

Editorial

Law's Justice: A Law and Humanities Perspective

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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