124).[22]

The movement from *ratio* to *logos* does not simply reveal the limits of justification, of the giving of reasons, it also reveals what we might call the violence

21 See Lord Hewart's dictum in *R.* v. *Sussex Justices*, Ex parte McCarthy [1924] 1 K.B., 256 that 'justice should not only be done, but should manifestly and undoubtedly be seen to be done'.

22 The title of Sachs 2009, *The Strange Alchemy of Life and Law*, points to the element of 'mystery' White (1985, 24) writes about.

of justification. As Heidegger writes regarding the modern epoch, 'the unique unleashing of the demand to render reasons threatens everything of humans' being-at-home' (Heidegger 1996, 30). The unrelenting demand to render reasons leads, paradoxically, not to proper building and dwelling, but, rather, to 'discursive strip-mining' (Manderson 1995, 317), for instance in the strip-mining of judicial opinions in search of representable grounds, of *rationes decidendi* (for which cases 'stand'), of propositional articulations of rules. Using similar, but less violent, imagery, White writes: '[t]he meaning of a text is not simply to be found within it, to be dug out like a kind of mineral treasure' (White 1984, 19). These *rationes* and grounds are crucial points of leverage in argument often deployed and experienced as a kind of intellectual arm-twisting. White writes '[t]his kind of discourse [conceptual, propositional] is structurally coercive, in the sense that the writer seeks to prove something even to an unwilling reader who resists with all his might until forced by factual or logical demonstration to yield' (White 1990, 29).[23]

The structural coercion of propositional discourse operates much like one might think the laws of physics, such as gravity, do. Of course, the laws of physics are crucial to actual buildings standing, and hence to the dominant resonance of the building metaphor. White's switch of building materials and his ultimate turn to the poem invite us to experience human thought and expression, including law, as not governed by laws of thought akin to the laws of physics as grasped by laypersons. Elsewhere, White is rather explicit about this point: rules of logic such as the rule of non-contradiction pre-suppose and require propositional and univocal language (White 1990, x-xi and 32).

Ordinary language, however, does not function as propositional language does and appears to escape the jurisdiction of logic. What is more, '[i]t is in fact the point of certain kinds of poetry—the greatest, in my view', says White, 'to capture assertion and denial at once, to carry the reader to the point where her languages break down' (White 1990, 32-33).[24] Putting dwelling first, taking seriously the change of materials to the 'living material' of poetic 'living speech', invites us to reconsider how we think of building such things as arguments and to reconsider whatever 'laws' might govern this building. Indeed, to de-throne the principle of sufficient reason and the laws of logic more generally is to continue to reveal the metaphysical cast of the dominant uses of the building metaphor.[25]

White's appropriation of the building metaphor shifts the key human faculty or experience from reason to imagination (White 1973),[26] and to an imagination

23 On the origins of the coercion of reason, see e.g., Arendt's treatment of Plato's ideas in Arendt 1961, 107 and following. See also Antaki 2007.

24 'The conception of excellence as the comprehension of contrariety or contradiction is an idea that leads out of poetry, as the idea of organic form does too, but perhaps less in the direction of art and architecture and music than that of drama, history, psychiatry, anthropology, and law. In each of these fields, it is a commonplace that the most significant truth is a simultaneous statement of opposing truths' (White 1985, 114-15).

25 On the 'metaphysical foundations of logic', see Heidegger 1984.

26 Note that the sub-title to White's classic *Legal Imagination* (1973) is *Studies in the Nature of Legal Thought and Expression*.

that is not asked to do the systematic and systematizing work of reason (see e.g., Antaki 2012). The shift from reason to imagination is the shift from the faculty of giving principles and foundations (Heidegger 1996, 71) to the faculty of receiving the gift of world. Following Hannah Arendt's thinking on Kant's critiques, the shift from reason to imagination goes along with the shift from rational beings to sensible beings who share a world as fellow dwellers and travellers in that world (see Arendt 1982). This is a crucial point for Arendt because only with the *Critique of Judgment*, she suggests (Ibid.), does Kant make primordial 'the fact that men, not Man, live on the earth and inhabit the world' (Arendt 1958, 7).

The coercion of propositional speech, as exemplified by its univocity, reflects an impatience with the 'human condition of plurality' (Arendt 1958, 7). Can it be that Babel is subtly—or not so subtly—present in any human attempt to build arguments with the materials of propositions in accordance with the rules of logic? The success of this everyday or ordinary project of Babel would secure justification but would make 'justice as translation' (White 1990), justice for sensible human beings in the condition of plurality, unnecessary. However, with the shift to imagination, intellectual arm-twisting gives way to rhetoric, understood and experienced as the appeal to and renewal of a shared world.

5. Musical grounds

White's appropriation of the building metaphor moves us from language as propositional or conceptual to language as poetic, from logic to rhetoric, from the solid and stable to the fluid and unstable. Paradoxically, this is a *grounding* movement through which propositional language and logic appear as derivative or modified forms of something more originary. In a movement similar to White's and following Heidegger's work,[27] P. Christopher Smith shows how 'dialogical conversation (*dialegesthai*)' is to be found 'beneath logic's monological and private "pointing out" to oneself (*apodeiknusthai*)'. And beneath dialogical conversation, Smith uncovers 'rhetoric's public con-sultation or our communal taking counsel with each other (*sumbouleusthai*)' (Smith 1998, 6). This uncovering (but not strip-mining) movement from 'demonstration' to 'rhetoric' (by way of 'dialectic') is a movement from solitary reason to a world in which we find ourselves always already with others (Heidegger 1962, 78). Indeed, 'being-in-the-world' is the 'basic state' (*Grundverfassung*) of human beings on which (representational) knowing is 'founded' (Ibid., 90). It may be of the kind of language characterized by 'care' (Ibid., 227), one belonging to world, that White says 'language is also the ground on which we meet' (White 1985, 27).

Rhetoric belongs to and exemplifies the 'basic state' of human beings. Being-in-the-world means to be with others (Heidegger 1962, 155), to be-attuned by way of one's mood (Ibid., 172) and to be concerned with what is to be done. Rational beings need not be *attuned* to the world or *moved* to do things, they need only 'think'. But being attuned and moved, not just when listening but when speaking, is part of what

27 Especially Heidegger's treatment of Aristotle's *Rhetoric* in Heidegger 2009.

it means to dwell with others. Thinking, feeling, and others are equiprimordial.

Accordingly, rhetorical or original speech is not simply meant to make something visible theoretically or to change someone's beliefs; it is meant to attune and thereby to move. Smith writes, 'the response to dialectical and logical argument is merely "Yes, I see it that way" or "No, I do not see it that way", the response to a rhetorical argument is "Yes, I (we) will" or "No, I (we) will not"' (Smith 1998, 7). Consequently, in rhetoric (as opposed to logic and dialectic), Smith says, 'the character or *êthos* of the speaker and the feeling or *pathos* communicated about the subject matter' are 'indissociable from the communication of the logical content' (Ibid., 7). For instance, White draws attention to how, on a rhetorical as opposed to logical reading, '[i]n every judicial opinion, the judge gives himself a character or personality,' 'a judicial persona or ethos' (White 1990, 111). Judicial opinions thus create their own 'authority', their own ground (Ibid., 112).

Thus, when White turns to 'spring' in his account of the limits of judicial justification, he is shifting attention from that on which a decision *rests* to that from which, however un-representable, a decision emerges. He is drawing attention to how actual human beings are moved to speak, to act, to judge as well as to how they are *attuned* to a world they cannot master but into which they are thrown (Heidegger 1962, 219).

'Living speech', bodily speech, voice (*Stimme*) re-attunes human beings to another mood (*Stimmung*[28]) and moves them, or resolves them to move.[29] This resolve or movement is part of the meaning, the sense, the resonance, of living speech. As White says, '[t]here, in the music the voices make, whether beautiful and harmonious or raw and ugly, is where the meaning lies' (White 1990, 231). The separating out of 'thought' and 'expression' is the casting aside of voice such that language becomes a means by which ideas or concepts 'in here' are ex-pressed and conveyed to someone else (see e.g., White 1990, 31-36). As we have seen, propositions, concepts, and the laws of logic are often inimical to embodied beings who have voices, who speak, who listen and who, by way of their listening, heed, are persuaded, or even obey.[30]

White's appropriation of the building metaphor, the movement from *ratio* to *logos*, and ultimately to the poem, return such things as rhythm and tone, indeed musicality, to human 'speech'. In the passage quoted above, White draws attention to what Smith calls 'the ultimate origins of argument in the ground and soil of voice' (Smith 1998, 305) or the '*acoustical* ground, or better said, ground*less* origins of

28 As Macquarrie and Robinson point out in a note to their translation of '[…] die Stimmung, das Gestimmtsein' as 'our mood, our Being-attuned', '[t]he noun "Stimmung" originally means the tuning of a musical instrument, but it has taken on several other meanings and is the usual word for one's mood or humour' (Heidegger 1962, 172).

29 Smith draws attention to how 'Heidegger radically redirects Aristotle's line of thought here [*Rhet*. 1357a10-23]: the enthymeme, he says correlates with *enthumeisthai* or "taking something to heart [*to the thumos*]", and it is primarily in this, not in the number of its premises, that its *logos* or argument is to be distinguished from the *logos* of a dialectical syllogism. For the task of the latter is only *apophainesthai*, only to let something be seen, to make something visible' (Smith 1989, 27-28).

30 Ob-audire gives rise to 'obedience'. As White notes, *peithô* 'is usually defined as "to persuade" in the active voice, "to obey" in the middle and passive' (White 1984, 35).

speech' (Ibid., 293). As Smith writes, '*logos*, namely reasoned argument in speech, originates […] in a primarily acoustical experience where the principle of sufficient reason, *nihil est sine ratione*, and the logical "laws" of non-contradiction and self-identity propping it up have yet to obtain' (Ibid., 302).

What I have called the movement from *ratio* to *logos* does not simply return bodily voice to speech, it also returns the body to speech. Moving from music to dance, White suggests that 'we can imagine languaging as a kind of dance, a series of gestures or performances, measured not so much by their truth-value as by their appropriateness to context' (White 1990, xii). Languaging as dance is reminiscent of Thrasybulos Georgiades's fascinating account of the 'musico-rhythmic quality' (Georgiades 1973, 73) of Greek, of 'the unity formed by [Greek] language and music' (Ibid., 93). Georgiades distinguishes Greek from modern languages, showing it to be *fundamentally* bodily. As he says, '[t]o experience words and verse as solid bodies, as something physical, means automatically to experience them *through* the body, physically. Since verse expresses itself in time, as the molding of time, as movement, its physical character expresses itself as visible physical movement, as dance' (Ibid., 82).[31] For the Greeks, 'languaging', including and as poetry, was *experienced*, not simply 'imagined', as dance.

And so, as we journey with White in his appropriation and transformation of the building metaphor, we find ourselves not only with poems but with dances. To dwell poetically in language, to hear and heed rhythm and tone, it turns out, *is* to dance—and, at least for the Greeks, dancing involves the solid *footing* of living speech, however 'shimmering and fluid' the 'world of language' (White 1990, 35) might be. This 'solidity' of living speech, though, involves movement and 'instability', even 'inherent instability'.

6. Post-script: (re-)hearing, (re-)grounding

White's appropriation of the building metaphor—including his turn to poetry, music, and dance—engages with the history of metaphysics. Metaphysics turns out to be not so much a question of mistaken or delusional *belief* in ultimate grounds but rather, or in addition, a question of our *experience* of speech, of language. Our modern loss of footing may be tied to how we fail to experience and appreciate the musicality of speech.

Perhaps, as Smith argues, invoking Friedrich Nietzsche, metaphysics, including the unrelenting demand that grounds be re-presented, emerges with the forgetting, the no longer hearing, of the acoustical ground of speech. As he writes,

31 As Georgiades explains, the Greek experience of words as *physical* means that speakers of Greek did not have the control over their words and speech modern speakers experience: '[i]n English … as in any other Western language neither the emphasis nor the length of the syllable conditioned by it, neither the lightness nor the brevity as exemplified in the word endings, are objective qualities of the word; they are not characteristics of the "word-body" itself, but instead are allied closely with the meaning, with the speaker and with what the speaker means to express' (Georgiades 1973, 56).

> […] the history of metaphysics begins with an abstraction and withdrawal from acoustical experience of temporal being and with a turn to optical supervision, an overview, of static spatialized being, a turn coincident with the turn from *phônê* and *phasis*, voice and saying something out loud, to *graphê*, the written mark, or in the terminology of Eric Havelock and Walter Ong, the turn from orality to literacy. (Smith 1998, 293.)

It would be fitting then, to attend to Heidegger's attempt to let the principle of ground (*der Satz vom Grund*), the 'principle of sufficient reason', *resonate differently so as to attune us and move us differently.* As he writes:

> The principle of reason is one of those principles that remains silent about what is most proper to it. Whatever remains silent divulges nothing. To hear what is silent requires a hearing that each of us has and no one uses correctly. This hearing [*Gehor*] has something to do not only with the ear, but also with a human's belonging [*Zugehörigkeit*] to what its essence is attuned to. Humans are at-tuned [*ge-stimmt*] to what de-termines [*be-stimmt*] their essence. In this de-termining, humans are touched and called forth by a voice [*Stimme*] that peals all the more purely the more it silently reverberates through what speaks. (Heidegger 1996, 50, all the square brackets are the translator's and not mine.)

Heidegger invites us to hear the principle as speaking *of* being rather than *of* or even *to* beings. A different 'intonation' (Heidegger 1996, 49) transforms what the principle says from something like 'foundations' to something like 'no foundations'. When we hear '*nothing* is *without* reason', the principle says that every being has its ground or reason, a ground or reason that can be re-presented, even produced, as a being, as *something* that *is*. When we hear 'nothing *is* without *reason*', the principle allows us to begin to experience ground not as a representable being but as belonging to the being of beings (Ibid., 50). Because being is itself not a being, and hence is not subject to the principle of sufficient reason, the new intonation allows us to hear the principle as 'no foundations'. Indeed, Heidegger says 'being: the abyss [*Ab-grund*]' (Ibid., 52). However, precisely because 'to being there belongs something like ground/reason' (Ibid., 50), the new intonation of the principle keeps saying something like 'foundations'; re-presentable grounds give way to unmasterable *grounding*.

With the new intonation, we are also invited to experience the plurivocity of speech. Indeed, the new intonation calls for 'a leap [*Satz*] into being' (Ibid., 54). As Heidegger says: 'If we fully think through the polysemic word *Satz* not only as "statement", not only as "utterance", not only as "leap", but at the same time also in the musical sense of a "movement", then we gain for the first time the complete connection to the principle of reason' (Ibid., 89). With the new intonation and the shift from univocity to plurivocity, Heidegger shifts the principle of ground from a ground-principle (*Grundsatz*) of reason into a call, an invitation, that attunes and moves human beings.

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Pots, Tents, Temples

Angus McDonald*

1. The site

The site of this text being a journal called *No Foundations: An Interdisciplinary Journal of Law and Justice*, the eleventh issue, a start might be made by asking what the insistence on *No Foundations* marks, and how the journal calling itself by that name has defined its project(s). *No Foundations*, the journal, was, for eight issues, from the first in 2005 until the eighth, identified as *a Journal of Extreme Legal Positivism*. The first editorial referred to a project on necessarily contingent law, and the first editor referred to the sociology, culture, politics and philosophy of positive law and the positivistic conception of law. Then, in 2012, the ninth issue, under new editors and a new editorial direction, replaced the subtitle describing the journal's theoretical orientation with *An Interdisciplinary Journal of Law and Justice*, the first issue of the relaunched journal being concerned with *Law's Justice: A Law and Humanities Perspective*; the second after the relaunch, issue 10, being concerned with *Judging Democracy, Democratic Judgment*. It is not a new journal, it still adheres to the commitment to *No Foundations*, it has a continuity beyond these shifts in emphasis; but, to a reader uninformed about how and why these developments have taken place, there is something curious here.

As the teaching of traditional jurisprudence would have it, the great either/or of legal theory is the choice between positivism and natural law. Natural law is the theory that links law to morality, was incubated in theology, speaks of higher and lower law, in some versions of god's law, the law of nature, the law of reason—in short, the theory which links law to other phenomena connected to ethics, justice and a substantive content embodying core values. Positivism, by contrast, is the theory that seeks to isolate law from all such 'fuzzy' talk, and seeks to take instead a cool, realistic, even cynical look at law as an institution defined by the use of compulsion, of force. For positivism, law has an author, the sovereign, who posits positive law, and what the sovereign wills is law. The content can be whatever the sovereign wills, is therefore massively contingent, and untrammeled by ethical or moral concerns.

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In the natural law tradition, law is reason; in positivism law is will, backed by force. Put this way, the shift from a journal committed to the positivistic theory of the contingency of law to one which makes the linkage between law and justice central to its project is not explicable as some gradual evolution, but might appear to be a complete rejection of its starting point.

A blow by blow reading of the journal's corpus of articles would not be appropriate here, but some surmises as to the point of containing the evident shift within a framework of continuity might be proposed. *No Foundations* in its positivist guise presumably takes its impetus from a rejection, above all, of metaphysics. Although law was to be investigated via politics and philosophy and sociology, the legal object would be presumed to be analytically autonomous, not a derivative of any other field of enquiry such as the moral and political philosophy of justice, or ethics. It would be literally not a metaphysics, but a physics—denominated by a field of forces, sceptical, like postmodernism, of the *meta*.[1] A view of law with no foundations, the anti-foundationalist position would reject any discourse of justification of law derived from any position claiming to be higher than or deeper than law. In its newer formulation, the journal's commitment to linking law and justice through interdisciplinarity would appear to suggest an assimilation of a natural law perspective, a perspective usually associated with foundationalist discourses, but the anti- (or at least non-) foundationalist commitment remains on the masthead. Can one be an anti-foundationalist natural lawyer? Presumably the new editors think so. This would have to be a theory of necessarily contingent justice. This may be possible, but will take some elaboration. Can one square the theory of reason with the theory of will? Well, yes, a Hegelian can, by means of the theory of rational will, but the Hegelian perspective has not to my knowledge been utilised here, and would be precisely the metaphysics which the journal is at pains to avoid. Or are there options beyond reason and will, such as, for example, imagination?

2. Watt's Beckett: gods, greeks

One contribution from the new era can be used as an example of the matters at stake. Gary Watt's contribution refers to:

> [T]he classic dramatic tension 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'. (Watt 2012, 119.)

Watt discusses law, transcendental rights, and customary values, and if he were the new natural lawyer of new-era *No Foundations*, we might expect to find these

1 See Lyotard 1984, xxiv: 'I define *postmodern* as incredulity towards metanarratives'.

transcendental rights and customary values trumping positivist legal norms as reasons for setting aside the obligation to obey positive law. But Watt's sardonic tone, where rights are immediately paired with righteousness and customary values with excessive respect suggests that the positivist is still present in these pages; indeed the view that ideas of human rights and social norms are not intrinsic to law but are 'extra-legal norms' marks Watt's perspective as positivist. For Watt, law is law, and all the other stuff—gods and Greeks—is not law. Law for Watt has as its due *obligation*, transcendental or immanent values call forth only *respect*, an attitude rather weaker than the recognition of an obligation. Positive law is 'capital L Law'; other values—although Watt refers to 'transcendental norms such as the law of the gods and the law of kindred blood' (Watt 2012, 120)—are 'small l law' (not quite law).

Actually, Watt is confusing his categories here. He started with the centrality of positive law as 'real law', and flanked it with two kinds of 'not quite real law', on one side the transcendent norms of religion and its contemporary equivalent, he would say, human rights; the other being the immanent norms of social custom, rather oddly presented as 'kindred blood'. But this latter has become transcendent too—'transcendental norms such as the law of the gods and the law of kindred blood'(Ibid., 120), Watt says, contradicting his earlier definition of social group values as immanent contrasted with the transcendent values associated with divinity. How social norms shift from immanence to transcendence by way of a rebranding as kindred blood is a worrying development that, in its *volkisch* undercurrent, is rather troubling. And why is human rights grouped with the gods as the contemporary version of religion? Presumably for its universalism as against the particularism of kin. For its transcendence as opposed to its immanence (if we set aside that blood became transcendent too in Watt's argument). The difference between law's relation to transcendent values on the one hand and to immanent values on the other is an undercurrent running through the argument here developed, which will not entirely be given its due, but it suffices to say for the present that the distinction is crucial, and Watt's elision of the two is surely a misstep.

