Law and Social Theory

Courting Death

The Law of Mortality

Edited by

Desmond Manderson

COURTING DEATH
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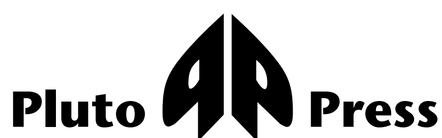
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Desmond Manderson
The University of Sydney
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Introduction: Tales from the Crypt – A Metaphor, An Image, A Story

Desmond Manderson

I have lived all my life under erasure. Who I am, a lawyer, a writer, a friend, seems only a trace, the wake a boat leaves in passing. I try so hard to hold fast its shape, to remember, to preserve, but inevitably the passage of time does its work of deliverance and loss. Like Dorothea Lange's cover image, 'Gravestone, Utah'[1] our memorial to ourselves and others has been windblasted smooth by time. 'In memory of ...': yes, but of whom or what? In the confounding face of death, deliverance becomes effacement, loss becomes lack, and memory seems only to remind us that there is something we ought to be remembering. Only a trace remains.

Animals, I suppose, do not seem to suffer in quite this way. For them it seems that the waters of experience are not stained by the prospective loss which death threatens, or the retrospective loss which time accomplishes. But the human animal, at least, is different. The shadow of time past and the darkness of death to come fall over and structure our lives.

> Death works with us in the world. It is a power that humanizes nature, that raises existence to being, and it is within each one of us as our most human quality; it is death only in the world – man knows death only because he is man, and he is man only because he is death in the process of becoming ...[2]

Let us turn from death as an idea to something specific: law and death. Each of the two crucial terms in this postulate are typically presented as if they were *faits accomplis*. Nothing could be further from the truth. We can and ought to study the relationship of law to mortality on the one hand because death is a cultural invention. Perhaps this seems counter-intuitive. The question is not *that* we die, however, but that we know we die. Consciousness changes everything. Norbert Elias made a similar point in his study of time.[3] Events will pass regardless of human intentionality, but the construction of time in a specific way, as a measure, linear, constant and abstract, is pure human invention.

Time and death, parent and child, are not the giddy oceans of our experience. They are the fragile boats we humans build to sail upon them.

If so, then our challenge is not just to accept death but to understand its meaning for us, and to appreciate why our human societies have developed this particular understanding of it. For some, like Simon Critchley in his readings of Blanchot and Beckett, the meaning is to be found in the very meaninglessness of death/life.[4] But this is a hard business, and I would have something more forceful to say about it than almost nothing.

We can and ought to study the relationship of mortality to law on the other hand because law is not just command but discourse, not only authority but also artefact. Law too is a cultural achievement. Furthermore, its cultural facticity, its pragmatic rather than its conceptual approach, brings new insights to the philosophy of death. *Courting Death* is committed in just this way to uniting the abstractions of death with concrete and mundane issues of legal regulation. This book aims therefore to investigate how death has constituted our selves, and how this mutual constitution is evidenced, articulated and realised by human law. It is a book about *The Law of Mortality* in both senses of the phrase – how law governs aspects of death, and how death itself governs our lives and social structures.

There is an ineradicable tension here that forms the text of this introduction and the subtext of every chapter in this collection. Law is the collective expression of our belief in the human capacity for responsible action. It defines, authorises and enforces responsible conduct. Our responsibility is nowhere more profound than in relation to death, a duty from which noone can relieve us. But these two types of responsibility – one legal, one ethical; one social, one personal – are contradictory. On the one hand, law seeks to control every aspect of our lives, including the manner of our passing; while death is precisely that element which lies outside of our control. On the other, the legal order is constructed around individual action and responsibility, yet death is precisely the moment at which this 'I' ceases to be. There are two desires here, Apollonian and Dionysian. The law expresses our desire for individuality and control, while death suggests a desire for dissolution and transcendence. Notions of responsibility are caught between the logic of law and the ethics of alterity. In this struggle, law may seek to bound and delimit the frightening otherness, the mystery of death, but neither can it help but be influenced by death's hold over the contours of our inner life. It is this fraught relationship, at once ambivalent and constitutive, which marks the courting of death.

Here's a secret: I do not dream, my sleep is black and heavy. But often I lie half awake in the pale night, conscious of a force upon me which has its own demands and density. Blanchot, the insomniac, for whom night is never black enough: 'If night suddenly is cast in doubt, then there is no longer either day or night, there is only a vague twilight glow, which is sometimes a memory of day, sometimes a longing for night ...'[5]

Insomnia is a kind of law; it imposes upon you against your will. In that state of obedience to a law which keeps me awake, as a passive receptacle of night's authority, I do not have dreams; rather, dreams have me. In suspended animation, I suffer an insomniac's fancies. My mother was born with the caul over her head: a premonition of death but also, they say, protection against death at sea. But for me, the fear of drowning is recurrent. In my fancy, I find myself in a boat, perhaps, a sinking boat. With a certain passive resignation I fall and slip and sink until the waters close, oblivious or disinterested, over my head. As such images pass uncontrollably across my mind, I feel overwhelmed by a sense of unfathomable impotence. This is what it means both to have a nightmare and to be in one: utter irresponsibility – having no choice either to wake up out of our dreams, or to act differently in them.