What Watt does resolve, although he may not be representative of the totality of the new orientation of *No Foundations* in this, is our earlier question of what kind of continuity of non-foundationalism is being pursued across the transition from extreme legal positivism to interdisciplinary law & justice studies. It becomes apparent that the sense of integrity & equity outlined by Watt which is not quite virtue, but maybe better, is a kind of Stoic ethic of internal consonance to process which makes no appeal to transcendence, finds justice in the mean, and in the keeping in harmony of two competing procedural values. The image is of a taut bow (Watt 2012, 139), wood and string in complementary tension, neither dominant. Watt contrasts 'a moral ideal in any categorical sense', which is not what he is proposing, with 'merit in a non-ideal (which is also to say "moderate" or "qualified") sense' (Watt 2012, 140-141). This is a specifically positivist law & justice: thus Watt offers one resolution (and an elegant one) of the matter which had me puzzled, how to remain without *Foundations* while making this move. He endorses behaviour

which, whilst 'not always positively virtuous', but 'can certainly be regarded as more desirable' (Ibid., 140). This moderate amelioration, where one aims to do better, but not to do the best—and it is implied even, that to aim to do the best might mar the less ambitious aim to do better—leads to his conclusion, in line with the Stoicism outlined, with the decidedly modest aspiration, in the well-known Beckett phrase, to 'fail better'. The use of this Beckettian sentence as carrying a meaning equivalent to helping 'to improve law and lawyers in practice' (Ibid., 141) seems to me to underestimate Beckett's massive comic gleeful pessimism. Fail better is funny. Watt's prescription is just melancholy. Is this best we can hope for? Is the aspiration actually to succeed exorbitant? What counts as success or failure, in the matters of law and constitution?

3. Beckett's Watt: 'pot, pot and be comforted'

Watt's take on Beckett as some kind of moderate liberal, like Jaroslav Hašek's party of moderate and peaceful progress within the limits of the law,[2] fails to get the Beckettian talent for worrying away at a detail until it explodes into a world view, or its collapse. For an example, look to, not Watt's Beckett, but Beckett's *Watt* (Beckett 1976). Watt worries about the attachment of names to things. The passage in question repays a lengthy quotation, slightly edited unfortunately, which damages Beckett's rhythm, but hopefully not his meaning.

> For Watt now found himself in the midst of things which, if they consented to be named, did so as it were with reluctance. [...] Looking at a pot, for example, or thinking of a pot [...] it was in vain that Watt said, Pot, pot. Well, perhaps not quite in vain, but very nearly. For it was not a pot, the more he looked, the more he reflected, the more he felt sure of that, that it was not a pot at all. It resembled a pot, it was almost a pot, but it was not a pot of which one could say, Pot, pot, and be comforted. It was in vain that it answered, with unexceptionable adequacy, all the purposes, and performed all the offices, of a pot, it was not a pot. And it was just this hairbreadth departure from the nature of a true pot that so excruciated Watt. For if the approximation had been less close, then Watt would have been less anguished. For then he would not have said, This is a pot and yet not a pot, no, but then he would have said This is something of which I do not know the name. And Watt preferred on the whole having to do with things of which he did not know the name, though this too was painful to Watt, to having to do with things of which the known name, the proven name, was not the name, any more, for him. (Beckett 1976, 78.)

This Watt's angst, is, I hope, clearly the same as that of the other Watt. This Watt, Beckett's Watt, is animated by a fear that the existent object somehow lacks the essence that would allow its name to be its true name. The comfort of knowing the names

2 Hašek 1974, x. Jaroslav Hašek, author of *The Good Soldier Švejk*, founded such a group as a satire on the timidity of electoral politics.

of things is lost. Likewise Watt, Professor Watt we better say, aims to distinguish the law that is truly law from the so-called law that is, by a hairbreadth, not law. This is the classic futile positivist quest, to isolate law from not-law, from transcendence and from immanence, and to allow that, if it 'answers all the purposes, performs all the offices', then it is law. But the law that lacks justice, is it law?—the classic question of the natural lawyer, which Professor Watt seeks not to answer but to neutralise by redefining justice as integrity & equity, or at least, by substituting the latter coupling in tension for the former ideal virtue. Watt has not after all provided the new *No Foundations* with the conjunction of law and justice which is being sought, perhaps because he remains more aligned with the legal positivist project of the earlier phase. What was troubling, after all, to Beckett's Watt? That things resisted naming. That names gave no comfort. That things slip from being not quite what their name calls them, inexorably, to being, even by a hairbreadth, not that thing anymore.

This puts the matters that separate the positivist from the natural lawyer in a broader framework. The positivist, as a species of analytical philosopher, believes that fixing the names of things is an exercise in eliminating metaphysics, resisting, with the later Wittgenstein, bewitchment by language.[3] The name of a thing is a matter of describing how it functions in language, with no surplus or residue. Law is that institution which is known as law. The natural lawyer is an essentialist by comparison, law's essence is to be located in a way that will involve a certain dealing with metaphysics, consideration of justice, concession to equity and fairness and so forth. The positivist may concede some of this, if this is how people refer to law, but only by way of usage, not by way of essence. The objection to the natural law tradition is the classic positivist accusation that an *ought* is being smuggled into a discussion concerning what *is*. Law ought to have justice as its essence, but if law is justice and the institution we observe is unjust then for the natural lawyer it is not law, whatever people may call it. For the positivist it remains law even if tarnished by injustice, because people (both people working in the legal institution [so-called] with an internal point of view, and people out there at large in the community regulated by this so-called law) persist in calling it law. The natural lawyer is foundationalist, law has a non-contingent essence. So, how can *No Foundations* remain so named yet investigate the conjunction of law and justice? One resolution, here suggested, is to accept the natural law argument not as an essentialist argument, but as a hermeneutical and genealogical one. Law has been associated with religious and moral arguments pertaining to justice, and what law *has been* cannot be ignored, as in the positivist vein, in favour of what it *has now become* in a secular context, but neither may the religious arguments be taken to be truths. This is perhaps the only way a non-foundationalist discourse of law & justice can be pursued. Therefore

3 Wittgenstein 1958 # 38: '[...] the conception of naming as, so to speak, an occult process. Naming appears as a *queer* connexion of a word with an object. —And you really get such a queer connexion when the philosopher tries to bring out the relation between name and thing by staring at an object in front of him and repeating a name or even the word "this" innumerable times. For philosophical problems arise when language *goes on holiday*'.

the name of law is a matter beyond the offices and purposes of law, but, avoiding the question of true law, law's essence, we can see that it is a matter of 'the more he looked, the more he reflected'.

For there is a more serious problem adumbrated here, which takes the *angst* from the ontological to the epistemological stage. It is not just that names cease to attach to things, but that this is so for Watt alone. It is Watt's ability to see names attach to things in a way that gives comfort which is lost. The name, 'was not the name, any more, *for him*' (emphasis added). For he could always hope, of a thing of which he had never known the name, that he would learn the name, some day, and so be tranquillized. But he could not look forward to this in the case of a thing of which the true name had ceased, suddenly or gradually, to be the true name for Watt. For the pot remained a pot, Watt felt sure of that, for everyone but Watt. For Watt alone it was not a pot, any more. (Beckett 1976, 78-79.)

This subjective doubt—it remained a pot for everyone else—leaves the positivist in possession of usage, but leaves Watt, looking, reflecting—Watt the thinker, Watt the critic—with an enquiry. One resolution of this, the conservative and reactionary position, is that the philosopher's only job is to find philosophical justifications for the common sense usages of language in his or her community,[4] returning to the reality that the pot remains a pot for everyone else, and that is what is to be justified. We are not in the foundationalist realm of absolute objective truth, but of 'the true name for Watt'. This is to twist the hermeneutical analysis in an interesting direction. Not the conservative sense that a tradition produces its own continuity, but that the questioning critic of here and now must excavate, or, even better, construct his own predecessors.

Watt is in effect experiencing Cartesian doubt—what he can know of the true names of things is not a problem caused by things, an ontological problem, but an epistemological one, caused by his crisis of the possibility of having doubt-free knowledge of things (even, it transpires shortly after, of his own identity and whether the name 'man' applies to him or not). The complicating factor added by my elision of pots and laws is of course the difference between concrete and ideal objects. Whether a pot can be called by me a pot, and thus be a comforting claim of knowledge of the nature of things is a question of a different order than the question whether that system understood by others to be law can be called law. Beckett's Watt has trouble with pot and not-pot. This could be a matter of this pot or that pot approximating to the true pot more or less. Professor Watt has trouble with law and not-law in relation to gods and Greeks. The law problem is not one of this law or that law (or this legal system or that legal system) approximating to the true law more or less. It is in this case a problem of the concept of law: how to make justice intrinsic to law but still have a contingent non-foundationalist theory.

To answer this question requires, I suggest, a shift of perspective beyond the dualism of either physics or metaphysics, either empiricism or idealism, either

4 Wittgenstein 1958, # 43: 'For a *large* class of cases—though not for all—in which we employ the word "meaning" it can be defined thus: the meaning of a word is its use in the language'.

positivism or natural law. The question becomes whether it is possible for law to open to the transcendent (and also the immanent, without equating the two), but remain non-foundationalist. I will endeavour to show that it is, in the very particular case of constitutionalism, in the very specific tradition of England. The argument, if it works, does so by rejecting an absolute opposition between the sacred and the secular, between law grounded in transcendent truth and the necessarily contingent law.

4. The architecture of constitution

The argument proceeds by way of a consideration of the appropriate architectural image of constitution, figuring constitutionality as a structure which can house law. I have introduced a complication here: law and constitution, and whether constitution is a kind of law, how the two terms relate. The problem can be instantiated by noting that there is an English legal system, and a Scottish legal system, but a UK constitution. Is a constitution a necessary prerequisite for a legal system? It is possible to argue in the UK that there is no constitution, certainly in terms of the definitions or instances of constitution found in most other countries. But again, the argument always proceeds by way of a discussion as to what exactly is meant by a constitution, and whilst other countries have a constitution with the features of permanence, entrenchment, a meta-level of fundamental rights or a higher law of transcendent values, well, the UK constitution lacks all these but is still some sort of constitution, less formal, less permanent, of the same level as ordinary law, but a constitution which can be named a constitution nonetheless. We can see the Watt question returning here: is the UK constitution something that resembles a constitution, is almost a constitution, but not a constitution of which one could say, Constitution, constitution, and be comforted? Is it a hairbreadth departure from the nature of a true constitution? Or is it something of which we have never known the name? Is there an overarching notion of constitution, encompassing these true constitutions of others, and the UK's slightly anomalous version, such that both are terms in one set?

It is difficult to think of the notion of constitution without thinking of an attempted permanence. Constitution lends itself to monumentality, it speaks a language of depth, of the fundamental, of eternal truths, occupying a more profound level of legislation than simple legislation: it is the necessary precursor to all future legislation, a legislation anterior to legislation. The making of a constitutionality marks a breach in history, a breaking of the soil which inaugurates a new building. This is the language of laying down a foundation, upon which a superstructure to contain a polity and its laws can be constructed. It is the notion of entrenchment, digging the ditches which will become the foundations guaranteeing the stability of the visible building, a building which can be adapted and developed in different ways, stable upon its unchanging secure foundation. A constitution is an architecture, a temple.

And yet, the exceptionality of the English has always resisted this pomposity.

The English constitution, as every English undergraduate student of law quickly learns to repeat, is different. Against the rigidity of others, it is flexible. Unlike the codification of others, it is 'merely' legislation. Against the unchanging stability of others, it is evolutionary, adaptable, capable of novelty in a way those 'carved in stone' could never be.

So, our image of English constitutionality cannot be an image of the entrenched foundational masonry built elsewhere. The English constitution was not a plan on an architect's drawing board, then executed in stone. No architect, no stone.

And yet, the English constitution, without plan, without solid materials, nonetheless *is*. How to picture it? Rather than a more solid building, conceding that it is a construction of some sort, think of it as a *tent*.

4.1 Tent, temple ...

The temple and the tent; both are structures, one far more solid than the other, but with certain functions in common. Both create a division of space into inside and outside, both divide an interior from an exterior, allowing the interior to take on a special status. The temple interior may be sacred, the outside secular, and, as will be seen, the tent can perform this division too. The metaphor of the tent and the temple invokes a theology provoking a commentary which performs some of the moves suggested in the discussion so far—an invocation of a tradition but divested of its truth claims.

For tents do not lack a significant standing in ways of thinking. A tent is flimsy, vulnerable to the elements (also offering protection from the elements), to be erected and dismantled and moved to the next place. It may contain a travelling freakshow, the headless man and the bearded woman, Lola Montes or the army general on manoeuvres; it may on the other hand contain a god. In common is the fact of being a container. A tent can be a foundation.

In the book of Exodus, the children of Israel, in the wilderness of Sinai, receive the ten commandments and what the Bible glosses as 'various laws and ordinances', and place the ark of the covenant in a tabernacle (*tabernaculum*, a tent), instructions for the construction of which are exhaustive: 'thus was all the work of the tabernacle of the tent of the congregation finished' (King James, Exod. 39.32). The tent is an enclosure to sanctify the covenant with god—but it is a portable, movable enclosure. It defines a community, a congregation, and so an inside and an outside, of a people at that point without a land.

The sequence of the biblical narrative is instructive. In Exodus, Moses communes with god, and receives the ten commandments, written by god on the tablets, and the instructions for the construction of the building within which god will meet with the children of Israel, the tabernacle, the tent. While all this is happening, the people make the golden calf and worship it. When Moses descends with the laws, in anger at the idolatry, he smashes the tablets of the law. Then the idol is destroyed, and the word of the law is reinscribed a second time, and the tabernacle is built to contain the covenant. These are the moments of the people's relationships

with gods. In the first, their leader meets god directly, and receives the tablets of the laws, and the instructions for the construction of the tabernacle. In the second, the people worship an idol of gold. In the third, after the destruction of the false idol, the physical representation of the true covenant between god and the people is made sacred in the construction of a tabernacle. Thesis: god's laws, delivered only to Moses; antithesis: idolatry, the people's worship; synthesis: the law, constitutionalised and revered in the tabernacle.

The relationship between the giving of the laws, figured by the tablets, and the making of the constitution, figured by the tabernacle, inverts the expectations of a constitutionalist: instead of, first, the framework and form of a constitution, and then the substance and content of the laws, here the substantive laws are given by god first, and then the framework to memorialise and contain and present the covenant is constructed. God gives the laws to the leader while remote from the people, then the theatre, the spectacle of the covenant is built amongst the people. It is a home in which god may become manifest, also a storing place for the laws. This inversion of the logic which says, first build the container, then fill it with content, is perplexing. For, surely, one cannot start with uncontained content and only subsequently enclose it in a containment? But the apparent paradox is instructive, for the narrative presupposes starting with the sovereignty of god. It is this primordial sovereignty, uncontained by constitutionality, which gives Moses, not a constitution, but laws. The function of a constitution would be to specify a legislator empowered to make laws, but divine sovereignty does not require the medium of a constitution to define and delimit its powers (if there is any constitutionality in divine sovereignty, it is a self-imposed limit, the rainbow shown to Noah which promises an end to destruction).

But between the laws and the constitution—between the plans for the constitution (the covenant) and its construction—there is the moment of idolatry. The handing down of the laws is a moment of legislation without constitution, of content without form, it is a moment of external legislation for a people not present except by the representation of their leader. The conversation between god and Moses has as its object how the people will be required to behave, but the people are not present to accept or reject the terms offered; Moses accepts on their behalf, but it is not clear, in fact the next moment of the idolatry confirms, that the people have not given to Moses the authority to make this compact with god. The laws say, 'you will be together this way', but it is an external command, and moreover the addressee is absent. The idolatry is a moment of form without content, 'the people gathered themselves together unto Aaron, and said unto him, make us gods' a moment of auto-instituted worship, of 'something/anything', an indeterminate object without symbolic significance. This is an institution of a social form saying, not 'we want to be together in this particular way, and to commemorate this we institute this constitution', but merely 'we want to be together, unified in togetherness, in no particular way'. When Moses, bearing the laws, encounters the idol-worshippers, he destroys the laws, for the practice of idolatry the people have instituted in his

absence is in breach of god's laws. To Moses, the people are not worthy of god's laws, and so the laws are not promulgated. The people must be purified, the pious separated from the idolatrous, and so Moses orders a massacre: 'Put every man his sword by his side [...] and slay every man his brother, and every man his companion, and every man his neighbour. And the children of Levi did according to the word of Moses: and there fell of the people that day about three thousand men' (King James, Exod. 32.27-28). Only after this were the laws re-inscribed in stone and the tabernacle constructed to house them.

So the tent has a violent pre-history. God gives Moses his laws, the people worship an idol, Moses destroys the laws and, following god's will, orders a massacre. Only after these false starts is the process of containing the laws in a tabernacle which will represent the covenant of god and people constructed. Before this, the people have rejected god, by means of idolatry, and god has rejected the people, by means of massacre. The limits of consensus are bounded by the two acts of rejection, the people's rejection of the god of laws in favour of the golden idol, and the god of laws' act of slaughter against the people. This presents a figure of the fragility of the possibility of a constructed harmony between god and people, built by means of the tent, the aftermath of apostasy and civil war.

The tent has a two-fold function—first, to domesticate god, to provide a container for his presence to his people, neutralising his wrath against the idolatry of the people, thus making the transcendent immanent, the universal particular. God becomes the people's god; the people become god's people. Second, to unify the people after the civil war, to give them an identity in their common worship, to provide a focus, a hub around which their loyalty can revolve.

The architecture of the tabernacle is a complex, detailed plan, and, in its specificity, it may well depart from our notion of a tent as a rather flimsy, variable and flexible construction, but the essential feature, that it is not fixed in place, that it accompanies the people without a land in their desert wanderings, is the crucial point for the present argument. The tent has an ultimate destination, the ark of the covenant, temporarily at home in the tabernacle, is ultimately bound for the temple, which will be its ultimate eternal resting place, but in the time before the temple, it is both a crucial location—where god and people memorialise their connection, and meet—and not of a particular site, a nomadic, ever impermanent place, reconstituted anew as the journeying continues. Even thus, it makes the identity of the people, as a people of god's law, and unified in that identity in relation to each other, and particularised in that identity in comparison to other peoples.

This exegesis of the tale from Exodus might seem to be itself a wandering thought, but if we take it, rather, as attempting the thinking of the significance of wandering, of how, even in non-fixity, a symbol can perform the essential tasks of a constitution, but without becoming the permanent entrenched fixed place of a constitution, being a tent, not a temple, then we might comprehend the tradition of English constitutionality: resistant to any definitive definition of form or content, but still embodying the promise and identity-giving function of constitution. Part of

that function is the openness to the transcendent, and the interest lies in achieving this without defining and fixing the identity of the transcendent—about universal values, but these values not defined, not fraternity, equality, liberty, not the pursuit of happiness, as we find in the temple-constitutions of other countries, but a fugitive gesture in the direction of values evoked but not defined in the tent-constitution. Another part is the immanent connection to its particular community, but once again the tent-constitution is different, it travels with its people, it does not become a temple-constitution to which the people must make a pilgrimage.

This might seem all quite particular, an investigation of English exceptionalism—but the suggestion can be made as to whether the tent is the exception that proves the rule. Are temple-constitutions really that much more solid, permanent, entrenched? Or is their apparent permanence illusory, an apparently grand architecture of fundamental rights just as easily dismantled as a tent-constitution? If you have the right tools—state of exception, state of emergency, derogation, margin of appreciation—then cannot the temple be reconfigured as easily as the tent?