***

Law and death meet in the crypt. A crypt is a hidden cell or chamber, concealing and darkening that which it encloses. In every crypt a secret lies. And that secret is, finally, the corpse; either the literal corpse which the crypt entombs, or the figurative corpse which its moistness summons, the sense of finitude and mystery and ambiguity it embodies: 'As for the cellar, we shall no doubt find uses for it. It will be rationalised and its conveniences enumerated. But it is first and foremost the *dark entity* of the house, the one that partakes of subterranean forces ...'[6]

All crypts share the mystery of death because death is the greatest of mysteries. I cannot know it or touch it or feel it, since death is the very dissipation of the 'I' that could do these things. But more than this, as Derrida writes, a crypt is not just invisible, a lack of light or negativity; it is a positive darkness which engages actively in the production of mystery.[7] All representations of death are misrepresentations, since death is a state of affairs about which one can have neither knowledge, nor intention, nor experience. We can never know what it is to die. Who could tell us? How could we comprehend them? Death, therefore, has about it not just an absence of meaning, an ignorance which may be remedied, but a shroud that resists uncovering. It is a caul, and the destiny to which all dark places tend. Appropriately, then, the three sections of *Courting Death – 'In Extremis'*, '*Post Mortem*' and '*Memento Mori*' – speak of the processes which

encircle death – dying, burying and remembering – and not of death itself. We are all Moses at the very end of his life, as he looked out from the slopes of Mount Nebo: death itself is the horizon or promised land that may be approached but never entered. This concept of a horizon to be imagined but never reached, anticipated but never realised, forms the basis of the first chapter by Peter Fitzpatrick, and is a theme which recurs throughout. *Courting Death* attempts to explore a negative space through an inventory of borders. It is a book of *echo soundings* from the deep.

From Hammurabi to Napoleon, law, for its part, has always been a matter of codes. A code is an order, but it is a secret order. A code of dress, a code of conduct, a *Code Civil*. These are opaque practices which likewise resist uncovering. Law is encrypted – it is not to be read but deciphered; it is a mystery into which one is not so much educated as initiated. Hardly surprising then that H.L.A. Hart, that most familiar of jurisprudes, should have worked as a code-breaker for Military Intelligence during the Second World War. Law is Enigma. It is a system of signs hidden behind a system of signs.

Sometimes, like a secret handshake, a password, or a trapdoor, codes conceal the very fact that they conceal. Laws provide us with smooth surfaces that appear to be about what they appear to be about. Encryption, which entombs meaning in the dark and the deep, always presents a series of signs on the surface which mislead us as to the signs beneath. Therefore, what is encoded cannot be read directly. Insight must be disinterred, and that is the true study of legal discourse. The purpose of this book is to exhume these secreted meanings.

Above all, law and lawyers proclaim their omnicompetence. The law has a spatial jurisdiction but absolute authority within it. It is, apparently, a system of sovereign command. Thou shalt, says the law; thou shalt not. But this is just what has been called (in another context) 'mineralisation', 'a hiding place (like the kind insects make of their own body when they feign death'.[8] This image of exo-skeletal protection, a self-made crypt, has overtones of Kafka, but metamorphosis is not death: 'It is halfway between the two, neither life nor death. The one who has been transformed remains as a memorial example still present within the human community – in the form of a tree, a fountain, a bullock, a flower.'[9]

The skeleton of the law is in fact a memorial to the fleshy matter concealed thereunder. It points, by this bluster and assertion of absolute power, to its own encrypted body. The *secret* of law against which it armours itself, like a cockroach, is its weakness in the face of death: the impossibility of instilling the responsibility law requires, and the control it craves. Through examining the secret of death we hope to unlock the secret weakness and fleshy body of the law. Law's competence and potential is its surface; its impotence and its impos-

sibility its secret meat. This is the argument of this introduction. It is a meaning every bit as hard as the meaninglessness of death.

> *In the dead of the night, when the weight of stillness settles on me like a stone, I often think of a friend I once thought I knew. She was a woman with a sense of justice rubbed red raw. She was a lawyer angry at the lack of fairness she felt everywhere, petty and monumental; and angry too at the way in which she felt overlooked as a young, poor, working-class woman. The sense of injustice that attracts people to law is so often borne of a desire for the promise of certainty that it is precisely the task of the study of law to disavow. To discover so much flesh beneath such a sturdy skeleton is shocking, and many people don't ever quite recover from it. Cynics are not pragmatists; they are fractured idealists. That was my friend. Hopeful, but betrayed.*
>
> *As I knew her, she seemed to be searching, ever more errantly, for some place that would fulfil her desire for belonging, and for justice. The law was no consolation. Then she went to Israel to live with her boyfriend and planned to convert to Judaism, but no sooner had she arrived than he abandoned her, and there she was. Another anchor had proved unable to weigh her down sufficiently. She bobbed up again in England, in London, in America, in Canada. Everywhere she felt ill-treated and angry and every turn she made seemed to exacerbate her feelings of betrayal. Nothing was fair, she said, and she was right. Nothing much was.*

***

Law is flotsam in its very essence. It presumes responsibility, and it requires it. Our personal responsibility for our actions is the one necessity of the legal system, whether in criminal law, tort, or contract. In *The Gift of Death,* Derrida makes the same point about religion. He argues that in the Dionysian world, there is no responsibility. Ecstasy is not an ethics. In the Dionysian frenzy, there is no sense of 'self' and 'other'; it is this relationship, this difference, that makes responsibility – that is, a sense of obligation or responsiveness to the needs of another person – possible. Religion and law alike presume access to an individual, a self whose interests are not the same as everyone else's. But this necessity also gives rise to a betrayal. When Moses descended from the mountain holding the commandments that founded both a religion and a jurisprudence (for in the Old Testament they were indistinguishable), he discovered the people corrupted by false gods, and he reacted with fury. The free will that is the weight of our compact with God, also allows the possibility that the people will choose *against* the law, against God.