Gary Watt gave us the useful image of the bow, and the tension between the wood and the string, as a way of imagining how two values might interact in a mutually sustaining way. This helpful image can be expanded in the notion of the tent, for the tent is nothing more than canvas, sustained by multiple tensions produced by the vectors of the guy ropes and poles. J.B. White has used the tent image too, to think about law, but in a way that appears more like an image of a toddler in reins, only experiencing restraint when pulling too sharply in one direction.[5] The tent gives us rather the notion of a structure where the sustainability of the always tentative equilibrium which means the tent stays up depends on the relative forces at play. In a temple, the more solid architecture fixes these relationships, and we know and understand the determining power of the pillars, their density and weight, and how the structure is stabilised upon its solid, entrenched foundations. The tent, by contrast, gives us a sense of a negotiation between the forces at play, the values of transcendence and immanence, whereby the edifice will either stand up, or tilt in one direction, distorted by an over-emphatic force in one direction not countered by countervailing forces, eventually toppling over into outright collapse. There is a 'true' shape to the tent-constitution, but also a margin of variation, where it can become rather otherwise in proportions, but still be sustainable. Then there is a point, or rather a series of points, when the balance is lost and the tent fails and falls. These comments are the beginnings of a suggestion that the tent image works for the English constitutional tradition, and perhaps for others too. The English constitution, pictured as a tent, allows of an analysis concerning the constituent elements that hold the tent up, the poles and guy ropes, the need for a taut canvas to keep the outside out and the inside in. It allows too, that the tent may shift shape

5 This notion of tension has been discussed by White in relation to Robert Frost's poem, *The Silken Tent* ('[…] And only by one's going slightly taut [...] Is of the slightest bondage made aware'), as discussed by Etxabe and Watt in their editorial introduction to the forthcoming volume of essays on White (Etxabe & Watt 2014). I am grateful to Julen Etxabe for drawing this to my attention.

over time and in reaction to the demands it faces, may be pushed and pulled out of one shape and into another without ceasing to be the same tent.

But a further difference might be the allowed vagueness by means of which the tent poles and guy ropes are not decoded into specified values, but instead summoned up as a complex system of interactions. In the temple-constitutions, the ideas named and represented in the foundations, the corner stone and the pillars are certainly, beyond ambiguity, given their true names.

4.2 ...Adam's hut, Noah's ark

Beyond tent and temple, Barthes has taken the analysis of scriptural enclosed spaces further, in his discussion of various types of room spaces. Barthes is studying what he calls *idiorrhythmy*, the attempt by groups of several individuals to live together while preserving his or her *rhuthmos*. Ideas of community, of difference within sameness and sameness within difference, and so, the demarcation of spaces as different from their surroundings is part of the inquiry. Barthes starts from the notion of Adam's hut in the garden of Eden, 'that primitive, fantasized hut […]. Every architect tries to remake Adam's hut—not a functional determination, but a symbolic operation. To create a space that the subject can interpret through his own body. House can't be understood without reference to the sacred (dwelling = language?)' (Barthes 2013, 49).

Adam's hut, the dwelling in language: Barthes' notes go no further, but must now inevitably evoke a Heideggerian notion. A structure communing directly with divinity in a prelapsarian Eden. Barthes presents the other spaces he discusses as variations on this theme. After Adam's hut, his first room space is Noah's ark, one of three forms, the others being the desert tabernacle and the temple of Jerusalem which puts us in spaces already discussed here.

For Barthes, Noah's ark is 'total autarky: compendium of the worlds, encyclopedia of all species'; the Desert Tabernacle is 'tent, pavilion, dwelling, Tabernacle (the tent in which the Ark of the Covenant would be placed)', 'different groups spread around an uninhabited centre = the very principle of idiorrhythmic organizations (I'd like a less voluntarist term: constellations?)'; the Temple of Jerusalem is 'Solomon's temple + Ezekiel's two visions = fantasy of the "total building". [...] Early model of the monastic structure: an exclusive, total multifunctional space. [...] Sacred calculations: the Temple and the tribes around the Tabernacle > Monastery, palace and church'. (Barthes 2013, 49-51.)

Taking Barthes notes on these three spaces, as models for ways for people to live together, we can tease out three models of relevance to the thinking of constitutions. Noah's ark, as Barthes says, is a totally self-sufficient community, present to itself without rules (either laws or constitution). The Tabernacle is a focus, but an empty space, the uninhabited place of power, the form without content, the structuring of an absence, a constituted space in anticipation of a future presence. The Temple is the fantasy of an eternal totality, the definitive constitution imposing for all futurity limits, boundaries and definitions, the presence made permanent. Noah's ark is

a solid structure which drifts, the tabernacle is a temporary structure which also moves, the temple is both solid and fixed (stationary).

Taking Noah's ark as the link between Adam's hut and the tent and the temple, variations on humanity's relationship to divinity are evoked: direct presence in Eden, the preserved community of beings in the time of the flood, the people in covenant with god at the tabernacle, and the 'total institution' of worship in the temple.

Noah's ark adds to the present discussion an evocation of the drifting community, outside of god's pleasure in Eden, awaiting the retreat of the flood, sustaining an inside against the great and threatening outside, embodying a covenant with god, eventually symbolised by the dove, the olive leaf, the rainbow. Just as the ark of the covenant was constructed after the slaughter of the idolatrous and in order to save the chosen, so Noah's ark kept close and safe those immune to the wrath of god delivered by means of the flood. The ark of Noah is certainly the first ark of the covenant.

The temple of Jerusalem adds to the present discussion a destination, a fixed site and fixed proportions for the placing of the ark of the covenant. The temple of Solomon is certainly the last tabernacle.

5. Conclusion

What interests me, in conclusion, is whether there is a point, in a 'tent-constitution' culture, in resisting the impelling teleology that transforms tents into temples. There are many, both progressive and reactionary, who call for a constitutionalising of the UK, a written document, installed in an ark of the covenant and put on the altar of the temple for worship—although this is not the imagery they would use. Also in Scotland, also in Europe, we have seen the demands for clarity in the definition of the institutions and the rules and their relationships, also definitions of what is inside and what is outside, lines between. The vagueness of the tent is not an essential virtue, the tabernacle which cannot be entered because it is occupied by the divine cloud: some dispersing of the divine vapours is a necessary act of rationalist enlightenment; but a transformation into a purely utilitarian machine of administration would lose a central truth of the constituting of a polity—that it has to be open both to the transcendent and the immanent in the realm of values.[6]

However, tentatively, these values can be named, without being claimed as

6 King James Version, Exodus 40.34-40: 'Then a cloud covered the tent of the congregation, and the glory of the LORD filled the tabernacle. And Moses was not able to enter into the tent of the congregation, because the cloud abode thereon, and the glory of the LORD filled the tabernacle. And when the cloud was taken up from over the tabernacle, the children of Israel went onward in all their journeys: But if the cloud were not taken up, then they journeyed not till the day that it was taken up. For the cloud of the LORD *was* upon the tabernacle by day, and fire was on it by night, in the sight of all the house of Israel, throughout all their journeys'. In relation to this, the method here employed, in the words of David Friedrich Strauss, is 'that the matters narrated in these books must be viewed in a light altogether different from that in which they were regarded by the authors themselves. This latter method, however, by no means involves the entire rejection of the religious document; on the contrary, the essential maybe firmly retained, whilst the unessential is unreservedly abandoned' (Strauss 1983, 25).

'British'. At this point in this presentation, this is no more than an assertion, but I wish to suggest that the cardinal vectors by means of which the 'tent' is kept in an appropriate tension amount to four poles, held taut by twelve guy ropes. Those expecting a constitution to be a temple of marble built from an architect's plans will deny the name constitution all together when applied to the English tent (a tent which can stretch over England, Great Britain, the United Kingdom, or retract from these areas); the tent, it will be said, is too impermanent, too vague a structure, too dispersed to take that name. The poles over which the canvas is stretched are four in number, and stand for four poles of attraction, determining the force field, the surface planes (in the manner of Deleuze[7]). They are (or could be, for example), in turn, the idea of the sovereign, of the law, of the constitution and of the public. These four poles, in various combinations, produce twelve forces, namely sovereign law, sovereign constitutionality and sovereign public; legal sovereignty, legal constitutionality and the legal public; constitutional sovereignty, constitutional legality, and the constitutional public; public sovereignty, public law and public constitutionality. Developing this content in which the names of the forces at play are sought, defined and their deployment analysed, is a larger work of specific content; what the current piece has presented by way of prolegomena, is an indication of the form such a study might take. A possible suggestion, by way of conclusion, might be that what is specific to the English situation is not any of these values, alone or in combination, all of which are transcendent and universal, but instead the very act of keeping their relationships in movement—this might be the English essence (but not foundation)—not deciding, deliberately not resolving which balance of powers will be definitive. A resolution in favour of irresolution. Everything remains in flux, and to be played for, and subject to politics rather than resolved by law, as long as the tent does not become a temple, as long as, unlike Beckett's Watt, we refuse to be excruciated by the ghosts of the divine, by the pot which, by a hairbreadth, is not the true pot, by the temptation to turn our tents into temples.

At a time (June 2014) in the UK when constitutional politics is defined in terms of independent sovereignty—both for Scotland from the UK (the forthcoming referendum on independence, promoted by the SNP, the Scottish National Party, whose platform is the need to assert Scottish sovereignty by leaving the UK) and for the UK from Europe (the recent electoral successes in both local and European elections of UKIP, the United Kingdom Independence Party, whose platform is the need to assert UK sovereignty by leaving the EU); at a time when political debate is defined by one government minister asserting the need for schools to resist 'Islamisation' by promoting 'British values',[8] including the core value of rule of law, when, at the very same time, a court accepts the need, for the first time, for significant

7 See Deleuze & Guattari 1988, 20: 'It is not a question of this or that place on earth, or of a given moment in history, still less of this or that category of thought. It is a question of a model that is perpetually in construction or collapsing, and of a process that is perpetually prolonging itself, breaking off and starting up again'.
8 As Ian Jack reports in *The Guardian*: 'Michael Gove thinks that every state-funded school in England should be obliged to promote "British values"' (Jack 2014, 37).

elements of a criminal trial concerning alleged terrorists to take place out of public view[9]—a decision which at the very least strains the definition of rule of law—then, at such times, the need to assert and develop ways of thinking that allow clear images of how the transcendent and immanent values which inform the UK's constitutional covenant interact (with each other and with the legal systems of the UK) is more pressing than ever. The pot that is not a true pot, the tent that is not a temple.

9 See Bowcott 2014 in *The Guardian*, 14 June 2014.

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Is Justice for Sale? Further Readings on Saramago and the Law

Joana Aguiar e Silva*

1. Law between justice and certainty: cultural-humanistic and political-economic insights

At the end of his lecture—'Meeting Alexy'—at the Faculty of Law in Coimbra in 2012, Professor Robert Alexy confessed that throughout his professional life most of his efforts have been addressed to the need to reconcile, in law, the fundamental dimensions of morals and mathematics. In other words, of justice and certainty, two magnitudes that need a careful and delicate balance to provide a legal order with its authority and legitimacy. As we know, that search led the distinguished professor towards the path of legal argumentation, and to an understanding of legal discourse as a special case of practical discourse (Alexy 2008, 203-213).

Throughout history, different concepts of justice and different notions of certainty have shaped multiple legal orders, with greater or lesser awareness of the difficulty of their empowerment in the context of law's fulfillment. It is not easy for law to accomplish justice without certainty, but without justice, certainty alone is of no value. Over the last few decades, Prof. Castanheira Neves has been exploring a *tertium modus* of judicative mediation that somehow seems to meet this balance between mathematics and morals introduced by Alexy.[1] This *tertium modus* may lead to a synthesis that overcomes the sense of autonomy of parameters such as

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** I am most grateful to Julen Etxabe for his helpful comments on an earlier draft of this essay. My thanks also to Vítor Aguiar e Silva, Professor of Theory of Literature Emeritus, at Universidade do Minho, for his careful and insightful reading of the first draft. I am also thankful to my dear friend Henry Warren, for his endless patience in revising the English version of this text with me.

1 The importance of judicative decision as the *punctum crucis* of legal methodology, as that 'general-particular' that brings law to its own 'true meaning and being', has been a major hallmark of Castanheira Neves's writings over the past decades. This idea has allowed him to understand that legal decisions, while not adhering to traditional logical determinism, do not have to submit to any sort of free legal activism or irrationalism. Instead he puts forward a third way, the *tertium modus* of judicial mediation, which a proper methodological model the respective *praxis* would define. See Neves 1993, 33-34.

those of certainty and justice, or of determinism and judicial activism. What both authors have been trying to establish is the need to grant the constituent nature of law's problematic and judicative dimension in the settings of legal reality without ever dismissing law's normative and pragmatic intent.

Contemporary thought tends to be split between those who link the attainment of law's values of justice to its profoundly humanistic and cultural dimensions, considering certainty as a function of that dimension's strengthening, and those who, giving more importance to certainty as a means to accomplish justice, prefer to focus either on the assertion of law's logical positivity, or on its linkage to political and economic facets. The difference may lie on what each side identifies as being legal certainty. For the latter, this concept may still be related to the potential determinability of a legal order they mainly identify with a stable and coherent body of general, abstract and imperative rules. These rules would still have potentially pre-determined meanings, and its empirical and social applicability would be possible as a merely reproductive or effective undertaking (see Holmes 1897; Posner 2009; Kelsen 1984). For those who claim the relevance of law's humanistic and cultural dimensions, the concept of legal certainty is more problematic, as it is the actual result of a process of reinterpretation triggered by the transformations of legal philosophy throughout the twentieth century. By considering law's linkage to culture and humanities a privileged space for the conciliation of tensions between justice and certainty, we are complying with an understanding of certainty as a dynamic and always imperfect achievement. Legal certainty is always a contingent value, as it is the result of a permanent effort to rebuild the meaning and intention of legal rules whenever they meet particular contexts of application (see Zaccaria 2004; Viola 2004; Kaufmann 2010; White 1985, 1990 and 2012; Sarat & Kearns 1994).

The process through which law is applied, and in which perceptions and apprehensions of lawyers and judges leave a clear print, has long ceased to be taken as a mechanical procedure. We consciously see it, today, as an argumentative circle of questions and answers fluctuating between rules and reality, going from general to particular and to general again, and gaining density in the process. This is, nevertheless, a circle presided by a cultural and professional pre-comprehension. According to James Boyd White, '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' (White 2012, 15). The art of judging—an art of mind and imagination—aims to reach points of balance in which justice and certainty, demanded by every legal decision, meet and mutually reconstruct each other, time and again. What the ancients called *prudentia*, was in fact a practical art: the practical art of judgment that allowed the *epieikeia*.

Since the aftermath of the twentieth century's world wars, rule of law has undoubtedly been through a severe process of revision. Discussing the meaning of justice within the formal frameworks of legal decision under the actual rule of law, Desmond Manderson insists upon the virtues of the concept of polarity.

Such a concept would represent for him a platform in which the elements inside the aforementioned tensions—norms and facts, form and substance, justice and certainty—would not dissolve or annul each other in some stationary resolution.

Polarity would allow him to hold on to the rule of law, but to have it recast in order to embrace the polyphonical experience and the irreducible contradictions of human discourse, 'not just as the fate of law but as its most important asset' (Manderson 2012, 6). Even though insisting upon the irrepressible uncertainty that such a conception means for law and legal judgment, Manderson's perceptions on the relation between politics, justice, law and human discourse often resemble those of Castanheira Neves in his search for that *tertium modus*.

Manderson focuses his analysis on D. H. Lawrence's writings, particularly in his novel *Kangaroo*. First, he stresses his skepticism towards any normative or moral worth of modernist literature, far more compromised with ideals of aesthetic autonomy and with the image of instability, controversy and ambiguity inherent to human subjectivity, than with its eventual correspondence to the world or to man's political and social world. This assertion justifies his understanding of law and literature's efforts to bring justice and a human perspective to an otherwise formal law by way of literary analysis as a 'romantic fantasy' (Manderson 2012, 17-20). Notwithstanding this, he finds Lawrence an uncanny point of entry into all these interrelated issues, and does not hesitate to use his writings in order to reconfigure an idea of justice not as an object of closure but instead as process, experience and continuance. What Manderson seems to argue is that law, just like literature, does not put forward unequivocal solutions, rather inducing into those who have to experience it the pains and the doubts that are the very circumstance of human existence. All together, he ends up carrying out an extraordinary exercise in law and literature, asserting that Lawrence's novel is a timely platform to reassess our problems with justice and judgment (Gómez Romero 2013, 141). Like Lawrence, 'we still face the terrible problem of what to do once we can no longer believe in our old habits of thought: for belief has died though the habit of believing lingers on' (Manderson 2012, 3).

It is not easy to draw boundaries. Being a humanely built reality, law clearly shares both the strengths and weaknesses of its creator, its vices and its virtues. Somehow paradoxically, nevertheless, jurists have repeatedly tried to conceal law's humanity, possibly in their eagerness to search for certainties more solid than those provided by human limits.[2] They have even tried, in a way we might almost consider 'unnatural', to conceal law's own historical dimension, unaware of the fact that without history, law would not exist at all, and that without the deep knowledge of its own history, its meanings and its range would become utterly unintelligible. One of the main ideas of legal thought in 19th century Europe, devoted as it was to the drafting of Codes that were intended to be perfect, bounded and virtually timeless, was precisely to withdraw law's purposeful abstraction from history. Legal reality's

2 This probably inspired Kelsen to withdraw all ethics from the groundings of his *Pure Theory of Law*. In order to be relevant as a science, law would have to let go of people...

own lack of historicity—embodied in legislative reality—would act as the condition of its certainty and objectivity. Underneath was the belief that history, like humanity, like the very culture in which they merge and with which they engage—and from which they are never independent—, opens law's doors to an extraordinary torrent of uncertainty and indefiniteness, one to which a certain idealization of law does not want to be associated with.[3]

Stances taken on this matter by another great German legal scholar, Friedrich Karl von Savigny, have always, somehow, been puzzling. The claim of law's distinctive historical and cultural contours has long been associated with Gustav Hugo's and Savigny's Historical School of Law. For Savigny, law, as language itself, was, above all, an historical expression of a people's spirit (Savigny 1878, 30-34; 1970, 56-58). This claim can be easily accepted; what is more difficult to understand is the fact that its implications had little impact on the author's legacy. Maybe because the assumptions and values embedded in the culture and spirit of 19th century Germany, namely values of systematic, logical rationality, or the need to grant certainty to legal science, eventually spoke louder.[4]

Savigny's idea of historical forces was not quite the same as ours: culture, as the notion of *volksgeist*, was not an aspect of society for him, but mainly an intellectual tradition. The tension between history and system that runs through his thought, can be felt in his aim of achieving a legal science combining the systematic (what he called in his *Methodenlehre* the 'philosophical') and the historical (that is exegetical and hermeneutical) treatment of positive law—identified with the tradition of Roman law in Europe. This historical treatment of positive law would represent the empirical input into a theoretic and logical construction, leading to a true science of legislation (Wieacker 1993, 397-454). The way Savigny deals with this tension deserves Wieacker's discreet approval, while it receives Hermann Kantorowicz's harshest remarks. Kantorowicz saw the bond between Savigny and the doctrine of the organic birth and coherence of culture, as of law, as merely 'accidental, superficial and constrained by fashion'. The most distinctive hallmark of the Historical School of Law would have been its ultimate disregard towards human life and historical reality (Kantorowicz 1970, 451).[5] In the end Savigny handed the game to 'his opponents', mainly by endowing the French School of Exegesis with an extraordinary

3 In a quite opposite register, Bertrand du Marais underlines the need for modern legal training to endow future jurists, also future legal creators, with skills that allow them to easily move around different legal cultures, requiring for the effect a deep knowledge of their own legal system and its history (Du Marais 2012, 458). By way of example only, Lawrence Friedman, as a 'legal sociologist who appeals to historic data', warns of the urgency to understand law and rights as an inherent part of each people's historical culture (Friedman 2011, 1996-1997).