This is an argument of powerful implication in relation to law, although Derrida does not pursue the argument in this direction.

Illegality is both the indispensable condition of responsibility and its heresy: the tablets of the law must be broken in order to be the law. Clearly the law requires illegality; why else would it be necessary? The law anticipates transgression even as it prohibits it. But there is more to it than this: law requires that our choice or decision to act is not based simply on obedience or the following of rules, but lies outside it. When the law enjoins us to 'be responsible', it requires that we make a decision about whether or not to obey which must be based on a sense of responsibility which comes from *somewhere else*. Legal responsibility implies individual free will. Without this extra-legality, we would not be behaving responsibly, but simply obediently; in other words, we would not be behaving as if we had a choice. But if that were true, if obedience to the law were *not* chosen, then it must likewise follow that disobedience is not chosen either. Without the concept of freedom of choice, on what grounds could any criminal be considered 'responsible' for their actions? Illegality would be (and it is often argued that it is) pre-determined, a function of psychology, or upbringing, or tragedy. On what grounds could an individual be punished for acts outside their control? This is why legal philosophy finds psychoanalytic theory so uncomfortable. It disrupts a necessary fiction. Responsibility requires free choice, a *decision* to obey, which cannot be justified simply on the basis of what the law says. It therefore follows that the legitimacy of law, the reason we obey it, cannot be found simply by reference to the validity of law. The concept of law *must* depend on a notion of responsibility ultimately derived from elsewhere.

In the concept of responsibility, the logic of the law which requires it meets the ethics of death that constitutes it. This is true in two ways. First, because the nature of responsibility is the experience of choosing a decision independently of others, but in a respect that affects another, which is to say, is *in response* to them. To be responsible for someone means to accept freely a duty to act in the interests or to fulfil the needs of another, at precisely the moment when those needs or interests are different from our own. Mutual self-interest is not the same thing as responsibility. To say that I have a responsibility towards you is to some extent to recognise that I am different from you, and that I am acting *for* you or on your behalf. This kind of action only comes from a sense of oneself as a distinct individual in relationship with other individuals who are in turn distinct from us.

Such a sense of individuality, of difference, of our precious irreplaceability, is relatively modern. Ivan Illich (and Philippe Ariès) both date this heightened self-consciousness to about the twelfth century:[10]

> I am not suggesting that the 'modern self' is born in the twelfth century, nor that the self which here emerges does not have a long

> ancestry. We today think of each other as people with frontiers. Our personalities are as detached from each other as are our bodies … This existential frontier is of the essence for a person who wants to fit into our kind of world … For earlier medievals, *person* denotes office, function, role, variously derived from the word's origin in the Latin *persona*, a mask. For us it means the essential individual, conceived of as having a unique personality, physique, and psyche.[11]

The psychic frontier makes the modern experience of death vertiginous to us, the more awful because what is lost in death is unique. But on the other hand it also makes a sense of responsibility or sacrifice possible at all. Our sense of death and of responsibility are alike artefacts of modernity. With the experience of death, as we so fearfully navigate it, comes a sense of self and therefore the possibility of a truly responsive relationship with others:

> For one never reinforces enough the fact that it is not the *psyche* that is there in the first place and that comes thereafter to be concerned about its death, to keep watch over it, to be the very vigil of its death. No, the soul only distinguishes itself, separates itself, and assembles within itself in the experience of this [practice of death].[12]

Second, death is the archetype for the exercise of responsibility in our lives. Just as our unique self is created by the prospect of death, our death shows each of us what it means to face up to a responsibility. We die: all of us, alone, and without evasion. We cannot escape this fate, we cannot trade or talk or bribe our way out of it. It is something which must be faced by each of us and which no one can address in our stead.[13] That is the essence of responsibility: the acceptance of an action or decision which must be taken on oneself, and which can be neither shirked nor delegated. In that sense, one cannot speak of someone dying *for* someone else, or *instead* of them. Death is never an exchange. Death is the moment for which all our responsibility prepares us; it is the event in the shadow of which all responsibility finds inspiration. This is part of the value to be found in the way our society understands death. It shows us both the necessity and the possibility of responsible action. It is the figure and ground of law.

***

Law needs death because it needs us to be responsible independent of its own constitutive power. In Part One of this volume, '*In Extremis*', the focus is therefore on the moment of death as an occasion of heightened responsibility. These four chapters address, with a socio-

logical eye and in a voice sensitive to the demands of aesthetics, the bodily experience of dying and legal attempts at its regulation. Peter Fitzpatrick presents death as the very limit of law. But his chapter and that of Austin Sarat both examine the ways in which law, in the United States at least, claims the power to end life and so to reduce the mystery of death to the subject matter of technological regulation. My own chapter, although historical in nature, is similarly focused on the arrogance of law's claim to decide and to enforce the hour of our death. Melanie Williams' chapter on euthanasia is in some ways directed towards an inversion of this problem – on the legal prevention of human attempts to set for themselves that hour. Capital punishment, euthanasia, the dying declaration: at each point legal argument is directed to our personal responsibility for words or actions at the crisis of death. Death becomes the very crucible of life.