4 Contreras Peláez is particularly critical of Savigny's historicism, arguing that, in a practical manner, the Historical School of Law led to a purely formalist conception of law (Contreras Peláez 2005, 121-124).

5 Fikentscher also highlights Savigny's dogmatic and systematic merits, considering his historical research as merely instrumental for the development of his idea of a rational system of Roman law (Fikentscher 1978-79). Speaking of Savigny's unintentional positivism, Roger Berkowitz agrees with this line of thought, stating that this German author's 'scientific approach to law did more to advance German legal codification than did the work of any other nineteenth-century legal figure' (Berkowitz 2010, 9, 135).

methodological repertoire.

Also Oliver Wendell Holmes, whom we might consider seminal for cultural and humanistic legal studies, in his emblematic text called 'The Path of the Law', foretold that 'the man of the future is the man of statistics and the master of economics'.[6] Oddly enough, Holmes' entire text seems to argue for the need to expose the essential bond between common law and each community's beliefs and moral practices. Defying law's static nature, the author urges scholars to plunge into its history in order to reach what he calls an enlightened skepticism, towards a deliberate reconsideration of the true value of legal rules. For, as he underlines, the history of law is the history of a people's moral development. But, at the same time, as he stresses law's need to evolve along with the community's moral and cultural practices, he ends up grounding law's sense of autonomy in its disregard for morality and for integrity. By severing law from tradition and cultural roots, he ends up risking its autonomy at the hands of purely political forces or allowing it to be manipulated by pressure groups.

Still another paradoxical example is that offered by Richard Posner, a legal scholar who has been, mainly in the common law context, one of the most emblematic references of law's connection to economics. Posner has certainly distinguished himself for the work he has developed in that field, but also for the no less relevant contribution he has made to law and literature studies, as well as for culturally legal research (Posner 2009). Often speaking and writing against these lines of investigation, and on behalf of the link he sees as more natural between law and economics, the distinguished judge has been responsible for an intense and most stimulating debate in the field of law, culture and literature.[7]

Considering the recent (and still thin) rehabilitation of cultural and humanistic legal studies in some legal academies as a way of balancing the rise in legal economic studies, Naomi Mezey admits the first will hardly ever reach the status of the second, since it tends to complicate Law, instead of simplifying it. This is a facet that the author rightly considers a virtue instead of a flaw of the endeavour (see Mezey 2001, 67; Constable 2005; Cover 2005; Ost 2004). Truth as simplification—or the illusion to it—does not necessarily lead either to certainty or to justice. Holmes himself had already imparted the idea that certainty is an illusion, and rest is not man's fate (Holmes 1897, 466), echoing the difficulty in obtaining Alexy's aforementioned conciliation. One way or the other, the accomplishment in and through law of these two fundamental matrices can hardly be separated from humanistic and cultural considerations.

At a certain moment, this rehabilitation embraced the duty to balance the increasing relevance, inside and outside the walls of the academy, of the so-called law and economics movement. Its main and wider goal, nevertheless, was the one of providing resources likely to help free contemporary law from what Guido

6 This text represents the speech Holmes delivered in 1897 during the opening of a new building for the Law School at the University of Boston (Holmes 1897, 469).

7 The fact that his commitment towards the law and literature movement has made him improve his legal writings has been substantially pointed out by critics.

Calabresi, amongst others, considers to be its own sterility, enhanced by a structurally functionalist and technocratic ideology. Humanities would stand as an antidote to the understanding of law as a value-free, social ruling machine.[8]

Writing in 1998, and taking stock of the law and humanities scholarship over the previous decade, Austin Sarat underlines the need to overcome this approach of rescue and rehabilitation of particular teaching and legal patterns through its association with humanities, urging us, instead, to take on critical challenges that ultimately lead us to re-think the boundaries of traditional concepts of law and of humanities, and to 'move from interdisciplinary eclecticisms to various new disciplinary syntheses', striving to 'build a disciplinary study of law outside the Law School' (Sarat 1998, 404-407).

Law and culture stand in a complex dialectic relationship, equally formative and informative. One cannot be thought of without the other, and both become unintelligible when considered alone. The last decades have indeed witnessed a deep renewal of the very notion of culture, particularly in the area of legal cultural studies. Instead of a reified notion of a steady and stable set of beliefs, values and institutions, culture has been redefined as a flexible selection of practices and discourses created through historical processes of discussion around signs and meanings. Classical ideas of closed, coherent, integrated systems are clearly inadequate, and today's culture constitutes a highly controversial reality, one that is continually created and recreated in particular historical moments, in multiple specific settings, inside global movements of people, capital and symbolic systems. Speaking of the transformation that the concept of culture has undergone, Sally Engle Merry takes it back to the intense scrutiny which the anthropological studies of the 20th century's last decades submitted it. Anthropology's main goal during the 19th century had been to resist the 'civilizing mission' fundamental to legitimate European colonial projects, by stressing the authenticity and coherence of different cultural patterns. Eventually, there came the time when, facing a different frame of circumstances, the model revealed its fragilities and inadequacy. Globalization determines the need to accept the fluidity of boundaries, whether national, cultural or ethnic; identities become hybrid, as cultural forms and practices become connected to 'global systems of economic exchange, power relations and systems of meaning'. Inherent as it is to the life of society, culture is also part of different systems of power, and different cultural forms sustain 'hegemonic understandings as well as the counterhegemonies that challenge these understandings' (Merry 1998, 577-582).

This redefined model of culture, as pointed by Merry, has significant implications for theoretical studies aiming to assume the linkage between law and culture. But a cultural study of law not only dares us to defy traditional ideas of culture, as it also allows us to draw new boundaries and intentions onto law. In Naomi Mezey's perspective, law is simply one of the signifying practices that constitute culture, and

8 The fact that Guido Calabresi, considered one of the mentors of the law and economics movement, together with Posner and Ronald Coase, puts forward these ideas, stresses the fluidity of the boundaries earlier mentioned. On the politics of disciplinarity, see Klein 2005.

it cannot truly fulfill itself if divorced from culture. The same way that culture cannot be separated from law.[9] Thereby, admitting that law has meaning-making power is to recognize that social practices are not intelligible when logically separated from the laws that shaped and gave rise to them (Mezey 2001, 46). Even the rule of law is, according to Paul Kahn, a social practice; it is a way of being in the world. 'To live under the rule of law is to maintain a set of beliefs about the self and community, time and space, authority and representation [...]. Without these beliefs, the rule of law appears as just another form of coercive governmental authority. This is the way law appears to the alien who happens to find himself temporarily within the jurisdiction' (Kahn 2001, 53). By providing the main categories in terms of which social life becomes apparently natural, normal, stable and coherent, categories through which the world gets to be interpreted and made meaningful, law shapes society from within.[10] Legal discourse and practices are cultural constructs that convey powerful meanings not only to those with legal training but to everyone in society.

This different conceptualization matches what many scholars inside the so-called socio-legal studies consider a constitutive theory of law, one which acknowledges itself as both constituting and being constituted by social relations and cultural practices.[11] In other words, law participates in the construction of meanings inside the shared semiotic system of a given culture, while being the product of that same culture and of the practices which reproduce it. Whether we call it constitutive theory of law or legal conscience, says Mezey, 'this understanding of the mutual constructedness of local cultural practices and larger legal institutions provides a way of thinking about law as culture and culture as law' (Mezey 2001, 47); and a way to reflect over the accomplishment within a legal cultural order of fundamental values such as those of certainty and of justice.

The intense scrutiny to which most recent studies—beyond those conducted by anthropology—have submitted the idea of culture, may force us to abandon stereotypes such as the homogeneity, stability and coherence of our cultural references, while it may also lead us to envision the simple structures and daily practices through which societies develop and circulate a world of meanings and values as true participants in that major cultural construct.

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9 In 'Law as Culture', Mezey goes over the curious conclusions reached in *Dickerson vs United States* in 2002, when the Supreme Court came to (re)consider Miranda warnings as a constitutional requirement, following the contents of the Fifth Amendment of the Constitution, not because it represented a demand of the Constitution itself, but because Miranda had become popular to the point of being culturally regarded as a constitutional requirement. 'The legal rule laid down in Miranda', says Mezey, 'so effectively infiltrated cultural practice that forty years later the cultural embeddedness of Miranda warnings provided the justification for recognizing the constitutional status of the rule […]. Law became so thoroughly embedded in culture that culture became the rationale for law' (Mezey 2001, 55-57).

10 Even though he agrees with most of Kahn's arguments, Sarat still reproaches the author's failure, throughout his work, to take into account the substantial literature produced by scholars committed to the interdisciplinary studies, namely outside the legal academy (Sarat exemplifies with the works of Cliffold Geertz, Robert Gordon, Christine Harrington, Barbara Yngvensson, David Trubek, Patricia Ewick, Susan Silbey, James Boyd White, to name just a few). See Sarat 2000, 132-134.

11 Sarat considers Kahn's book one of the most important investments in this perspective, which is also noticed both by Naomi Mezey and Robert Post (Sarat 2000, 134; Mezey 2001, 46; Post 2003, 489).

Law has been going through a similar process of re-interpretation and of re-legitimation. We can no longer think of it as a complete and self-sufficient body of rules, embedded in stereotypes such as those of coherence or homogeneity, able to provide the kind of safety and certainty that it once aimed to. The presence of narrative, argument or interpretation whenever legal rules come in contact with social and human dynamics convey a much more complex and multifarious notion of law. The process of legal decision is not—and has never been—a matter of rigorous logic or calculation. It is a moment of intellectual creation, of imaginative intelligence, that through the mediation of rules purports to restore balances momentarily lost in human relations. This is a deeply argumentative and rhetorical process, made of constant advances and retreats, and where neither certainty nor truth is ever absolute. They are temporal and context bounded; they are, in fact, human deeds. But that does not make them less possible, less real, or less worthy. As is the case with law, or culture, for that matter (see Aguiar e Silva 2011).

This last reference is meant to illustrate the adequacy of what Rosemary Coombe called a contemporary shift towards the cultural politics of practical daily life. Rejecting both modern boundaries between culture and everyday life and those between high culture and popular culture, this shift has been leading today's cultural studies to focus on everyday cultural practices as the locus of domination as much as of transformation. Culture does not exist outside the ongoing local practices and the parochial social relations. And this is precisely the kind of culture that both lives through law and that brings meanings to its life: in Rosemary Coombe's words, 'we need to attend to the social life of law's textuality and the legal life of cultural forms as it is expressed in the specific practices of socially situated subjects' (Coombe 1998, 463).

2. The present context of (economic or cultural?) crisis and the University

Holmes was right when, back in 1897, he suggested that the man of the future would be the man of statistics and the master of economics. And those who feared in his prophecy the risk of exposing the law to political forces or to pressure groups manipulation were not wrong. Life in modern western societies today, in general, and in academic communities, in particular, has been conditioned by huge financial constraints resulting from the economic crisis that has spread throughout capitalist democracies at large. This pressure that has been exerted on the institutional framework of academia by the purported scientific, technocratic and economic archetype has had deep and clear implications. It has in particular led to a worldwide decline in funding for research in humanities and social sciences, deepening the gap in public investment over the past decades between the so-called STEM domain (acronym for science, technology, engineering and mathematics) and that of human and social sciences. Recent news in the Portuguese national press have exhibited disturbing headlines such as 'social sciences thrown into hell', and convey outbursts like the one from a researcher who claims that 'this year, winter has descended

on research in humanities with the strength of a hecatomb'.[12] A while ago, Moisés Martins, from the *Centro de Estudos de Comunicação e Sociedade da Universidade do Minho*, publicly wondered whether a day might come in Portugal when the alleged soft sciences would be excluded in the name of an utilitarian, productivist and mercantilist ideology. Today, more than never, that fear seems real. According to the same scholar,

> truly haunted by a power they never question nor wish to see questioned, the country's policies raise to the skies the operative and productivist sciences and throw the social sciences into hell, as if Portugal's economic growth and integrated, sustainable development depended solely upon productivist sciences, dismissing the social and human sciences as an unnecessary and expensive luxury for a country in crisis. (Martins 2004.)

The problem is not exclusively Portuguese, as we can see through the challenge launched by this year's 17th annual conference of the Association for the Study of Law, Culture and the Humanities (ASLCH), with the title 'The Politics of Law and the Humanities: Crisis, Austerity, Instrumentalism'.[13] Changes concern both the need to allocate diminishing financial resources and the endless political pressures brought to bear on social sciences, law included, as to the worth of an investigation that does not address the immediate needs of the current economy. As a result, research in these areas is by many considered a luxury we cannot afford, because it is not of immediate relevance to the country's economic and political situation. Boaventura de Sousa Santos calls this a mercantilist conception of science and he identifies it as a model which seeks to connect research, and university as a whole, to the needs of the market. Referring to the challenges facing today's European universities within the current financial crisis and the ongoing globalization processes, the author writes that:

> the commodification criteria will reduce the value of the different areas of knowledge to their market price. Latin, poetry or philosophy will be kept only if some informatic McDonald recognizes in them any measure of usefulness. University administrators will be the first ones to internalize the classifying orgy, an orgy of objective maniacs and indicators maniacs; they will excel in creating income by expropriating the students' families or robbing the faculty of their personal lives and leisure. They will exert all their creativity to destroy

12 The author of the remark, Diogo Ramada Curto, is a researcher in the *Centro de Estudos de Sociologia* from the Universidade Nova de Lisboa, in *Publico* (one of the most influential national newspapers in Portugal), Lisboa, 25 January 2014, 28-29.

13 The main goal of the conference, hosted by the Law School of the University of Virginia, was to discuss possible alternatives for the law and humanities scholarship in a time of economic crisis. Humanistic and social sciences are being overwhelmed by the scientific and technocratic paradigm, as they are forced to adopt its logic and purposes in order to survive. If research has no immediate relevance within the frames of our current market-driven society, it is not worthy and should therefore be suspended. How can we fight this subversion? How should we claim our political, cultural and ethical relevance? Is there a distinct politics addressing law and the humanities?

> university creativity and diversity, to standardize all that is standardizeable and to discredit or discard all that is not […]. They will end up being zombies of forms, objectives, evaluations that are impeccable in terms of formal rigor but necessarily fraudulent in substance. (Santos 2010, 9.)

In time, we tend to forget that true science requires time and hard work; that it forces one to a lifelong, frequently silent, immersion in problematic and synthesizing thinking. The criteria to which today's scientific and academic merit depends upon are mostly quantitative, lacking qualitative measures of appraisal of what is done and produced by universities. Obsession with the number of published works, used as assessment criteria from natural sciences to the social ones, engenders a deep impoverishment of scientific culture, turning into something natural the fact that one publishes when one has not much to add to what has been published already. We live under the realm of the so called *fast science*, which leaves neither time for maturation nor for paused reflection. In the same piece of news we have been quoting, another researcher claimed that with as much as we all have been writing, there's not even time to read what others are writing, and so researchers are less and less educated, and their knowledge more and more shallow.

If this is the overall picture when it comes to social sciences in the academic framework, what can be said about the humanistic dimension of legal knowledge and teaching? Courses like legal culture, legal history or philosophy, although seminal to an ontological understanding of law, barely manage to survive and are clearly being overtaken by their positivist and technocratic counterparts. Disciplines that reflect positive law are those that best match the mercantilist model of contemporary science and that, in the axiological sterility of a legal order turned into form, best sustain both the logical determinism of decisions which shield themselves behind what Robert Ferguson called the 'rhetoric of inevitability',[14] and judicial free activism guided by neoliberal pragmatic criteria of economic efficiency. Posner would certainly be amongst those who invoke the last guidance, by openly criticizing the model of logically deductive legal practice and by taking law and legal decisions through the path of an economic cost-benefit analysis and reasoning. Acknowledging the weaknesses of a positive body of law and taking a highly pragmatic and neo-liberal standpoint, Posner starts from the extreme uncertainty in which judges often have to perform their judicial duties, 'which forces them to exercise an uncomfortably large amount of discretion' and that time and again casts them 'in the role of de facto legislators'.[15] A role they should perform, according to Posner, by adhering

14 This rhetoric of inevitability is seen by the author as an instrument in the hands of a judicial practice entrenched in the characteristic formulae of a bounded universe. A judicial practice which 'uses its own limits to insist upon a predetermined course of judgment at the moment of decision', discouraging any sort of judicial activism (Ferguson 1990, 217).

15 Posner (2007) had already argued these ideas in 1973, and continued to do so in *How Judges Think*, published in 2008. The conversation between Posner and Jonathan Masur following this book's release is quite enlightening. See <www.law.uchicago.edu/alumni/magazine/spring08/posnerhowjudgesthink> (visited 30 April 2014).

consequentialist and economic criteria, even if time and again they try to conceal their normatively creative ability under the rhetoric of inevitability.

'The man of the future is the man of statistics and the master of economics'. Following in the steps of Alexandre Morais da Rosa, this displacement of criteria for judicial consideration towards the universe of numbers and the paradise of statistics, leaves law's social dimension and, we might add, law's ethical and humanistic groundings, behind, only to settle itself down in a mathematical universe, one with no face and no identifiable victims (Morais da Rosa 2010, 156). It ignores the fact that the axiological issues with which law has to deal with are by nature irreducible to numbers; they resist calculation. They are fed by notions of good and bad, just or unjust, right or wrong which are not quantifiable, as rightly perceived by Francis Cardinal George (George 2003, 1-3); rather they demand a thoughtful reflection, a cultural and axiological judgmental ability that does not ensue from dispassionate and objectified statistical analysis. Certainty is an illusion, and 'the justice' that might derive from it, a farce of itself.

3. Justice and Saramago: from the socio-political critic to the cultural criticism

Given this referential scenario, a particular remark made by the Portuguese literature Nobel Prize, José Saramago, in a private conversation, shortly before his death, somehow seems to acquire a more intense meaning and range. When he declared that the so much debated global economic crisis, that everyone talks about and that leaves almost no one unharmed, is not in essence an economic crisis at all but mainly a deep cultural crisis, a crisis of values, he is pointing his finger at the rise of an unrestrained mercantilism and of patterns tied to the economic globalization in pseudo-democratic societies. He identifies the privileged victim of such a crisis with the value of justice.

There are several texts in which the Portuguese literature Nobel expresses his deep concern with the path taken by contemporary societies, so frequently blind to the most basic fundamentals of social justice, in its inhuman mercantilist and economic zeal. A particularly relevant piece of literature in which the author, in a truly dramatic and sublime way, launches a cry of alarm over the state of axiological dormancy in which the capitalist society, controlled as it is by the neoliberal discourse, plunges human existence, is *Blindness*.[16] However, the text in which he most confessedly and explicitly reflects upon this matter, is his closing speech at the II World Social Forum that took place in Brasil, Rio Grande do Sul, in 2002.

He entitled his speech 'From Justice to democracy by way of the bells', and even though it is quite short in length—and it is written as a letter—it reveals a remarkable

16 First published in 1995 and since then translated to virtually every language, *Blindness* remains one of the writer's—and one of the world's literature—most charismatic, disturbing and suggestive pieces of writing. Reflecting upon the crossroads of justice that underlie this literary work, see Aguiar e Silva 2008b and 2010.

depth of meaning.[17] It tells us about the act of despair of a Florentine peasant from the XVIth century, who one day climbs to the top of his village's church tower to ring the death toll. The villagers, used to hearing the constant and daily ringing of the bells, gather up in the main square, eager to find out whose death they should mourn, only to find out it isn't the official bell ringer who has summoned them, but a simple peasant who tells them that no one has died; at least, no one who has the name or the semblance of a person. 'I rang the death toll for Justice, because Justice is dead'. The peasant thus justifies his action, with which he culminates a *via crucis* as a means of obtaining protection from the injustices perpetrated by the greedy lord of that land, who daily occupies private properties, making them his own, by the simple exercise of his despotic will. Finding himself dispossessed, wronged and humiliated, by all of those who are supposed to keep peace and justice, social and legal order, he sees no other way than this to appeal to his equals unofficial assistance and relief.