Whether manifested as the legal imposition of, or the legal prohibition upon, the moment of death, these authors' plea in the face of legal regulation is consistent: that law ought not to arrogate to itself those fundamental moments of human responsibility which are and must remain outside its jurisdiction. Our laws attempt to circumscribe and regulate the self, and thus to control the death which is necessary for its functioning. Blanchot calls this 'the exteriority of law … when exteriority slackens', 'the fall into law and the epoch of the Book'.[14] Suicide and euthanasia are precisely attempts to control dying. Encompassed by specific laws or not, they are about regulation, 'an attempt to abolish both the mystery of the future and the mystery of death'.[15] They appear, therefore, from one perspective as the apotheosis of the self, and from another perspective as its desecration: it all depends on whether one believes in taking responsibility, or in accepting it. In a more general way, the very sedimentation of a community into a fabric of legal definitions and relations, declared once and for all time, gestures towards an attempt to create a kind of cultural immortality which is neither possible nor desirable. Thus law attempts to claim an omnipotence and to impose a control which as we have seen, it cannot achieve. Law betrays itself. All the essays contained in Part I speak to that betrayal.

In Part Two, '*Post Mortem*', our focus shifts to the procedures that follow death. These four chapters address, with an anthropological eye and in a voice sensitive to the demands of politics, the corporeal object of burial. Here our attention moves from our own experience to respect for others, and from responsibility to accountability. How do we fulfil our duty to the dead body, with what formality and care do we place it in the crypt, render by thought and by deed the secret that it holds? These studies testify above all to the cultural variety of human practices. Ngaire Naffine draws our attention to the uncertain status of the corpse in English and Australian law, and ties that uncertainty

to the philosophies of property and of will which underpin it. For Naffine, the right to burial remains a legal anomaly because the legal system as a whole refuses to treat as worthy of respect an entity which falls so awkwardly between person and thing, subject and object. Prue Vines and Jon Willis, discussing similiar problems of 'comparative anthropology' from different directions, develop these themes. Each argue that, in cultures such as those of indigenous Australians, a profoundly different approach to the corpse prevails. Burial is an act of collective responsibility in which the memory of the community is at stake, rather than an act in response to an individual claim of right. Practices of burial, then, reveal vast differences in the ways in which different cultures understand the role of law in relation to responsibility, to community, and indeed – as Willis shows – to truth.

Scott Veitch's chapter concludes Part Two, again by elegantly inverting the problem. The *post mortem* question for Veitch is not one of burial but of exhumation. What, he asks, is the role of the undead in the legal constitution of the nation? The victims of wars, dead long since, and the victims of prior regimes, unburied yet far from forgotten, return to haunt their communities so that most find a continuing place for them in their myths and their dreams, or else their nightmares. Burying the past is both a literal and metaphoric act on which hinges our societies' understanding of its self and its potential for justice. Our accountability to the dead is a test of our responsibility to the living. It cannot be accomplished without complex processes of disinterment.

There is a paradox here. The responsibility of dying and the apparent accountability of burying are at odds. Responsibility, as we have seen, takes place outside the law as a decision, a silence and a freedom. Accountability requires an explanation of behaviour in terms of the articulation of established reasons, and so the subjugation of a decision to general rules. It demands obedience to a law and to social practice. In *The Gift of Death,* Derrida thus distinguishes the secrecy and singularity of responsibility from the transparency and generality of ethics and of law. Ethics 'incites to irresponsibility ... it impels me to speak, to reply, to account for something, and thus to dissolve my singularity in the medium of the concept.'[16]

The call to burial is silent. It is a mute entreaty to act purely on another's behalf, without any hope of recognition or acknowledgment from the person for whom we act. No one is as powerless as the dead, as unable to demand action or to return a favour. From Antigone onwards, non-burial has become the epitome of the violation of justice exactly *because* the dead are the most vulnerable, their 'rights' entirely unenforceable except through the freely given actions of another – free will, and goodwill. It is this element which connects our treatment of

the mute corpse *post mortem* so intimately with the demand by Veitch and others for justice. But our responsiveness in such a circumstance of ultimate dependence *cannot* be accounted for. To whom would this accounting be due? What form would it take?

> I cannot respond to the call, the request, the obligation, or even the love of another without sacrificing the other other, the other others … I am responsible to any one (that is to say to any other) only by failing in my responsibility to all the others, to the ethical or political generality. And I can never justify this sacrifice.[17]

I think here of another situation of demand and dependence. I have walked through many cities, and had to confront the pleas of beggars on the street. Every act of charity raises the question – why *this* one? Why not the others? Why not all the others? Why a coin and not a note? Why not more? Why not nothing? It is an experience which traumatises me. For a long time, I tried to give myself a law to obey, a rule to follow, which would somehow relieve me of the taxing responsibility of having to make a decision, every time. I'll only spend two dollars a day ... I'll only give them money if I believe their story … if they're selling something … if they harass me ... if they don't … . But after a while I gave up these attempts to create for myself a principle which would be able to justify in advance my heartlessness or my generosity, which would in short relieve me of the responsibility of making a decision. No such law is possible. Each act of giving is unique, secret, spontaneous and inexplicable. There is no accounting for it, as there is no value in counterfeit coin.

> *Responsibility to the other must have, for its legitimacy, a justification outside the law. It must be a gift utterly without rules. It seemed for a while as if that was the conclusion at which my wandering friend had arrived. The next I heard, she had given up the practice of law and turned to teaching. She wrote me a letter from Finland, in the middle of winter, in arctic darkness. She described there the begging, poverty and drunkenness she saw on the streets, but despite all that, she said she found the gift of teaching reward enough:*
>
> > *I'm glad I came here – it's certainly an experience. I'm trying to really appreciate everything and look positively at everything and also to do as many different things as I can. Life is a gift and I want to make the most of it: I have only one life.*
>
> *The day I received this letter, buoyed up by her enthusiasm, I phoned Helsinki to find out how she was. She was no longer there. She had quit*

her job that week and abruptly left the country; consumed, as I supposed and feared, by a sinking feeling that comes in the darkness of a solstice night …

***

The idea of the gift returns us for a third time to the crypt, to the meeting point of law and death. The reason for giving must remain cryptic: 'The moment the gift, however generous it be, is infected with the slightest hint of calculation, the moment it takes account of knowledge, or recognition, it falls within the ambit of an economy.'[18] Death is in this sense the paradigm of the gift, since to die is an act of responsibility so incommensurable and infinite as to be beyond calculation and beyond exchange. It is also the guarantor of all gifts since it is the fact of our mortality that makes possible a gesture which will not be eventually rewarded or traded. Our mortality ensures that there are some acts of generosity that will remain unpaid. Death makes a double line under our life, and leaves the ledger never squared. There is, on the other hand, no gift without the taint of sacrifice or loss which the gift entails in its reference to one other, only and exclusively.

The shadow of death has always been used in order to enforce such generosity. This is what ultimately decided my friend on the need of God. She had written to me a month or so after that last letter from Finland. Its change in tone and direction shocked me:

> *What do you think happens when we die? If nothing happens, doesn't it seem completely unjust and unfair that nothing will happen to people who do bad in their lives? Is it right that the just and good die and have the same fate as the bad people? Surely not! … Even if your academic training still blocks your belief, then I suggest that you think about death. For sure, your death is certain. All your life leads to your death. It's so simple.*

But acts of justice and compassion cannot, must not, be wholly justified. There is no satisfactory *reason* why we ought to respond to the call of the other, this other, any other. It must be a gift. The existence of God, for all the good it may do, seems on the contrary to undermine the logic of the gift. Instead, it very often entails two related concepts. The first is that it ushers in 'the epoch of the Book', codifying rules on the basis of some justification external to human experience. The Book converts doing justice into a matter of following the law. Responsibility becomes a function of obedience. The second is that it provides for eternal life as a reward for virtue. It is this point

which is particularly relevant here. The promise of the afterlife turns gift into credit, responsibility into accountancy. Such a system of reward and punishment is

> ... an offering that appears too calculating still; one that would renounce earthly, finite, accountable, exterior, visible wages, one that would exceed an economy of retribution and exchange only to capitalize on it by gaining a profit or surplus value that was infinite, heavenly, incalculable, interior, and secret ...[19]

Indeed it transcends law only to institute a new law.

The gift, on the other hand, is the expression of a responsibility to others which takes place outside the principles of economy or accountancy. So too, justice is the expression of a responsibility to others, which must take place outside the principles of law. It is the code beneath the code of law. The explanation for our actions by reference to a rule or a process – which is what law sets out to describe – is a necessary element of social relations, but, in the case of burial, charity and beyond, it is never sufficient. Responsibility is the *supplement* which law requires for its functioning but cannot constitute.

Responsibility is connected to justice by the relationship it establishes with the other – incommensurable and secret, justice demands that you love thy neighbour not *as* thyself, but precisely *as* the other, through the operation of gift and sacrifice. This justice, for which we must all take responsibility individually, the law requires and cannot constitute. It is death which makes *this* justice conceivable: on the one hand it confronts us with a responsibility which cannot be evaded, and on the other, it puts an end to all thought of economy and reward.

> *Death makes justice possible because it provides the horizon or parameters of a life in which freedom and responsibility are not simply functions of obedience or of calculation. But by the same token, injustice and illegality become equally possible choices. Without death there is neither, only a grey insomnia of passivity, a state of suspended animation that for Blanchot is literally a fate worse than death. This is the consequence of the flight from freedom, from responsibility and from death. In exchange, the idea of an afterlife provides a certainty which my friend found, in the end, necessary:*
>
>> *Of course, everything has happened quickly, but when you receive faith, really strong faith, as I have, things must change straightaway because you can no longer continue to live the same life … When I returned to England I realised that I could no longer live the 'immoral' life of a*

> *lawyer ... I decided I wanted to give something, so I turned to teaching ... Although I was much happier working as a teacher I still had a feeling of emptiness ... Life in Finland was not easy and although I found teaching rewarding I was thinking about God more and more ... Then even more fantastic things happened, which are impossible for me to describe, but they made my faith so strong. So, in my heart I had no choice but to become a Muslim ...*
>
> *We hope to be here for another three weeks or so, and in January (God willing) to go to a Muslim country ... I hope you are well and that you will think about everything I have said.*

It is too harsh to say that the concept of immortality governed by a system of punishment and reward renders justice impossible. But religion has left a trail of bloody violence in its wake. It is not just a consequence of certainty, although that is partly true. It is also because the rewards for being in possession of the truth now seem to be eternal, and because death, along with everything else, can now be traded off against some future prize. Without death, there can be no end to the commodification of life.