> I reckon that this was the only time, anywhere in the world, that a bell, an inert dome of bronze, after so often tolling the death of human beings, sadly pealed the demise of Justice. The funeral dirge of the village near Florence was never heard again, but Justice continued—and continues—to die every day. Right now, at this moment as I speak to you, both far away and nearby, on our doorsteps, someone is killing it. Each time it dies, it is as if it had never existed for those that trusted in it, for those that expected from Justice what we all have the right to expect: justice, simply justice. Not the kind that wraps itself in theatrical tunics and confuses us with flowery, empty legalistic rhetoric, nor the kind that let itself be blindfolded and the balance rigged, not the kind where the sword always cuts more one way than the other. We have the right to a modest justice, a justice that is a companion in our daily lives, a justice in which what is 'just' is synonymous with what is 'ethical', a justice as indispensable to happiness of the spirit as food for the body is indispensable to life. Undoubtedly, it should be a justice practiced in the courts whenever so required by law, but first and foremost a justice emanating spontaneously from society itself in action, a justice that should manifest itself as an inescapable moral imperative, the respect for the right to be, attendant on every human person. (Saramago 2002.)

This is the exact sense of justice that is being threatened by today's conspectus of economic and cultural crisis. An ethical justice, permeated by values of right and wrong, fair or unfair, that rises above the formalities and the loyalties to political and economic legislative programs. A kind of justice that does not hide behind empty rhetoric but that, instead, senses rhetoric as a constitutive and practical device to build allegiances within a community. Law's authority lies in its inherent aspiration to justice, sought through the momentary and transitory relief of the tensions that constitute its core: tensions between the ideal intentions of abstract legal commands

17 See <www.espacoacademico.com.br/010/10saramago.htm> (visited 29 May 2014). For an English version, see <www.terraincognita.50megs.com/saramago.html> (visited 29 May 2014).

and the reality of an imperfect and disruptive world; between expectation and experience; between the rationality of a dogmatic system and the irrationality that so constantly flows from life; between the formal discourse of authority and the practical discourse of those in need. When law and culture both reflect the subversion of human values entrenched in an economic and globalized *imago mundi*, they conveniently tend to present justice in its formal robes, way above the inconsistencies and the complexities of life and of human behaviour. This instrumental model of justice disregards the tangible life of a society and its most authentic moral and cultural expressions. Law and culture, as justice and morals, may not be universal truths, in that a consensus on their contents will hardly ever be attained. But that does not mean they cannot convey a sense of identity and purport a sense of belonging. They can and they should, in the exact limits of the ethical dimension they stand for. Reconceptualized models of law and of culture, as unbounded and contextual realities, do not affect its worth as platforms of shared meanings: as ways of collective living and thinking, complex enough to accommodate difference and change by ways of argument, dialectics and rhetoric.

We tend to lose sight of all this when we are forced to understand law, culture and human ethics through the lenses of today's dominant economic and political aims and interests. We tend to disregard actual idiosyncrasies and differences for the sake of the embracing narrative of global wealth. What is driving us towards that alienation—which is the essence of the message conveyed by Saramago's epistle—is the simulacrum of democracy that is now shared by most of the western world. A democracy in which the possibilities for democratic action are deeply constrained by the real force controlling the world, that of economic power, to which governments are increasingly becoming mere political commissars, with the key mission of producing laws to suit their power (Saramago 2002). A democracy that, pouring itself into a sick and irrational system, 'one to which people are nothing but producers at all time expendable and consumers forced to consume more than they need',[18] compels us to share the author's anguish when he says that something is not right when 'half of the world is dying from starvation while the other half does nothing […]'.[19] Underlying this outburst is what Saramago identifies as the irrational rationality of contemporary man and society. When we institutionalize the pursuit of values such as profit, success and triumph over our fellowmen, we necessarily blur the legitimacy of the means we use to reach our goals.

> We have talked a lot over the last few years (and fortunately we still do) about human rights; but we simply ceased to talk about something that is very simple, which is our human duty: our duty towards each other. And it is that indifference towards the other, that sort of contempt for the other, which makes me wonder whether there is any meaning […] in the context of the existence of a species

18 'Was it the absence of solidarity that produced Europe's 18 million unemployed, or are they rather the most visible effect of a crisis attacking a system to which people are nothing but producers at all time expendable and consumers forced to consume more than they need?' (Saramago 1994, 64-65).
19 See Gómez Aguilera 2010, 146 (originally published in *La verdad* 1994).

that says itself rational. (Reis 1998, 150.)

In the face of the globalization of neoliberal capitalism, with its focus on economic development and borderless markets, law has become an instrument for policies of diffuse international paternity. Diffuse because faceless, with no autonomous identity that allows an enlightened or intelligent dialogue. According to Ana Maria Ezcurra, actual governments don't govern at all; they merely administer these international market policies. At the same time, political parties play the basic role of legitimizing such policies. Quoting John Bailey, former director of the Latin American Studies Program at Georgetown University, Ezcurra adds that 'political parties increasingly resemble each other, being left the single task of legitimizing sets of measures that are already assembled by capital markets. It would all be about making them look good to people or, at least, make them look necessary, inevitable'.[20] Beneath these policies lies a specific rationality of pragmatic guidelines, poured into a pot of cost-benefit analyses and also a shift in the philosophical matrix in the legal order of western society—the watchword is now efficiency. A new legal principle seems to be rising above the horizon: that of the best interest of the market, transforming law into a means to obtain the greater goal of economic growth. One tends to agree with Morais da Rosa when, echoing Saramago himself, he states that the price society has to pay when it raises the economic matrix to a sacred, unquestioned dogma, is the collapse of democracy, the erosion of sovereignty, and the end of social justice (Morais da Rosa 2010, 165).[21] The ongoing and perverse process of economic globalization acts through a faceless network that has no center to which guilt or responsibility can be ascribed to. It embraces a seductive and mellifluous discourse of rescue and development, ready to, through 'ideological manipulation' and 'symbolic violence', distract consciences and to induce that social numbness that Saramago highlights. At some point, Saramago himself raises the question of knowing how far economic globalization is compatible with human rights. 'We must ask ourselves this question, in order to understand that we can either have globalization or rights, we can't have both no matter how much the powers at be hypocritically tell us that globalization favors human rights, when all it does is to produce "excluded human beings"'.[22] Meanwhile, the hidden and dormant economic and politic interests of anonymous, multifaceted and powerful multinational groups thrive in the shadow, following strategies of power that have nothing to do with that common good to

20 See Ezcurra 1996, 103 (citing John Bailey's words in *Clarín*, Buenos Aires, September 16, 1996). This is, after all, the long lasting slogan made popular during Margaret Thatcher's conservative government in the last decades of the 20th century: TINA, or, *There Is No Alternative*. In law, as in politics or in economics, rhetoric is still that of inevitability.

21 This is the consecration of what Saramago elsewhere named 'authoritarian capitalism', in which the sole difference between capitalism and dictatorship is the fact that this last one has a face. The market, says the author, has no face; only a name. It is everywhere and we cannot identify it by saying: 'it's you!' And since it is faceless, we don't know who to fight against. There is no one who to fight, which is not what happens with dictatorships (see Gómez Aguilera 2010, 485).

22 Totalitarianism has many faces, the author reminds us, and globalization is just a new form of totalitarianism (see Gómez Aguilera 2010, 474).

which democracy, by definition, aspires to. 'We all know this is true, yet, owing to some sort of verbal and mental automatism that keeps us from seeing the raw, naked facts, we continue to speak of democracy as if it were something alive and dynamic, when little more remains of it to us than a set of ritualized forms, the harmless passes and gesturing of a kind of lay mass' (Saramago 2002).

When economic guidelines become the criteria for public administration, for constitutional and legislative production and for the judicial system itself, fundamental Rights of the citizen end up being substantially instrumentalized. Any legal order that does not consider its priority the protection of rights such as private property and freedom of contract—the market's new fundamental rights—is considered an obstacle for global market's welfare. This has implied the claim for the amendment of laws protecting the working class, or the consumer, or for the limitation of laws prohibiting unfair contract terms, just to mention a few. In order to attract international investments and to secure a place in the international political and economic framework, a nation's legal institutions must comply with the neoliberal charter of rights. Everything is now negotiable, in the names of the illusory and elusive values of freedom and equality. All we have to do is take a close look at the way in which so-called humanitarian interventions such as those that have suspended legalities and sovereignties, conceal economic interests—interests that have been subliminally hidden under the camouflage of human rights. According to Morais da Rosa, the constitutionalization of the private sphere implied in the neoliberal model, leads to the extension of the public sphere, creating the paradox of the rhetorical possibility of state interferences in what used to be protected by traditional fundamental rights. 'The explicit discourse is the humanitarian one', with its apparent neutrality, says Morais da Rosa; but humanitarianism works as a mechanism of interventionist ideology, bearing concealed interests that are quite different from the ones listed in the explicit discourse. This humanitarian aid eventually legitimates interventions meant to 'imaginarily appease the guilt and justify the oppression with which one ultimately condones. Humanitarian interventions hide economic interests which are clearly silenced in the explicit discourse' (Morais da Rosa 2010, 156-166).

The law's political and economic instrumentalism disregards its humanistic dimensions, threatening that 'rational and sensitive dignity we once assumed to be the supreme aspiration of mankind' (Saramago 2002). This is also a relevant issue in *Blindness*' narrative plot, as Saramago builds a fictional society where the loss of physical sight is to be understood as a metaphor for the loss of a rational kind of vision. The argument is that man misuses his reason whenever he becomes, as he has become, blind and indifferent to his kin. He can have spaceships sent to the skies, he can have the earth surrounded by thousands of satellites, but he cannot—or will not—prevent his neighbor from dying, whether from starvation or from solitude. We injure a person's dignity whenever we treat him as an object, as an instrument or as a mere number. We certainly injure his dignity when we stand indifferent to his suffering. When people become means to maximize wealth, we fail to respect their worth as human beings, their existential value and their personal identity as unique

individuals who are irreplaceable and not exchangeable for another (Kateb 2014, 10).

By adopting economic efficiency as the criterion for a pragmatic legal adjudication, we separate the roots of law from its historical, ethical and cultural groundings, alienating law from the historical and communal objectification of the normative principle of law which, following Castanheira Neves' or Aroso Linhares' lessons, can be identified as a general legal conscience.[23] If we give in to the economic model, we risk threatening values of justice that ought to be law's lighthouse; we also risk watching, in the words of the Portuguese Nobel, 'the mouse of human rights be implacably eaten by the cat of economic globalization'. In other words,

> if man is not up to the task of organizing a global economy which satisfies the needs of a mankind who is dying of starvation and of everything else, than what sort of humanity is this? We fill our mouths with the word humanity, but we have not reached that position yet; we are not human beings. Maybe we will be so one day, but we are not yet; and we still are a long way from it. Here we have the spectacle of the world, and it's a creepy thing […]. And while people's consciences do not wake up, this will go on and on, because much of what is being done is meant to keep us apathetic and to lack will, to diminish our capacity of civic intervention. (Gómez Aguilera 2010, 152.)

With our dormancy, as citizens, we also risk witnessing the cracking of the civilizing varnish of legal institutions that once replaced practices which were socially and humanely more expensive, like those of vindictive justice. Let us not be deluded. The impulse for revenge in the face of injustice is one of the most lasting features of human spirit; one that not even the harshest penalties or legal orders have been able to eradicate (Barton 1999, xiv). When society replaces the individual in the exercise of punishment, it assumes a responsibility towards its citizens, especially towards the victims of injustice; a responsibility that also needs to take feelings of retribution into consideration. And if it does not do this in a competent and sufficient way, it risks people taking the law/justice in their own hands.[24] Saramago's Florentine peasant rang the toll for justice, in a true cry of despair, but in his gesture, we can easily see the threat of more drastic and dramatic measures.

The law does not intend, nor can it intend, to eliminate feelings of revenge; it cannot eliminate a certain proclivity towards retributive meanings of justice. It should rather seek to channel these feelings of retribution into more rational and less costly paths. In the words of Norbert Rouland, penalty and vengeance coexist

23 This is a concept that identifies the transient and problematic synthesis of all the values and normative principles that in an established community provide law its basic shared meanings and understandings (see Neves 1995, 65-66).

24 Oliver Wendell Holmes and Richard Posner both coincide in this perspective which reduces law to its origins in vengeful practices and feelings. Despite the features and attributions we acknowledge in legal orders today, they would stand for the final result of an evolutionary process which began a long time ago with the mechanism for solving social conflicts that lies underneath the vengeful system (see Holmes 1991, 2-20; Posner 2009, 49-51; Aguiar e Silva 2008a, 131-145).

in all societies, whether traditional or modern (Rouland 1995, 195). When the law's mechanisms are blocked, either because they are rigged, controlled by the wrong hands, or because some people seem to be out of its range, legal institutions lose their credibility and strength, and that loss is consistent with a rekindling of a popular sense of justice, and with a subsequent resurrection of vengeful practices. Josh Wilker's remark stresses that an old problem—vengeance—is increasingly being considered as the solution to a new problem—legal institutions failure to do justice (Wilker 1999, 74-75).

We hear several voices today, claiming for the urgency of a worldwide debate on the concept of democracy, on the ethics of democracy and its connection to global economic and financial powers, on the need to rethink our own role inside it and inside the political and social life of our community. Embracing humanities, in law as in politics, may stress the complexities of substance above the simplicity of form, enhancing the richness and the 'perfect' imperfections of human life towards the rationality of the 'imperfect' perfection of theories and numbers. This may endow us with the tools we need to restore balances lost for the sake of the elusive shared welfare of a global market. Cultivating humanity is a way of cultivating citizenship and of maturing skills for political and social involvement (Nussbaum 1998).

The fact that culture needs to be taken as a fragmentary reality, hardly perfect, never entrenched in stable frameworks, in no way uniform or standardized, does not deprive it from its virtues as an identity reference, as a platform of human understanding and as a guard rail of shared meanings. A sense of cultural belonging may prevent us from feeling adrift within the subtle invisibilities put forward by neoliberal patterns of humanity.

To ensure each person a distinct voice in the construction of their world—because 'a village is exactly the same size as the world to those who have always lived in it' (Saramago 2002)—law must also comply with its cultural, historical and humanistic embeddings. Disinvestment in certain areas of research may precipitate the shattering of delicate social balances that depend on the ability to recognize and to dialectically and rhetorically manage tensions inside a polyhedral reality. A consistent whole is invariably made out of possibilities for difference and for change, for doubt and uncertainty, embraced as possible sources of enlightenment. Rather than dissolving these in a theoretical fiction of certainty and perfection, policies—whether political, economic, cultural or legal—should ensure the requirements for personal growth and fulfillment, within and not against the backdrop of a global progress.

Saramago joins these voices together, adding the urgency to promote a global debate on 'the right to happiness and worthwhile existence, on the misery and the hopes of humanity or, to cut down the rhetoric, the hopes of simple human beings that make up Mankind, one by one and all together' (Saramago 2002). The Portuguese Nobel is a deeply allegorical writer, and allegory never ceases being a rhetorical device for incitement to desire and to action: a place for restlessness and for passionate, sometimes aporetic, speech. All allegories are ethical, in the sense

that Paul de Man describes it: linguistically, and not in terms of personal options. Ethicality does not stand as a value, but rather as an imperative category, a discursive mode amongst others (see De Man 1979). The straight bond build between the saramaguian narrator and his reader destabilizes the construction of single truths upon the text, often sending us into an inconclusive search and allowing us to reflect on the presumable links between textual truths and the empirical world. Saramago does not bind us to a particular reading of the world, rather challenging and driving us through a constructive process of reflection. He is not a prophet, pointing us towards the path of salvation. Nevertheless, his speech is always a perlocutory one, trying to reach our minds and urging us to act. This is the light in which we should understand his demand for the search and the invention of a new ethics for mankind, as the sole possibility for regeneration. His textual universe gives us clues on how this new reality should be, suggesting an ethics of 'non indifference', of accountability and of action, as an unwavering commitment of transformation. Throughout *Blindness* Saramago develops a trilogy of 'seeing, looking and observing'. Fighting rational blindness demands now a new ethics that goes further and encompasses another trilogy which he develops: 'observing, thinking and acting'. It ultimately demands what he calls a 'revolution in kindness' (Gómez Aguilera 2010, 118).

It's our turn to risk abusing Saramago's words, by now saying that 'I have nothing more to say. Well, yes, just one thing: to ask for a moment of silence. The Florentine peasant has just climbed the church tower once more, and the bell is about to ring. Please, let's listen to it'.

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Book Review

Hanoch Dagan: *Reconstructing American Legal Realism & Rethinking Private Law Theory.* Oxford University Press, Oxford 2013.

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What is required these days of legal theory, or jurisprudence in the Anglophone part of the world, is not altogether clear. The idea that the theoretical branch of academic law could be secured as legal philosophy, with a primary focus on municipal law, sustained a period of reinvigoration and flourishing for jurisprudence following the publication of Hart's *The Concept of Law*, but more recently that approach has given rise to doubters and detractors. Even among those who wish to hold onto Hart's analytical tradition, there are serious misgivings that this can be applied so crudely to municipal law, and a number of efforts have been made to amend Hart in ways that can deal with the phenomena of transnational law or other forms of non-state law (Culver and Giudice 2010; von Daniels 2010; Croce 2012). More fundamental objections that have questioned the taking over of the province of jurisprudence by legal philosophy include Allan Hutchinson's efforts to radicalise jurisprudence (Hutchinson 2009). The title of a recent article by Roger Cotterrell makes the challenge unequivocal: 'Why Jurisprudence is not Legal Philosophy' (Cotterrell 2014).

Yet this countering of legal philosophy with a focus on municipal law as a secure basis for legal theory can be destabilising in a number of ways. In one respect, there is a lack of a definite subject matter. As William Twining, an energetic supporter of expanding the subject matter of jurisprudence, has pointed out, there still needs to be a central recognition of the jurisdiction-specific study of law in a more expansive understanding of legal theory (Twining 2009). In another respect, there is the risk of legal theory freed from the constraints of an analytical grasp of the narrowly

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legal being seized by normative ambitions and made subject to restrictive political agendas, thus imposing a different type of limitation on the remit of jurisprudence (Halpin 2010). An underlying problem for both of these concerns is how to establish legal theory as a distinctively legal theory. A related concern is that legal theory might reasonably be expected to engage with the substance of the law.

In this troubled setting for legal theory, Hanoch Dagan's efforts to produce a theory of law through a reconstruction of American legal realism are to be welcomed as offering thoughtful and stimulating responses to the basic problems that legal theory needs to grapple with. His more recent book (Dagan 2013), reviewed here, follows on from his earlier treatment of property (Dagan 2011) in a book whose ambition is measured by the three levels on which his theory of property operates. There Dagan provides an analysis of property in the law; he locates this analysis within a general jurisprudential outlook on law; and, he ties in his understanding of property to a political ideology dominant in western democratic societies. His theory of property is, in turn, pluralist in a technical analytical sense, realist in a jurisprudential sense, and pluralist in a liberal ideological sense. The present book expands and refines Dagan's approach, in tackling private law more generally, but more significantly in addressing a number of possible objections that might be raised against his reconstructed realism.

Dagan's theory remains a theory of municipal law, but as a matter of focus rather than necessary restriction. Reconstructed realism for non-state law is still a fairly open question (Dagan 2013, 128 n88). However, the crucial advantage of Dagan's approach is that his theory of law is founded on what he perceives to be truly distinctive about law, and about law as it is practiced. And so it has promise of delivering a theory of law in the fullest sense.

1. Dagan's ambitions for legal realism

Within an introductory first chapter and a fuller treatment of his attempt to reconstruct legal realism in chapter 2, Dagan spells out the fundamental premise of his entire enterprise. It amounts to this: only the realists (that is, the American legal realists) have identified the truly distinctive character of law, and so only a realist theory of law will be capable of portraying a full picture of law. In more detail, the distinctive character amounts to a state of accommodating three irreducible tensions; and the failings of competing theories of law amount to latching onto one side of one of these tensions, and distorting it as a full representation of law's character (Dagan 2013, 2, 3, 8 15, 67-68).