***

One cannot but wonder if there might not be more justice and less arrogance in a world which had a better sense of its own mortality. In all this, law is complicit. It creates institutions, such as nations and corporations, which are designed to extend life indefinitely. Law even presents *itself* as embodying a community and a tradition, and claims to carry forward that spirit beyond the death of each of us. There is a self-deluding eternity to these manoeuvres. We must be critical of the myth of law as transcendent and immemorial and certain. Law often provides for human beings the comfort of continuity and therefore allows us to evade the logic of the gift. Law often claims a plenary power and thereby denies us the space for responsibility.

Part Three, '*Memento mori*', is the most allusive part of the book, and turns our attention from the individual to the social aspects of death, from experience to memory, and from law to justice. A *memento mori,* after all, is the name given to a talisman of mortality which we, the living, carry around with us. These four chapters address, with a literary eye and in a voice sensitive to the demands of ethics, the ways in which death is remembered in and by the living society. Rituals of mourning, in particular, bring to the fore communal aspects of the experience of death. Certainly Veitch's discussion at the end of the previous part suggests that mourning, reconciliation and reconstruction are linked. Gillian Rose argues, in *Mourning Becomes the Law,* that it is through mourning that we incorporate our loss into an enriched

understanding of our community: '[A]ll meaning is mourning, and mourning (or absence) must become a norm (or presence) for there to be morning (dawning or future), and *not* interminable dying ...'[20]

I fear this is too strong a claim. Costas Douzinas provides a darker psychoanalytic reading of the problem of mourning, drawing on *Antigone*, that great tragedy of burial, of mourning, and of the aporia of law and justice. This is a reading which specifically links the desire for the other, to which law gives social form, with the desire for death. Law is a force entwined with a destiny it cannot control. Indeed, Douzinas picks up on the very point which this introduction has been developing: '[Antigone's death] first alerts us to the desire for the other in the midst of law, to the unique and contingent character of the demand for the other, that is to the reason that makes justice both necessary and impossible.'

Mourning stems, then, from the very distance between self and other. It is this distance which gives meaning to an ethics of responsibility. This is the focus of Marinos Diamantides' chapter on the treatment of those in the twilight world between life and death. The mystery of what the author calls 'vegetable man' overturns the orthodox life/death oppostion and allows us, instead, a glimpse at the nature of being so unknowable as to provide a paradigm for what it is to act ethically with respect to someone else. 'Vegetable man' is himself a *memento mori*.

But death always comes before we are able to fully respond to the other: 'Quoth the raven, "nevermore".' In mourning we express our grief at the incomplete and the unspoken which death ensures can never more be remedied. And at the same time mourning binds us closer together in the inadequacy of our communication and the incommensurability of our dying. Death is crucially connected to community, through a relationship of absence and imperfection.

Memento mori is the naming of death in our lives, specifically the naming of absence and the provision of space in our lives in which to *endure* – both to survive and to continue – that absence. Law is the social speech of the name, and the curse of law is its compulsion to speak and the impossibility of silence. Although Samuel Beckett has Krapp say, 'Nothing to say, not a squeak', this too 'is not yet silence, it is yet a word, yet a squeak.'[21] Here Adam Gearey, in 'Death and the Law between James Joyce and Pierre Legendre', shows us the strength of that absence as it fashions the fates of Joyce's literary and legal subjects. The pact that law and language make with death is their pretence to conceal behind the confident structures of social communication and legal subjectivity, 'a deeper void, a more profound absence'. But as Joyce reveals and the law knows, it is a pact which cannot be kept. At its best, law can help to structure a space which

allows us that absence, that openness. In the final chapter of this collection, Peter Goodrich himself offers just such an inversion – writing not of the illumination of law by death, but of death by law; providing not a literature of jurisprudential issues but a jurisprudence of literary themes. Drawing on historical cases concerning love and death which came before the courts of love in chivalrous Europe, the medieval corpus which Goodrich decodes tells us something contemporary and profound. It tells us that law can speak of death without attempting to appropriate it, that it can show humility and respect, that it can provide judgment without exclusion, and therefore that we can imagine a space in which law helps to name love and death, without disciplining them.

Encoded, in the crypt, lies the body of law, as mortal and fragile a vessel as any. The secret it conceals is its weakness, but this weakness is in fact a strength. We should not despair at law's impotence but welcome the choice it gifts us. Law requires and allows a supplement. What makes *memento mori* – the space allowed for mourning in our world – possible is the deep water that law leaves for something outside itself. What makes justice possible is our freedom and our unavoidable responsibility – both our quickening and our death.

For my friend, living now, I don't know where, that is not enough. For me too, as the night steals the morning, it is not enough either. But sometimes it is. Eventually the sun will grow cold and unfathomable night will return to the earth. Why then will we have saved a life? Only to establish a connection without reason in an ethics that allows no opportunity for repayment and no hope of memoriam. What then will remain of charity? No reward, no consequence, no memory. Only the secret act of giving and having given. What then will remain of us when the waters at last close, oblivious or disinterested, over our heads? No gravestone, open and public. Only a crypt, so perfectly concealed that scarcely a trace remains.

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11. Illich, *In the Vineyard of the Text*, pp. 24–5.
12. Derrida, *Gift of Death*, p. 14.
13. Ibid., pp. 41–4.
14. Critchley, *Very Little ... Almost Nothing*, pp. 45–7.
15. Ibid., p. 70.
16. Derrida, *Gift of Death*, pp. 60–61.
17. Ibid., pp. 68–70.
18. Ibid., p. 112.
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21. Critchley, *Very Little ... Almost Nothing*, p. 168.

Part One
In Extremis

1
Death as the Horizon of the Law

Peter Fitzpatrick

INTRODUCTION: LIMITING THE LAW

In its supreme stasis, death is often equated with 'law itself in its origin, in its very order'.[1] This tends to be put in terms of death as the ultimate or final assertion of law as sovereign, its mundane mode being capital punishment.[2] But there must be more to it. For Blanchot, law is 'less the command that has death as its sanction, than death itself wearing the face of law'; this 'death is always the horizon of the law.'[3] And this law is 'the angel of discord, murder, and the end', antithetical to 'life itself'.[4] Hence, law's deathly claim to fix, determine and hold life, to deny its protean possibility. Death in this guise can be found, for example, fully operative in the Benthamite dream of 'total and certain order' through law,[5] or it can be found in the quest of legal positivists for such an order within law itself – a law which, in its achieved autonomy, would not have any essential relation to what is beyond it. But to thus 'make a work of death' in its totality or finality is not just to deny law's vibrant responsiveness but to deny the importunate mystery of death itself, for death in its determinate predictability is not only the greatest certainty but, in its opening to what is unknowably beyond, also the greatest uncertainty.[6] Law mirrors this uncertain dimension of death and even, in a sense, primarily so, since law is only called to affirm certainty in the face of uncertainty. If something could be certainly put beyond question, then it would simply and fully 'be', and there would be no 'call' for law.

We could take standard notions of the rule of law to illustrate a bringing together of the extremities of law in the face of death – a bringing together of the certainty and uncertainty, the determinate and what is beyond determination. The predominant view of the rule of law would drape it in a secure solidity. Countless histories and juridical affirmations would have us believe that the rule of law is characterised by certainty, predictability and order. As against the vagaries of an arbitrary and discretionary power, the rule of law clearly marked out an area of calculability in which the individual could now purposively progress. In order for this law, and 'not men', to rule, it had to be coherent, closed and complete. If it were not coherent but

contradictory, something else could be called on to resolve the contradiction. If it were open rather than closed, then something else could enter in and rule along with law. If it were incomplete and not a whole *corpus juris*, and thence if it were related to something else, then that something else could itself rule or share in ruling with law. For all of which, law had to be self-generating and self-regulating because if it were dependent upon something apart from itself for these things, then, again, those things would rule along with or instead of law.

We can, however, take each of these imperative qualities of the rule of law and evoke their opposite 'in' the rule of law itself. For law to rule, it has to be able to do anything, if not everything. It cannot, then, simply secure stability and predictability but also has to do the opposite: it has to ensure that law is ever responsive to change, otherwise law will eventually cease to rule the situation which has changed around it. So, how could the rule of law be complete if it must ever respond to the infinite variety of fact and circumstance impinging on it? How could it be closed when it must hold itself constantly responsive to all that is beyond what it may at any moment be? And how could law, in extending to what is continually other to itself, avoid pervasive contradiction? Law cannot be purely fixed and pre-existent if it is to change and adapt to society, as it is so often said that it must. Its determinations cannot be entirely specific, clear and conclusive if it has integrally or at the same time to exceed all determination. And every tale of law's bringing order to disordered times and places in the triumph of modernity or capitalist social relations, and such, can be matched by others where it created uncertainty and inflicted massive disorder in the same cause.

Returning to death and relating it now to these dimensions of the rule of law, the ability or the aspiration of the rule of law to provide certainty, an assured stability, cannot mark an achieved completeness for law, if law itself is to survive. True, 'the imperious law' would in one way seek this outcome but the static and terminal nature of that outcome corresponds to a comprehensive death.[7] There would be nothing living left for law to rule. We can, then, say that death is the horizon of the law in that death is an horizon belonging to law. Law has an affinity with death or some similarity to it. But the horizon is also a relation between law and death as different and separate. Should, or could, law relate purely to death, in the sense of identifying completely with it, or, in Blanchot's terms, if law were only 'death itself wearing the face of law', law would be no more.[8]

So, law must be something more than its traditional attributes of determined fixity, assured stability and so on, and that 'more' can also be found in death as the horizon of law – the horizon now where we reach and orient ourselves towards what is beyond us. We cannot

know our death or experience it 'in' life. What is of ultimate significance to us remains ever beyond us and inclines us always beyond ourselves. Death as the horizon, then, conjoins the determined fixity of identity within the horizon with the opening or the responsiveness to all that lies beyond the identity. There cannot be an isolated fixity, a solitary stasis. Identity, including the identity of law or of a law, depends on a constant responsiveness to all that would, coming from beyond, impinge on and challenge it. We could say, in short, that death is the horizon of the law not just in the standard and simple sense that law kills or that it fixes and positions, but also and conjointly in the sense that death impels a responsiveness to all that is beyond fixity and position.

I will now 'test' this death-provoked responsiveness of law, a responsiveness integral to law's position and necessary for the very supposition of its fixity, by setting and exploring the opposition between law and capital punishment. My argument will be that law in its responsiveness cannot accommodate the deathly finality involved in either the general decision to have capital punishment or the particular decision to kill someone. The abnormality of capital punishment for law and the intrinsic failure of law in its attempting to effect capital punishment will be brought out, first, by visiting scenes of execution and taking some account of the interpretative debates involved in their histories. Then, I will show how this failure of law in dealing death is revealed in the judicial discourse on the death penalty in the United States. The inability of the judiciary to produce any consistently or coherently formulated relation between law and the death penalty leads to my conclusion that law cannot be in such a terminal relation and yet subsist as law.