Dagan openly admits that he is reconstructing rather than expounding an historically accurate realist conception of law, but claims to be doing so in the spirit of charitably combining the key insights of the American legal realists (Dagan 2013, 2-3). This enables Dagan to make a simple and bold challenge to any alternative theory of law, represented here in words taken from the opening pages of chapter 2, and the concluding page of the book:

> Legal realism […] stands for a specific conception of law irreducible to any other. […] the legal realists' rich account of law as an ongoing institution (or set of institutions) accommodating three sets of constitutive tensions—between power and reason, science and craft, and tradition and progress […]. Law can neither be brute power nor pure reason; it cannot be only a science or merely a craft; and it is neither concluded by reference to the past nor fully understood by a future-oriented perspective. Legal realists reject all these reductionist conceptions of law, which are in vogue in contemporary jurisprudence. […] legal realism, by accommodating these three constitutive and irresolvable tensions, captures law's irreducible complexity […].
>
> [The realist legacy] captures a deep truth about the law, which is obscured both by legal formalists and legal monists as well as by the purported heirs of legal realism who discarded it in favour of a refinement of one feature of this complex conception of law. (Dagan 2013, 14-15, footnote omitted, 223.)

Chapters 3-10 unpack this premise in a variety of ways. They also build upon it. In chapters 3 and 4, Dagan allows the nature and role of legal theory to receive direct attention. In both chapters this is closely linked to a realist understanding of law. Chapter 3 emphasises an ambivalence between rational self-interest and other-regarding benevolence (or concern for communal interests) in the law as manifested in both law's subjects and law's servants—the judges. Dagan presents this double ambivalence or duality as helping to explain further the first constitutive tension between reason and power (Dagan 2013, 69-70). Of particular significance are a couple of concluding remarks in which Dagan draws from Christopher McCrudden (McCrudden 2006) in suggesting that the intellectual discipline of law has something distinctive to offer the social sciences, and then develops the prospect for legal theory to play an active role in nurturing the proper normative attitude towards specific institutions (Dagan 2013, 83 and n58). Chapter 4 reinforces the claim that legal theory has its own intellectual identity, neither collapsing into neighbouring disciplines nor being assimilated into the practical wisdom of professional practice. Dagan sees legal theory performing a synthesising role across the different (disciplinary and professional) discourses on law, while retaining a unique focus on 'law as a set of coercive normative institutions' (Dagan 2013, 85, 93, 97). He also takes the opportunity for pressing the claims of legal realism to fulfil this potential for legal theory (Dagan 2013, 95-96), and then again draws out an essentially critical aspect of legal theory's attachment to the specific condition of law: 'a reconstructive stage guided by the dynamic understanding of law as a great human laboratory continuously seeking improvement' (Dagan 2013, 96).

The remaining chapters of the book, 5-9, then convey Dagan's theory of law as affecting private law. Chapter 5 explores the debate between an autonomist understanding of private law values (as being isolated from broader social values and springing instead from the correlative positions of the parties in a private-law relationship), and the instrumentalist understanding that private law is merely

another form of legal regulation serving the promotion of public or collective values. Dagan rejects this dichotomy in insisting that the correlative entitlements of private law represent an 'ideal vision of the pertinent category of interpersonal relationships' (Dagan 2013, 127), and as such must be subject to collective values. Acknowledging pertinent categories, or a taxonomy of private law, forms the subject of chapter 6. However, taxonomy is recast here in a realist light as being dynamic, open to critical scrutiny, and more flexible (Dagan 2013, 137-42). Chapter 7 examines how remedies can be seen as substantively affecting the range of legal rights available, rather than being detached from a primary definition of the available rights. Like Dagan's approach to taxonomy, this creates a more supple understanding of private law, but Dagan is quick to point out that this does not mean a descent into particularism or chaos (Dagan 2013, 133, 139, 145). It does, nevertheless, bring with it an explicit endorsement of pluralism (Dagan 2013, 159-60).

Chapter 8 provides the deeper theoretical underpinning for Dagan's reconstructed realist understanding of private law. The key elements here depend on an initial assumption that society enshrines a liberal commitment to autonomy and individual choice. Once this is accepted, it follows for Dagan that law will display structural pluralism embodying a plurality of values, while also exhibiting a moderate perfectionism in ascertaining the appropriate balance or mix of values for each social or interpersonal context—manifested for property law in a specific property institution. This chapter connects tightly with Dagan's earlier book on property, and could stand as an elaboration of the theoretical approach taken in that book. Apart from the deeper theoretical work undertaken here (which embraces Berlin's value pluralism, Raz's perfectionist liberalism, and a subtle distinction between foundational and normative pluralism, which enables Dagan to suggest that foundational monists may yet recognise the values of structural pluralism as instrumentally serving their preferred basic value), the argument is coordinated around Dagan's appeal to the observational accuracy of the structural pluralism of his reconstructed realism (Dagan 2013, 162-63, 191-92), culminating in the recognition of a normative role for legal theory that is latent in a fully accurate picture of property institutions:

> [T]he main task of property theory is to distill the distinct human ideals of the various property institutions, to elucidate the ways each of them contributes to human flourishing, and to offer, if needed, a reform that would force these property institutions to live up to their own implicit promises. (Dagan 2013, 191.)

Chapter 9 tackles a final objection that Dagan's reconstructed realism, displaying structural pluralism with a normative perfectionist edge, cannot be reconciled to the rule of law. Dagan's strategy here is to divide the demands of the rule of law into two, providing guidance and acting as a constraint on official power, and then to demonstrate with practical illustrations how these two demands can be met by his account of law. This chapter then serves to reinforce the observational accuracy of

structural pluralism made out in the previous chapter, together with the normative appeal of an approach which defends expectations and strengthens guidance, because the values being promoted in a specific private law institution fit what is regarded as appropriate, or even just, in society's understanding of the context in which that institution is found (Dagan 2013, 222).

2. Beyond realism?

If the three constitutive tensions identified by Dagan represent an accurate, realist, portrayal of the state of law; if, moreover, these tensions are irreducible; then certain implications follow both for the practice of law (or legal doctrine) and for legal theory. Dagan himself does not dwell on the full extent of these implications. First of all, each side of each of the three tensions is not in itself an uncontested position. Whose power, which reasoned account of the law, what scientific understanding, which deployment of craft, whose account of tradition, and which vision of progress, all amount to questions with a variety of possible answers. Secondly, the state of tension apparent in the three pairings indicates further variations in the way, or the point at which, each tension is resolved: how much power and how much reason, etc., on a particular occasion.

Although Dagan speaks, in the passage excerpted above, of the irreducible and irresolvable character of the three constitutive tensions, there is an obvious sense in which the tensions must be resolved, for any law to emerge at all. Now if on every occasion the tensions were resolved, and let us also suppose the preliminary contestability of the positions at each side of the tensions were similarly resolved, by some overarching normative viewpoint, then that normative viewpoint would effectively circumvent the tensions as representing a full account of the law; in other words, the tensions would be reducible.

On the other hand, if those tensions (and the preliminary contestabilities) could not be resolved by a common normative viewpoint, the tensions would be irreducible but then correspondingly the realist portrayal of law would be descriptively impoverished. All that could be said would be that somehow or other on every occasion requiring legal regulation these tensions get resolved, and that these are the factors (although the precise standing of each factor remains contestable) that may potentially play a part. This latter option would retain the realist portrayal of law in terms of the three constitutive tensions but would necessarily open up the space for a plurality of normative arguments over how law should develop, rather than running smoothly into an attached normative outlook.

So it would appear that if Dagan wishes to retain the distinctive character of law as only portrayed by realism, in terms of the three constitutive tensions, our attention is diverted elsewhere in seeking a convincing normative theory of how law should develop. As we have seen, Dagan does provide a detailed and impressive normative theory of law encompassing a moderate perfectionism. However, the consequences of accepting the points raised here are twofold: that Dagan's normative theory cannot be realist (in the sense he gives to realism); and that being external to

a realist account of law, it is but one contender as a normative complement invited by a realist portrayal of the state of law.

In this light, Dagan's structural pluralism and moderate perfectionism have to be regarded as not inherently realist but reliant on their own normative convictions and arguments. There is enough material in the book to point us in this direction, in seeing Dagan's efforts as providing a normative theory of law for western liberal democracies. The plausibility of this position cannot be fairly assessed here; Dagan's arguments are subtle and draw on a rich array of sources. Yet the very richness of his position does provide some ground for thinking that his is unlikely to be immediately recognised as the only normative account of law in western liberal democracies: notably, when it claims to reconcile foundational monism with foundational pluralism within structural pluralism.[1]

The need to go beyond a stark realist portrayal of law is not new; nor is it alien to the realist tradition to seek to accommodate a normative softening of an otherwise descriptive starkness to which realism might be prone. Karl Llewellyn's 'situation sense', to which Dagan refers (Dagan 2013, 55-58), provides a glaring illustration. However, on delving deeper into Llewellyn's use of situation sense, it becomes apparent that the particular appreciation of the situation required comes not from a legal skill but from a common understanding. For Llewellyn a 'situational concept' lacks definition such as a formalist lawyer might impose but rather springs from a layman's understanding (Llewellyn 2011, 107).

William Twining takes the point further in suggesting that Llewellyn's notion of situation sense had its origins in commercial contexts where there existed a tightly-knit mercantile community with a well-established consensus on what the context required. For the judge or lawyer to possess situation sense in order to read a context correctly, it follows that what is required is not greater legal understanding but a closer affinity with the community affected by the context. Twining refers to Lord Mansfield dining regularly with merchants, to illustrate the point. He also speculates on the prospect of judges dining with trades union leaders. (Twining 2012, 224-25.)

In the absence of a community consensus, or in the presence of conflict between different sub-communities, Llewellyn's situation sense has no traction, and the confidence in law ascertaining the 'felt demands of justice' (Llewellyn 1960, 38), replicated in Dagan's 'legal optimism' (Dagan 2011, 31; 2013, 65, 138, 186), is misplaced. In the case of property law, the conflicting interests of different sub-communities (of landlords and tenants, of mortgagors and lenders, of landowners and ramblers, of farmers and ranchers, of spouses and creditors, etc) are rife.[2] And

1 At a concrete level, Dagan claims that a challenge to his normative approach must provide 'a detailed demonstration of its superiority' (Dagan 2013, 219), but this sidesteps the real challenge that comes not from a demonstrably superior but from a demonstrably alternative approach—a fairly easy option to demonstrate in an environment of value pluralism.

2 This is clearly illustrated in the conflicting interests (and values) evident in how an entireties estate should be viewed under USA law, a topic given particular significance in Dagan's earlier book. There he reports the different responses in state laws to this question (Dagan 2011, 9 and n15).

if a situation sense cannot be found within the resources of the law, as depicted by realism, then the felt need for a normative resolution of law's stark tensions has to be sought elsewhere, and is open to multiple responses.

3. Concluding remarks

What Dagan provides, in both this book and his earlier book on property, is a serious, well informed, and penetrating account of the workings of law, faithful to his realist commitments. From his detailed understanding of the workings of law Dagan operates effectively to challenge theoretical speculations that drift away from the realities of the practice of law, or need to suppress the observable variety of legal forms in order to promote a tidier theoretical construct. His theoretical censures are generally balanced and even-handed.[3]

More broadly in the service of legal theory, Dagan's work sets not simply a realist agenda but an attainable agenda for theory that is distinctively legal, in the sense of promoting theory that does engage primarily with law as it is practised. Where I have suggested, in the confines of this review, that his work might be questioned is in linking a normative theory into the realist account of the state of law, rather than seeing that account as providing an arena for different competing normative theories to engage with and seek to further refine the law. Space does not permit that debate to run its course here. What can be suggested is that the envisaged debate introduces the possibility of considering the relationship between descriptive legal theory and normative legal theory in a fresh way, and were that possibility to bear fruit it would also be testimony to the rich stimulation provided by Dagan's book.

3 As an example, see his treatment of Kennedy and Weinrib towards the end of chapter 9 of the present book.

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Book Review

Gary Watt: *Dress, Law and Naked Truth. A Cultural Study of Fashion and Form.* Bloomsbury, London 2013.

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As I read Gary Watt's new book, *Dress, Law and Naked Truth* I kept having flashbacks. I was naked. I can't now remember the year but I do remember the event and location. It was the Socio-Legal Studies Association conference in Leeds. I got naked while giving a paper at an academic conference. More specifically as I delivered the paper I took my clothes off. First the jacket; I had arrived rather overdressed in a full suit, collar and tie. The tie came next. After the boots it was the trousers; till I was naked. Not stark bollock naked, which the Oxford English Dictionary (OED) explains is 'absolutely without clothing', just naked. As the OED explains, 'naked' can include clothing: 'wearing only undergarments'. And so there I stood in my 'undergarments'. I then re-dressed. I put on a different garb: blue denim jeans, check shirt, open neck collar. At some point in the paper I think I described it as a 'clone look'. As my sartorial performance unfolded so did the topic at the heart of the presentation: the police use of clothing and gesture to incite and seduce other men into performing a variety of criminalised genital gestures and acts in public toilets. Police statements found in the Metropolitan Police archive now housed in the National Archive in London were the source of data and inspiration for my study. They record in great detail a police performance of temptation, seduction and criminalisation in central London: its movements, gestures, props and its costumes. I was particularly interested in the way the police, as the embodiment of law demonstrated an intimate knowledge of, and skill in inhabiting, the clothing and manners of the other, a threatening contagious disorder, then associated with criminal acts and pathological subjects, as part of a

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strategy to bring disorderly bodies to order through the law (Moran 1996, Chs 5 and 6). My flashbacks of this academic event were a very visceral reaction prompted by the central theme of Watt's new book that dress functions as an economy of signs through which order and disorder shape and make public the subject and more specifically make that subject a legal subject.

Gary Watt doesn't get naked in *Dress, Law and Naked Truth*. Not in the literal sense. But his book is a project that seeks to expose and lay bare. It peels off the layers of meaning that the author identifies as evidence of a complex web of interconnections tying law to dress and vice versa; 'that dress is law and law is dress' (Watt 2013, xvii). They are, Watt argues, 'culturally equivalent'. He explains the nature of this cultural equivalence in the following terms:

> What I mean by cultural equivalence is that a culture finds meaning in dress by relating it to law through metaphorical language (and vice versa, that it finds meaning in law by relating it to dress), and that such metaphorical meanings reveal close functional, semiotic and aesthetic similarity between law and dress. (Watt 2013, 36.)

The common denominator shared by both dress and law is an association with making, representing and institutionalising social order.

The opening chapter, 'Dress is Law' takes the form of an etymological striptease. Inspired by legal terms such as 'vested interests', 'arrangement', 'decency', 'habit' and 'custom' and the ghostly presence in these and other terms of reference of words that denote dress, Watt searches for the reason for this:

> The very word 'dress' ultimately derives from **reg*-, which is precisely the same Proto-Indo European (PIE) root that gives modern European languages and legal systems their most basic word-set for legal order (the set which includes 'rule', 'right', 'director', '*rex*', 'regulation' and so forth). (Watt 2013, 2.)

They have a common linguistic root that Watt dates 'Around the period 4500-4000 BC' (Watt 2013, 3). The approach adopted in this chapter exemplifies Watt's characterisation of the project as a whole. It offers, 'an analytical appreciation of perennial connections and tensions between dress and law' (Watt 2013, xvii).

Chapter 2 entitled 'Foundations of the State of Dress' turns to a different type of origin: one that is located in myths and storytelling. In the beginning was *The Epic of Gilgamesh*, an ancient Sumerian tale. It tells of the origin of society by way of a story that weaves together clothing and the foundation of political society, 'civil life' (Watt 2013, 18). For those, who, like me, are unfamiliar with *The Epic of Gilgamesh* the author's reference to the story of the fig leaf in the Garden of Eden is a more recognizable tale, in which a covering of the body is a founding gesture that has wide ranging ontological, social and political significance. From this point of departure the author explores dress and its administration as a semiotics through which the order of things and its institutions are created, put into operation and enforced.

The third and final foundational chapter is entitled 'Shakespeare on Proof and

Fabricated Truth'. In this chapter we fast forward from the mythical mists of time immemorial to the edge of modernity in Europe, 16th century England. The focus is the other central theme of this book: 'Naked Truth'. As the title of the chapter indicates the link between truth, dress and law is in the idea that in law truth is fabricated. The word 'fabricated' adds a rather ironic twist to this epistemological issue, suggesting that this model of 'truth' is all about 'falsehood'. Watt's argument is that truth is made; it is an effect, rather than an essence or a cause. The legal world of telling the truth and establishing the truth is used to explore the intimate relationship between truth and devices dedicated to truth making. In the justice process in general and the trial in particular the event, the moment when order is violated, is both the point of origin of the legal process and the constant preoccupation of the process of justice that is and will always remain a tantalising beckoning absence. Without the absolute certainty of divine revelation for guidance the best that can be hoped for is a recreation of the event through an elaborate set of rules and principles that shape the representation of the event in the justice process. The evidential standards of 'on a balance of probabilities' or 'beyond a reasonable doubt' make it plain for all to see that there is no investment here in a juridical expectation of absolute 'truth'.

For Watt a key term in law's lexicon of truth is 'proof'. He turns to one of the greatest English fabricators of imagined worlds, the playwright William Shakespeare, to trace the meaning of 'proof' and more specifically the associations between fabrication, costume and truth. Watt pulls out quotations from a variety of Shakespearean texts that highlight proof's association with testing, putting on trial, questioning, and clothing, or to be more precise a very particular form of clothing: armour.

The second half of the book takes the form of a number of case studies. Chapter 4 'The Face the Law Makes' explores the peculiarities of legal dress and the legal professional preoccupation with dress. Chapter 5 'Addressing the Naked and Unfolding the Veil' takes as its point of departure a number of court cases. One focus is a number of criminal trials involving Stephen Gough, who the UK media have dubbed 'the naked rambler'. Gough has been arrested 28 times and counting. He has made numerous appearances sometimes 'naked', in courtrooms in England and Wales and Scotland. He has spent more than six years in prison because of his sartorial practices in public places. 'The so called Islamic veil' (Watt 2013, 131) is the other piece of dress that has become something of a preoccupation in several western jurisdictions. In this chapter cases from the US and France are considered.

This book is a very ambitious project. The chapter on legal dress is a good example of this. 'The Face the Law Makes' explores the topic of legal dress by way of a rich assortment of materials from a variety of disciplines; fashion theory and history, cultural studies, semiotics, sociology as well as a wide range of legal scholarship. In addition to the writings of Shakespeare and Dickens, the 19th century lithographs of Daumier and 21st century photographs, as well as contemporary British television courtroom drama, *Silk*, are all woven into the relatively short space of a forty page chapter. Its temporal sweep is large: from the 16th to the 21st century. The

jurisdictional range incorporates both common law and civil law, and stretches from the 'global' to the local, specifically 'London' and 'Paris'. In both the breadth of approach and its subject matter this chapter shares with the other chapters the potential to be in itself the basis for a book length study.[1] On the positive side this makes the book a rich and tantalising resource for those interested by the issues raised in the book and keen to develop research in this area. On the negative side it can at times make for a frustrating read.

The chapter on Shakespeare is a case in point. Why turn to Shakespeare? The citation of Shakespeare performs a number of functions. The name and time of Shakespeare functions here as another mythical origin. 'Shakespeare' works as a sign of the high culture origins of all that is English. Law and literature's appropriation of Shakespeare gives this cultural origin a legal twist. The citation of Shakespeare's texts and the use of quotations is all part of an argument that seeks to persuade the reader that Shakespeare is the great legislator of the modern age.

At best Shakespeare is more a convenient accident. He was writing at a moment of great change. His writing career spans a time to paraphrase Marx and Engels (1967) when all fixed, fast frozen relations were being swept away. The social and political order that had been solid in the Pre-Reformation epoch had melted into air and was being reinvented. All that had been holy according to Rome had, depending on your point of view, been rendered profane or saved, reinvented, resurrected, made holy again, by way of a new regime. This was an epoch when iconoclasm was all the rage. Smashing images because of their heretical depictions, temptations to falsehood and error was taking place at the same time that there was a frenzy of making and circulating new images, establishing and showing new truths (Latour 2002; Montrose 1999; Strong 1977 and 1987; Tittler 2007). It is therefore no surprise to find a preoccupation with proof and truth as a theme in the Shakespearean imagination. But to expect Shakespeare to embody and reveal the rich complexity of the social, cultural and political forces that shaped and continue to shape the Common Law imagination is to put an impossible burden on one source.

I want to offer two reflections that engage with substantive aspects of Watt's study. The first concerns the 'face' referred to in the chapter title, 'The Face the Law Makes'. The 'face' of the chapter's title is not a reference to a particular part of the body, the head, but a term that highlights the importance of the surface of things; of that which is presented for view. The body is the primary surface in question. The chapter explores the robes, uniforms, pinstripes, that shroud and shape the human body as they make visible the signs through which the meaning of the judicial body and the body of the legal profession is made and made public. With the exception of some references to the wig, consideration of the face as the head is largely absent. My criticism is concerned with the way this face is neglected in Watt's study.

This is something of a surprise as earlier in the book in an aside Watt notes that

1 Watt does make reference to existing studies such as works by Hargreaves-Maudsley (1963) and Hunt (1996). Ruthann Robson's most recent work (2013) explores dress by way of seven chapters that gather together an array of US reported decisions that address the legal regulation of dress.

'all faces are in a sense "put on"' and as such fit within a commonly used definition of 'dress' (Watt 2013, 6). My argument is that when it comes to the judiciary and the legal profession putting on the face, the head has become increasingly important focus for dressing the subject.

I turn to portraiture to demonstrate the point. More specifically I want to explore this by way of a picture of the first President of the Supreme Court of the United Kingdom, Lord Phillips who held that office from 2009 to 2012 (Figure 1).

Figure 1. Lord Phillips first President of the Supreme Court of the United Kingdom 2009-1012. © Supreme Court

Figure 1 is one of a larger collection of portraits of Justices, past and present, of the Supreme Court of the United Kingdom. All were commissioned by the Court and made by a professional photographer.

Watt includes one of the commissioned pictures in the chapter on legal dress that shows Lord Phillips (Watt 2013, 84).[2] It is not the picture shown here but another one. It is an injudiciously cropped group shot showing five members of the court.[3] His choice of picture is significant. The judges are depicted in full body poses: sitting and standing. These poses emphasise the body of the sitter rather than the face. The dominance of the body is of particular significance. These are poses particularly associated with portraits that are preoccupied with the display of symbols, and more particularly symbols of authority: state portraiture (Jenkins 1947; Townsend-Gault 1988). The limited space allocated to the face in this style of composition represents its relative insignificance. Clothes are an important dimension of these portraits as they are used in the picture to represent the values and virtues of the institution that the sitters, in this case the Justices, individually and collectively embody. The physical body of each sitter is little more than a mannequin upon which the symbols

2 The court has twelve Justices. One, Justice Neuberger resigned shortly after the opening of the court to take up another judicial post. He returned to the court in 2012 as the second President of the Supreme Court.

3 The picture was taken on the day the court opened. On that day eleven Justices were sworn in as the judges of the new court. One post was vacant. Six of the Justices have been edited out of the picture that appears in Watt's book. View the full group shot at http://www.theguardian.com/law/2010/jun/07/religion-judiciary-supreme-court (Accessed 21 March 2014).

of office are put on display (Moran 2012; 2013).

As befits his preoccupation with judicial clothing, approximately two thirds of the picture he uses is devoted to the robes that adorn their bodies. The Justices are wearing their ceremonial judicial robes; they wear no robes when conducting the day to day business of the court. The black and white reproduction in the book barely hints at the splendour of these sumptuous gowns: edged in a thick golden trim, the long sleeves liberally covered in symbolic embroidered clasps of woven gold thread. A golden arch sits at the top of each sleeve into which is embroidered the four heraldic elements that make up the court's official emblem: a five-petalled wild red and white rose, the green leaves of a leek, a purple thistle and a light blue five-petalled flax flower.[4] The twelve gowns are reported to have cost just under £140,000 (Anon 2009). The use of this particular picture by Watt offers an illustration that echoes the argument that the robes, uniforms, stripes etc., that cover the body are all important.

In stark contrast to this is the head and shoulder portrait of Lord Phillips. Like the other portrait this too is a state portrait. It puts on display symbols that represent the values of the institution, and more particularly symbols of legitimate judicial authority. This particular portrait and others like it accompany short biographical notes about the Justices past and present on the court's website. They have also been used for other purposes. Sian Lewis, the court's first Head of Communications explained: 'They are more for identification purposes as much as anything […] we have a picture of each of them on the back of one of the leaflets that explains how we operate. It is so that when people come in they can see who is sitting…' (Lewis 2009).

The reference to 'identification' here draws attention to the way this style of head and shoulder portraiture is associated with recording the distinctive features of the sitter through a preoccupation with the head. The head, in a full-face pose, dominates taking up about half of the picture. Little of the sitter's body is visible. The subject's gaze is direct into the camera lens, engaging the viewer, inviting scrutiny. Little clothing is visible. The background is devoid of detail and characteristically uniform in colour and texture.[5] Other common uses of this style of portrait are passport photographs and police identification 'mug shots' (Moran 2012; Tagg 1998).

It is a style of judicial portraiture that is now commonplace. As a judicial portrait it is in sharp contrast to the generally larger scale three quarter and full body official judicial portrait considered above. The small scale close cropped head and shoulders composition prioritises the face. Clothing is noticeable by its absence or at best severely restricted, confined to the subject's neck and shoulders and shown as ordinary business wear. Judicial robes and props are also noticeable by their absence. All in all it is a very different composition. It points to a very different approach to

4 The four symbols represent the jurisdictions that come together to make this the highest court in the United Kingdom; the rose of England, the Welsh leek, the thistle of Scotland and the blue flax flower for Northern Ireland.

5 It is a form of portraiture that is common on the websites of law firms and barristers' chambers.

judicial dressing. Not one that is covered by Watt.

Allard, commenting upon the emergence in the 19th century of this intimate and informal style of portraiture in the context of images of important political figures suggests that the emphasis upon the head, the individuality of the sitter, rather than the symbols of office expresses 'democratic and bourgeois principles' (Allard 2006, 82). The qualities and characteristics of the institution and the social status attached to the post and the post holders are, he suggests, not so much missing but are now coded in a different way. Status now has to be represented using a certain discretion. Status is now, 'not so much [what] is shown as the manner in which it is shown that betokens dignity and exemplarity of the illustrious man…' (Ibid., 83). The lack of background, costume and props emphasises the importance of the face. The face of the sitter now carries much of the burden of representing the institution. So how is the face worn in these portraits?

When we look at the photo portrait of Lord Phillips what do we see? The head is the 'face', the symbolic assemblage, par excellence. We see a judicial subject whose individual features are clearly depicted, free from the obscuring effects of the symbolic regalia of judicial office. The face is open and engaging. The gaze of the sitter places them at the same level as the viewer. That together with the gentle smile draws the viewer in, inviting inspection. Through this preoccupation with the face these pictures represent their subjects as the embodiment of openness, visibility, transparency and proximity; all of which are virtues of this judicial institution. The 'temptations of realism' are at their most seductive here when viewing photographic images. This makes the truth of these institutional values seductively immediate and easy on the eye (Burke 2001, 21; Tagg 1998).

My second brief reflection focuses on 'the naked rambler' who is one of the subjects covered in chapter 5 of the book and referenced in the chapter's title, 'Addressing the Naked and Unfolding the Veil'. In part my concern is with the use of the word 'naked'. It engages my unease about the lack of attention to detail in the book.

For Watt 'naked' means, 'an absence of dress' (Watt 2013, 8). This seems to fit the 'stark bullock naked' approach to 'naked'. If that is the case then putting the legal proceedings that involve Stephen Gough, the so called 'naked rambler', under the chapter title 'Addressing the Naked and Unfolding the Veil' is a misdescription. A Google image search brings up many photographic images of Mr Gough rambling 'naked' including several that record the time and nature of some of his many arrests.[6] He is not, 'naked' as in 'stark bollock naked'. He inevitably wears socks and robust walking boots. On many occasions he is 'naked' wearing a back pack, hat and scarf. This is a form of 'naked' I referred to earlier to in the opening paragraph; one that involves a particular economy of undress. The cases involving Gough are not so much about an absence of dress but more about the presence or absence of particular items of clothing and the display of particular parts of the male anatomy. They are

6 For example see http://jamesstewart.photoshelter.com/image/I00009dN.mllVS9A (Accessed 21 March 2014).

cases about genital dress and 'absence of genital dress'. Precision is necessary if we are to make sense of the law and dress interface.

Related to this is a need for greater precision and attention to the detail of the offences Mr Gough has been charged with during his criminal career. Watt pays most attention to proceedings relating to contempt of court allegations that arose out of an appearance by Mr Gough 'naked' in court. Appearing 'naked' in court Watt explains was described by the appeal court judge as the performance of a 'crime of public indecency' in the face of the court (Watt 2013, 128-129). At other points in the discussion of Mr Gough's legal career there is also a reference to a 'breach of the peace' offence. Section 63 of the Sexual Offences Act 2003 is also mentioned though it is not clear whether Mr Gough was ever charged with or found guilty of this offence, of intentionally exposing one's genitals and intending that someone will see them and be caused alarm and distress. A brief internet search also reveals that Mr Gough has been made the subject of an 'anti-social behaviour order' (ASBO) and sent to prison for breach of the terms of an ASBO (Anon 2014). The ASBO procedure is formally a civil rather than a criminal matter. It signals a rather different approach to regulating 'low level' behaviour thought to be threatening to 'good order'. The lower standard of proof associated with civil law is indicative of a creeping expansion of control by way of a strategy of 'defining down' (Garland 1996).

'Indecency', 'breach of the peace', 'sexual', 'ASBO', and there may be others, as legal categories and regimes through which the economy of dress and undress is made sense of are all worthy of much more consideration. Each draws attention to a range of different separate and connected intelligibilities through which the symbolic body of the subject is made sense of, both at different points of time and at the same time (Moran 1996, Ch. 4). Each in their different ways connects bodies, 'dress', and economies of dress and undress to social and legal order in particular and potentially different ways. The lack of attention to these different intelligibilities in Watt's analysis of the legal preoccupation with Mr Gough is a missed opportunity to put some real flesh on the bones of the general argument that law and dress are intimately connected.

In a single book that runs to a little over one hundred and fifty pages calling for more in an already brimming cornucopia needs to be approached with caution lest it appear to be asking for the impossible. Each chapter of Watt's book is teaming with ideas, webs of associations, examples, insights all of which I wanted to see developed further. But a more select approach by the author giving the book a more specific focus might have been one way of managing the richness of the topic of this book, opening up opportunities for a more in depth theoretical or historical study or a study with a specifically more contemporary focus. As it stands this book is a useful and tempting point of departure. It hints at many avenues for researchers to pursue.

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Book Review

Richard Dawson: *Justice as Attunement. Transforming Constitutions in Law, Literature, Economics, and the Rest of Life*. Routledge, Abingdon 2014.

Jack L. Sammons*

1. Introduction

Although he does not express it in these terms, in approaching justice through attunement Richard Dawson is thinking of justice as a certain form of truth,[1] a way of thinking about it far from common for our time although it may have been common in times past. In doing this, he is trying to make our language reveal that which we have used to conceal for a very long time, and the challenge of this, if not impossible, is certainly daunting. This book then is an act of courage, and to read it well I think you must read it as such. There is no way to say in propositional terms what he wants to say. What he must do instead, if he is to be true to this form of justice, is to offer readers of this alphabetical lexicon not ordinary definitions, but performative ones: carefully chosen unsettling experiences of the words one might wish to use if propositional terms were possible, experiences that, as he puts it, can 'transform' these words and, in doing so, 'transform' his readers in their understanding of justice.

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1 In Dawson's hands this ancient way of understanding justice becomes the claim that justice is an attunement to situations of conflict such that we uncover who we are, in truth, in those situations. He offers no other way of describing justice (nor should he) other than as a matter of our deepest and, therefore, most truthful identity. If this puzzles you it may help to draw an analogy to poetry. Poetry, we sometimes say, is a certain form of truth. The form of truth poetry is not only requires an attunement to the poetic, but is constituted by this such that we could say that poetic truth is this attunement, and thus involves a poetic way of being. This, I think, is close to what Dawson has in mind for justice. If this way of thinking justice is unfamiliar to you, I hope that it will become clearer as the review proceeds.

In a culture wedded to 'It is what it is!' Dawson, with each word he explores, gently insists: 'No, it isn't'.

All this is to say that this is a very difficult book to review. Its form is as a lexicon of twenty-four words,[2] most of which are central to the work of James Boyd White, and also central for Dawson for an 'attunement'[3] to justice. Analogous uses of each word are explored through carefully selected literary, legal, philosophical, political, historical, economic, and other texts in order to determine the word's role in this attunement.[4] Now, doing this as a lexicon is certainly interesting and creative, but it is also straightforward enough. The way in which each entry works, the way each relates to the others, the way each works upon us, and the way all this relates to justice, however, is quite another matter.

For this reason I think it best to begin with a summary of one entry in the lexicon to give you the feel of the book, knowing well that, since Dawson wishes to provide his readers with very particular experiences through which a transformed understanding of each word can arise, this summary will be very inadequate. The one I have chosen—in part because it is so central to White who is so central to Dawson—is 'Imagination'.

2. 'Imagination'

Starting with a reference to White's *The Legal Imagination* (1973), Dawson tells us that White's work complicates the relationship of reality to imagination. Quoting White, he says that White's central thesis is: 'the activities which make up the professional life of lawyer and judge constitute an enterprise of the imagination [claiming meaning against the odds]: the translation of the imagination into reality by the power of language'.[5] Dawson then asks—and this move of immediately applying what has just been presented to itself is done throughout the book—'How might we imagine the imagination?' (Dawson 2014, 106). At this point he turns to his 'method' (in quotations here because it is a word he explores) to address such questions: an exploration of analogous uses of the word 'imagination', in other texts. This is a method Dawson has self-consciously adapted from legal thought.[6] Unlike the law, however, what will serve as relevant analogous uses for Dawson's inquiries

2 The words he explores are: activity, alienation, attention, attunement, character, constitution, conversation, culture, equality, experience, imagination, integration, judgment, justice, language, listening, metaphor, method, movement, performance, play, questioning, reading, rhetoric, silence, understanding, and voice.

3 'Attunement', a word he borrows from Alton Becker, 'is a way of orienting ourselves to meaning, which is not an object but an experiential process' (Dawson 2014, 232).

4 To give you a feel for how broad the inquiry is, here is a sampling of some of the authors he relies upon: Jane Austen (of course), Edmund Burke, Bertolt Brecht, R.G. Collinwood, John Commons, Robert Frost, Hans-Georg Gadamer, Bernard Lonergan, Nelson Mandela, Michael Oaskeshott, David Tracy, Mark Twain, Simon Weil, and Ludwig Wittgenstein.

5 White 1973, 758, cited in Dawson 2014, 106.

6 Notice that by using this method, the book becomes an analogy, one for exploring what we mean by legal thought, and what value it might have. This, too, is a matter of self-reflexivity, but, and this is typical of Dawson, taken one level higher than you would expect.

is very broad. We will find within 'law, literature, economics', as his title says, but also, as his title adds, 'the rest of life'. For 'imagination', the first analogous use is in *William Shakespeare's King Richard II*. When the Duke of Lancaster encourages his son to 'imagine his exile in a way that will make it less of a "sorrow"', Bolingbroke responds:

> Oh, who can hold a fire in his hand
> By thinking of the frosty Caucasus?
> Or cloy the hungry edge of appetite
> By bar imagination of a feast?
> Or wallow naked in December snow
> By thinking on fantastic summer heat?
> Oh no, the apprehension of the good
> Gives but the greater feeling of the worse.[7]

This then will serve as the understanding of 'imagination', to be reimagined through other analogous uses. Notice that he has captured our most common understanding of the word, given our tendency to use it as a substitute for 'fantasizing'. Telling next the familiar tale raising the question of the meaning of power in *King Richard II*, Dawson notes that Shakespeare, 'between the lines', is asking his audience: 'Have you ever really looked carefully at the Crown?' (Dawson 2014, 108). And, in doing so, Shakespeare renders the familiar, the Crown, strange, thus 'offering the experience of words losing their meaning and the opportunity to become a self-conscious composer of meaning' (Ibid.). This is, of course, what Dawson is also doing in using this play, not with the word 'Crown', but with the word 'imagination' and it too is mostly done 'between the lines'.

Next Dawson returns to White's *The Legal Imagination* to complete and to extend the connection, again through *King Richard II*, of imagination to authority:

> It seems to be part of the notion of authority that it is unquestioned, an obvious fact, not a judgment. [...] [A]s Shakespeare's Richard II demonstrates, when such a language is taken as open to question, it loses its peculiar force at once.[8]

If this is true of something like authority, that is, that its dependence upon our imagination becomes clear when it is questioned, then it is also true of law. In other words, 'the activity of law deeply involves reality-creating symbols that can become meaningless without due exercise of bare imagination' (Dawson 2014, 110). White concludes:

> This suggests that the ethics and politics of the play is Socratic […], for it locates us in a *position* of increased responsibility and decreased certainty, expanding

7 Shakespeare, *King Richard II*, I.iv. 293-300, cited in Dawson 2014, 106.
8 White 1973, 815 and 817, cited in Dawson 2014, 109.

> our knowledge of the way in which valid forms of thought and speech erode each other.[9]

Now this locating of responsibility in the uncertainties of our own thought is interesting and important, and we can see as well that Dawson is questioning the *questioning* of meaning as he questions the *meaning* of 'imagination', but to leave it at this would be to leave it with White, not Dawson, and so Dawson continues his 'method' with questions that have been silently raised: 'The image of the "position" that "Shakespeare brings us to share" is helpful for thinking about the "position" that White brings us to share in *Acts of Hope* and in his other books'. (Dawson 2014, 111.) And then goes on:

> How are we to imagine the experience of being 'brought to the limits of our imagination and understandings'?' Is this not a 'religious' 'limits'-experience …? [...] The 'paradoxical' image suggests to me that Shakespeare establishes a [position] that is at once outside and inside life with language, a [position] that will be of interest to theologians. There is a place for economists, too: the reality of 'competing languages' should be of interest [...]. Theologians and economists could get together to talk about how to 'undo ourselves'. With 'many people in one person', the question might be: which selves? (Dawson 2014, 111.)

With this Dawson has turned to themes, especially a concern with the language of economics, that will reappear throughout, but his primary interest seems to be in getting clearer about this 'position' from which we reimagine, for surely reimagining can be for better or worse. What then is it about the 'position' Shakespeare and White and, by extension, Dawson wish to share with their readers that lends itself to [...] well [...] justice?

What Dawson does at this point, what he always does at such points, is shift the analogy. Suddenly we leave the world of *King Richard II*, the world of White's inquiries into language, inquiries that risked becoming abstract and theoretical, to turn to '*Maps of Sovereignty': Perry Dane on the Cherokee Nation*. In suddenly abandoning White—stopping theory from developing rather than developing it as many would be tempted to do—Dawson, it seems to me, is actually extending White's work in the way that White might be most inclined to do.

Through Dane's analysis of Chief Justice Marshall's opinion in *Worcester v. Georgia*,[10] Dawson introduces the idea that laws by a state harmful to indigenous people entirely within the state can nevertheless be considered 'extra-territorial' and void. Marshall's opinion doing this, Dane says, is an act of imagination which is 'the ability to hold, in tandem, apparently contradictory images of the relationship of self and other. It is the ability to insist on absolute dominion, and yet also recognize the dominion of others'.[11] For Dawson, this example of imagination offers a way

9 White 1994, 79, cited in Dawson 2014, 111, emphasis added.
10 31 U.S. (6 Pet.) 515 (1832).
11 Dane 1990, 990, cited in Dawson 2014, 112.

to begin thinking about not an *answer* to the 'position' questions he raised, but a way of going on with it. Dane, he tells us, has identified in Marshall's opinion an act of 'constitutional transformation', through 'a "transformation" of "the imagery of state exclusivism"' (Dawson 2014, 113). Going further, he notes that Dane, as a writer, performs the same sort of act, 'cavorting with the orientational metaphors of "inside"/ "outside"/ and "hierarchy"/ "equality"' (Ibid.). After reading Dane, he says, 'we may never hear the word "sovereignty" [...] in quite the same way again' (Ibid.). But then he asks, continuing with the question of 'position': 'How are we to judge Dane's judgment?' (Ibid.). What Dane is saying, in this essay with the odd subtitle 'A Meditation', sounds like a lawyer to Dawson, one 'confidently speaking the language of sovereignty' (Ibid.). So:

> Is he not writing from inside the law? In his own sovereignty-talk, he seems to be offering the 'contradictory images' that are his subject. He is mixing genres, and in doing so bringing together parts of our culture that are commonly imagined to be apart. This is a constructive act of integration which could be a source of hope for those on the margins [...] (Ibid., cross-reference omitted).

Dane's reimagining, Dawson suggests, was prompted by his asking the right questions about the legal order (perhaps as Shakespeare was doing in *King Richard II*). As Dane puts it, the question, 'Who are these people?' is, 'for any legal order looking at the world, the great question of existential encounter'.[12] With this, what we thought was a question of 'position' has become a question of how one acquires the character for asking these right questions, questions which then determine the 'position'. Quickly then, Dawson turns back to White to tell us that 'the imagination is a facility of sympathy as well as intellect'.[13] In this, 'imagination' has moved from an opening in language for 'imagining' something into reality, to a question of an offered shared position made possible by these openings, to become a question of questioning which is then understood as a matter of the character needed to ask anew: Who are we? Who are we to become? And, then/finally, the 'radical question of justice': Who are we to be to each other?

There is more to this chapter on 'imagination'. Dawson takes us through other writers to see that the law, in providing 'a subculture in which two or more rival images of certain events in our culture can be placed against each other', is a social way of 'mak[ing] our construction and reconstruction of images conscious, [making] controlled changes of culture possible' (Dawson 2014, 117). In this law offers a model for other discourses, he adds, including economics. But rather than exploring this interesting thought with him as our guide, let me add a thought or two.

Dawson implies at the end of this entry that the way imagination relates to justice is that imagination, working in the way he displayed it, allows us to become 'other to ourselves' (Ibid). In one sense, this is a large part of the 'position', he was

12 Dane 1990, 1004, cited in Dawson 2014, 113.
13 White 1973, 758, cited in Dawson 2014, 114.

trying to display. And a display it must be, for there is no way to answer the 'position' inquiry without doing what I did above: use the word 'justice' and 'justice' is no 'answer' at all. For it is 'justice'—and we can see this most clearly in his concluding thought about the law—which in Dawson's terms determines if and which exercises of imagination are fitting. Dawson knows this—it is justice as a form of truth in its 'fittingness'—and it is why, I think, that his performance of 'imagination' led directly to an inquiry into justice, not as a propositional matter, but as something also on display in his examples from which we can 'imagine' how to 'imagine' in a way that will be just.

Almost all of the other words in the lexicon end up working this way as well, *i.e.*, they all point towards 'justice,' while relying upon it. So 'justice' really is the central inquiry in the book, as the title suggests, and it is important, I think, to hold on to this as you read it.

3. The virtuous circle

Notice that one way of describing what Dawson did with the word 'imagination' is that he extended what the word concerns through comparisons[14] to its analogous use in various texts. In doing this, he extended the word's 'horizon'—as Heidegger or Ricoeur or Gadamer or Lonergan and a whole host of other writers put this. In doing this with each word, he does it for us as well, for the horizons of these words define our thoughts on justice. Since each word's horizon is being expanded, and each word in the lexicon reappears in numerous chapters (always marked with an asterisk), this work could become impossibly complex if one tried to read the book in a linear way. Doing so would also miss the point, for the book is intentionally circular: each word circles back to itself (as 'justice' is required to understand 'justice'), each chapter circles through other chapters back to itself (as 'imagination' and 'justice' reappear in each other and are interdependent); we become good readers of White by becoming good readers of Dawson by becoming good readers of White; and so on. In fact each thought is at some point reflected back upon itself in small circles of words. The point here, paraphrasing Heidegger in 'The Origin of a Work of Art',[15] is not to find a way out of these virtuous circles, but to try to stay within them.

For some this could become inordinately frustrating, and perhaps it will be so for those who might profit the most from the book. The solution, I think, is the one Dawson suggests at various points: Each entry can be profitably considered entirely on its own, and the entries need not be read in any particular order. Dawson (2014, 187) wishes his readers to be able to make the book their own creation by the way they choose to read it, and, he says with a refreshing honesty few of us can muster, in an important sense he cannot know where the book will lead them. In other words,

14 In almost every entry, Dawson asks the following question about some thought or someone he has just affirmed: 'Shall I compare [...] ?' Sometimes he then provides the comparison and sometimes he lets the question go begging.
15 See Heidegger 1971.

relax with it; start off not with the prologue or the introduction (those you can read later as questions arise), but with whichever word is of most interest to you at the moment, and read the entries one at a time. Over time connections between the entries will appear to you and it is likely you will wish to reread some in light of your experience of others.

4. A problem and some questions

Dawson sometimes suggests that the point of the transformations readers might experience is to render us equal to the tasks of democracy, equality, and openness to others, but notice now that none of these are goods in and of themselves. They are instead the locations of social tensions, the resolutions of which can move us towards the good. There are things prior to each of these that give to each its value for us. One of these is justice. For any of these to be good requires that there be justice in our continuing resolutions of the social tensions they provide and the conversations these tensions produce (much as any of the individual Aristotelian virtues require practical wisdom). So the book really is, as I described before, about justice, or, to put this in Dawson's terms, justice is what the book does. And it 'does' 'justice' by placing us near to it, within its own virtuous circle of thought.

There are, however, moments when the book fails to do justice to itself. These are most often the moments it becomes too polemical. Typically these occur when Dawson gets too close to his own initial experience of the sort of transformation he tries to offer his readers. He was a beginning economist, one who suspected that something was askew within his field, something, that is, that did not fit with the world he knew, but he lacked the words, or rather the understanding of the words, needed to think this for himself. Through an exposure to the writings of John Commons, P.E. Earl, and White, he was transformed towards a more humanistic, and therefore for him more truthful, account of the science of economics. White was central to this, not so much for his thoughts on economics for most of those thoughts can also be found within the literature of economics, but because White was directly concerned with this sort of transformative experience in reading; he, more than any of the others, was very consciously seeking to provide this experience; and he was doing this with the sort of wondrous success he had with Dawson as a reader.

When Dawson gets too close to his own initial experience, two things happen. The first is that he describes what he is doing, as White sometimes does, as offering control over our languages so that we might have a choice in the way they shape us. The second is that he then finds a gentle, but firm, way of making it clear in the context of the issue he is addressing at the moment what this choice should be. This is very different from offering to readers an experience with a word for the (trusted) transformative uncovering of meaning it can provide. For me, these more polemical moments in Dawson's book were blasts of cold air in a very warm environment. But now let me expand from this minor complaint in a way that might be helpful to other readers and potential readers—starting with an excerpt from White as Dawson would. In White's essay, 'Economics and Law: Two Cultures in Tension', there is a

passage, one quoted by Dawson in the entry on 'language':

> I start from the position [...] that the languages we speak, and the cultural practices they at once reflect and make possible, shape our minds by habituating them to certain forms of attention, certain ways of seeing and conceiving of oneself and of the world. This is in fact why we learn them [...]. For me [...] the major art of intellectual life is [...] to discover, and try to control, the ways in which our languages capture and drive our minds, so that we may recognize what they leave out or distort, both in ourselves and in others, and subject them to the discipline of other forms of thought and expression. Control of such a kind is most difficult, for it is at heart a species of self-control: when we speak our languages we cannot help believing them, we cannot help participating emotionally and ethically and politically, in the worlds they create and in the structures of the perception and feeling they offer us. In time the soldier wants to go to war.[16]

At various times in the book, this seems very close to the bedrock for Dawson's project: '[we need to attend to it] lest we fail to do justice to ourselves and to others' (Dawson 2014, 161), he says in the same entry on 'language'. When he is too close to his own early transformation, as I mentioned before, he almost always describes what he is doing this way, *i.e.*, emphasizing control (which is to say acts of will) over our own languages. In this, as it often is with new converts, those who led him astray about his practice of economics take on the role of the enemy such that escape from their clutches and wrestling control over the 'language' of the practice from them becomes personally important political combat.

But now notice the problem with White's passage. In this passage, there is something called 'languages' set against something called 'mind'; something called 'self' set against something called 'world'; there is also an inherent internal/external spatial divide; and even a 'they' of languages set against a 'we' of something somehow outside of them. This way of thinking—a binary reification for the purpose of theory—is a serious problem in both White's and Dawson's own terms. It is a way of thinking that almost always works against the mystery that defines us, the very mystery which offers the understanding of humanity so central to the thoughts of both writers. In fact, what one learns from both writers is that we cannot divide the world into such 'things,' such nouns, such autonomous objects (especially when they are cultural 'objects'), without doing harm to who we are and to what they are.

For example, the 'languages' to which White refers in this excerpt are not true 'languages'. They are instead extended registers, with very particular vocabularies, located within a language. We call these registers 'languages' only as an analogy that aids our understanding of the complex hermeneutic relationships we very often have with them. The 'language' of law (or of economics, science, mathematics, music, and so forth) cannot possibly be autonomous to the extent that true languages are. Each

16 White 1986, 166, cited in Dawson 2014, 161.

and every word within these 'languages' is located within a web of words within a true language from which it never escapes, no matter what claims may be made about it within the disciplines that rely upon certain words for their own identity. As I read them, this is what makes White's work, and Dawson's extension of it, both possible and powerful. Not to think that this is the case is to risk reducing the traditions of the practices in which these 'languages' are found to something fixed, a static status quo, and nothing, *nothing*, could be further from the thinking of White and Dawson than this.

As I also read them, however, neither is really offering *control* over such a 'language', although both often say they are. Instead each is uncovering within these inherited 'languages' truer meanings—better, fuller, more complex, more contingent, more connected, more experiential, accounts of the horizons of these 'worlds'. *Such meanings are always already there within the inherited 'languages' of our practices, awaiting their uncovering*. Is this not the point? The work of both writers makes it seem to their readers that something these readers already knew as lawyers, as judges, as economists, as so forth, but did not know that they knew, has been uncovered through their writings. Is there anything more personally persuasive, more 'transformative', than the surprising sense that you are suddenly more authentic, truer to who you are, and even perhaps to who you are 'meant to be'?

Does this matter? Or is it a quibble, mere word play? I think it does matter, particularly so for reading Dawson well. 'We cannot help participating [...] in the worlds [our languages] create', as White says in the quotation above, but this is not a problem for us, as he suggests it is in the excerpt. Our participation doesn't render 'control' difficult for us, for control is not only impossible, but destructive if what one is seeking is something called 'an attunement'. Instead of control, the inevitable fact of our participation in the worlds of 'languages', worlds that obviously would not exist without us, means that we can find within these worlds—*we can always find within these worlds*—the resources to do something called an 'attunement' to something called 'justice'. Perhaps justice is never a matter of somehow standing outside of the languages of our practices even when we are drawing analogies or making comparisons among practices or texts; never a matter of acquiring an endlessly broader perspective through ceaseless self-reflection; never a matter of either an expanded self or (even) a loss of self; never a matter of control; never a matter of will; never a matter, as both White and Dawson put it, of becoming 'self-conscious composers of meaning', but is instead something to be quietly uncovered in our practices in the missing middle voice of the Greeks that so many writers in our postmodern era, including White and Dawson, seek.[17]

And perhaps then 'justice' is not something we can draw near to, either individually or socially, in any way other than through an 'attunement' to the words we would use for it, one similar to what Dawson offers.[18] And perhaps this is what makes

17 You can see this search for the middle voice in words like Dawson's 'attunement' or Heidegger's '*aletheia*' or Ricoeur's 'appropriation', words which can only get them part way there as they all know all too well.

18 Perhaps this is one way of understanding what 'the law' does for us socially: the law as the primary form

his work so interesting and so valuable. But—and to ask the questions as Dawson would—if 'justice' is something to be uncovered through an 'attunement', what is it? How would we think 'justice'? Is this 'justice' an 'activity' of our 'imagination'? If so, what sort of 'movement' is involved in drawing near to it. Perhaps the word 'justice' is a 'metaphor' but, if so, for what? What does it mean to say we can have an 'experience' of justice uncovered? What is it we are 'experiencing'? What 'method' would we use for this experience? In which 'language' would we approach justice if in language at all? And, if in language, what sort of 'conversation' is required? And, which 'questions' within this conversation are the right ones to ask?

Each of the words in quotations in that paragraph is a word explored by Dawson. 'Playing', another of his words, with each would be, as you can see, important to an understanding of justice as a form of truth for our time, and, as I said at the beginning, this is what I believe Dawson is trying to do. But now, if 'justice' is as central to the work as the title suggests and as I have argued in this review, perhaps we should turn, at least briefly, to that entry to see if there is a potential 'integration', yet another of his words, of these thoughts.

5. Justice

The entry on 'justice' starts with the idea, through the *Crito* (as read by White) that the justice central to Socrates' own identity as an Athenian, as that of Athens itself, is a 'fictive creation partly of his own making'[19]—at which point Dawson reminds us that the line between the 'imagination' and reality is an imagined one. The entry ends with a question about bringing this 'fictive creation' into reality in the form of the law at its best. Along the way we encounter the primary problem: those for whom the government, in the words of the Supreme Court of New Zealand's opinion in *Wi Parata* v. *Bishop of Wellington*,[20] can be 'the sole arbiter of its own justice', when a case cannot be resolved by 'known principles', *i.e.*, a 'settled system of rules', an especially distressing claim by the Court because it was being applied to the issue of the recognition of the rights of a New Zealand tribe under 'the Treaty of Waitangi'.[21] In other words, the problematic understanding of justice comes from those for whom justice is not a 'fictive creation partly of [their] own making', but a non-fictive thing *entirely* of their own making.

At this point, Dawson shifts from law to take us to poetry—the art through which we can best know what our own language has on offer. Specifically he takes us to the poem of Gerald Manley Hopkins 'As Kingfishers Catch Fire'[22] to remind us that 'the just man justices' and that, as in the poem, justice is not a noun, not a

social attunement to justice takes in other words. In so many philosophers who might be linked with the postmodern, you can hear, I think, if you listen carefully enough, a yearning for something very much like the common law.

19 White 1994, 34, cited in Dawson 2014, 135.

20 *Wi Parata* v. *Bishop of Wellington* (1877) 3 NZ Jur. (NS).

21 *Ibid.,* 77-78, cited in Dawson 2014, 136-7.

22 Mackenzie 1981, 141, cited in Dawson 2014, 138.

'thing' at all, but a verb. But if it is not a 'thing', but a verb, what action is this verb describing for us? As we have come to expect throughout the book, he turns to White for guidance on how we might talk about this word 'justice'.

'Do not look for propositions', White says, but for 'movement, for shifts in the meaning of words'. Listen to 'the music [our] voices make', he says (1990, 229-231). And at this poignant point in the text, there is yet another abrupt shift in Dawson's style. Suddenly we are faced with the text of a 'face-to-face' imagined conversation with White, one White had asked his students to imagine, in which all of the multiple selves of Dawson and White are in play. This, Dawson seems to say, is how 'the just man justices'. Notice that this is a way of speaking that we might say is more fully human, not only in the sense that it attempts to capture the multitude that each of us is, but also in the sense that within this multitude are multiple modes of reality, including ones in which 'fictive creation[s] partly of our own making' are real. In the very next section of this entry on justice, Dawson give us a powerful example of this 'fictive creation' taking on a life of its own in the life and work of Bram Fischer as Fisher, in the name of justice, defends his own struggle to free the people of South Africa (Dawson 2014, 141-146). Through Fischer's words, we hear of law as containing within it a 'fictive creation', which Fischer calls a 'higher law'. This 'higher law', rendered real through Fischer's life, is an idealized element of law, indistinguishable from justice, something always already there within the law, and the law's true origin, we might say. This, Dawson tells us, is a matter of 'belief' for Fischer, but 'belief' he also says, through White again, is a form of love[23]: a personal commitment inherently connected with justice.

This is 'justice' in its most human form. In Dawson's deft hands justice has become no more of a thing than a person is a thing. Instead it is alive, and in the way in which, through other people, we best know what 'alive' means: complex, contradictory, full of tensions, constantly progressing, and ultimately mysterious. 'Justice', has taken on a clear experiential reality for us here, and yet it is not real in our usual sense of the word. It is not 'out there', but it is, nevertheless, there. Not a 'thing', but perhaps a 'no-thing', as Heidegger might say. Like the 'music of our voices' at their most human, it exists only in its performance and our experience of it. This justice is like the other person: always ultimately unknowable, forever at a distance we can never cross, and yet it can be, in our love, closer to us at times than our own selves.

Perhaps the mystery that justice is for us is the same mystery that each of us is, Dawson suggests well 'between the lines'. And perhaps justice then is as 'real' as we are. Is there really any wonder then why the form in which we have *imagined* justice throughout history is as a god (or, after the Hebrews, an angel) in human form: Dike, Justicia, Themis, Rageul, Maat, Utu, and so forth.

If you put this entry on Justice in the context of the virtuous circle of the book something very interesting occurs. Yes, we are given an understanding of justice as

23 White 2006, 214, cited in Dawson 2014, 145.

a form of truth, a truth about ourselves, and of course there are others who have thought of it this way, but Dawson's 'justice' appears to be remarkably different. The primary issue regarding a conception of justice as truth[24] is whether such a conception requires us to abandon the ordinary notion of justice we depend upon: justice as a certain moral relationship to the other; justice as fairness, justice as equality, as balance, as empathy, as openness, as care, as love, and, as my mentor, Tom Shaffer, was fond of saying, as something we give to each other. In Dawson's good hands, however, this issue has somehow lost it meaning.

6. Concluding thoughts

The questioning of White and Dawson I did earlier—the one about the role of the will in all this—while honest was also something of a setup to show you how Dawson's book might work for you as a resource. I have gone on about his entry on 'justice' not just because I think 'justice' is central to the book, but also because I think it is important that readers hold on to a certain conception of justice throughout to do justice to Dawson's book, and that Dawson's book can teach this. He speaks so often about freeing oneself from the bonds of language, of bringing language to conscious so that it can be a matter of our choice, and of composing our own meaning, and while there is nothing inherently wrong with starting that way, to shake a reader lose from 'it is what it is', a reader could, nevertheless, be led astray were they not to read 'between the lines'. Dawson's purpose, I believe, is not for us to will ourselves towards something of our own choosing, or to shape our languages to suit our purposes, but to open ourselves, through the openings the words of his lexicon offers to us, to justice.

In doing this, in reviewing the book this way, I have tried to do what Dawson does throughout his text: use a text I admire to examine that very text. And by using Dawson's text this way I do mean to express my great admiration for it. Of course the quality of the entries in the lexicon is uneven as we should expect. At times the book may seem repetitious; there are moments when you will wish more had been said; some may find it frustrating, as I described before, with its frequent cross references and unending, endlessly self-reflective, circular, questioning—questions about questioning questions and so forth. In all this, it is a very human book, nothing if not sincere, heartfelt, and personal. Whatever flaws it may seem to have are flaws born of the author's courage in writing it: reflections of the complexities of a mind trying to be honest with itself. It is also *brilliant*.

24 See, *e.g.*, Charles Bambach 2013.

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