SCENES FROM THE EXECUTION

If it were the case that dealing death is the supreme expression of the law, then we may expect the scene of execution to mark law at its most efficacious and assured. But it does not. Instead of a confident and maximal assertion, the scene of execution shows law as uncertain and vulnerable. The precise expectation that law will pointedly contain death, or manifest an instrumental dominion over it, is always frustrated. At first sight, however, tales of execution would not uniformly support that argument for there is a relevant dispute among historians about how we may describe and interpret the behaviour of crowds at the site of execution. To set this dispute I will take the monumental and in some ways contrary accounts of capital punishment provided by Gatrell for England and by Evans for Germany and I will extract a comparability between the two

situations.[9] The disagreement, bluntly, is between the perception of the crowd as awed and orderly and the perception of it as resistant and riotous. My argument will accommodate both perceptions. The place of execution was an unsettled and uncertain zone for the crowd, a place where law's force of affirmation and legitimation no longer pertained. The crowd was transgressive, and to the extent that it was otherwise this was due to the presence of compensating modes of order – modes of the sacred and of official discipline.

There is a preliminary problem in that first-hand accounts of the crowd which the historians use are themselves affected by the class, gender and other positions of the tellers. To rely, for example, on descriptions of the crowd as being like children, women or savages is not itself to accept that either the crowds or those to whom they are likened are accurately described. What in one view may be 'loose and disorderly behaviour' will in another be highly focused and ordered.[10] But what subsists in both views is the transgressive nature of the behaviour and this is all that is needed for my argument. What abounds in the literature are indications that at the site of execution we are entering a place which is qualitatively different to what surrounds it. The ordinary rules somehow no longer apply and it is uncertain what does. The void could be momentarily filled by a show of official force or by the straining solemnity of religious rituals, but there always remained a pervasion of illegitimacy and unease – a dis-ease. Gibbon Wakefield captured something of this:

> Fail not to watch the people; the men, women and children, good, bad and indifferent, who have gathered to behold the sacred majesty of the law. You will see such flashing of eyes and grinding of teeth: you will hear sighs and groans, and words of rage and hatred ... and then laughter, such as it is, of an unnatural kind, that will make you start; and jests on the dead, to turn you sick.[11]

But perhaps what is most telling is the crowd's own perception of pathology. The crowd 'seldom unambiguously affirmed [the] legitimacy' of the execution.[12] 'Too often that despised crowd denounced justice as murderous in itself': 'Who was the murderer here? It was the crowd's question.'[13] The question was posed in some particularly potent ways. The execution and its trappings were to exemplify supremely the law's awesome force but, despite doing this at times very effectively, the crowd also 'saw through the law's pretentions more clearly than the polite people did, commenting sardonically on a tableau which they refused to accept as their own'.[14] Pointedly, the state had to make its protective presence felt 'when the offence had been against the sovereign' and extra precautions had to be taken by officialdom 'at politically loaded executions'.[15] The

execution of an official could be an occasion for cheers but, contrarily, 'there was never doubt as to where the crowd's sympathies lay when radicals or protestors were executed.'[16]

Those in authority may have taken fleeting consolation in seeing the crowd's exuberance as 'primal gratifications', or as 'a collection of insensate lusts and hatreds', but, no matter how base the crowd's behaviour was taken to be, it still meant that 'the sordid assemblage of the lowest among the vulgar' mocked 'the awful sentence of the law'.[17] The very presence of the transgressively uncowed countered law's claim to ultimate affirmation at the very point where it was supposed to be most manifest. Rather than a scene of assured legality, the place of execution was 'a summons to all thieves and pickpockets, of both sexes ... a free mart, where there is an amnesty for outlaws ... one continued fair, for whores and rogues of the meaner sort'.[18] It was an occasion of 'low, black-guard merry-making' and a playing out of 'quasi-erotic fantasies', and often more than 'quasi' as well;[19] in all, 'no sorrow, no salutary terror, no abhorrence, no seriousness; nothing but ribaldry, debauchery, levity, drunkenness, and flaunting vice in fifty other shapes'.[20] But the attribution of 'perversion' and 'passions' to the crowd was at times simply a denial of the acuity of its protests.[21]

The sustaining simplicity of the argument so far has now to be made a little more complex. The historians would see the claim that transgression typifies the crowd in the shadow of the scaffold as at least overdone and Foucault is usually advanced as the major culprit.[22] What happened, instead of or as well, is that crowds respectably 'consented' to the proceedings and these proceedings, in turn, successfully 'implant[ed] the law's presence'.[23] No matter what the vagaries of the English situation where 'public hangings ... were squalid, hasty often chaotic affairs', in Germany and 'in other European countries' the execution was a more ordered and acquiescent occasion.[24] But, as Evans tells us, 'execution riots' did occur in Germany, and with increasing frequency from the early nineteenth century.[25] For my purposes, this divergence of perceptions about the crowd is productive rather than insuperable.

There is, I hope to show, little mystery in all this. The uncertainty in the literature is testament to the uncertainty at the scene of execution. It was not simply a matter of the crowd being consensual at one execution and resistant at another. There were also 'strange but revealing fluxes in crowd behaviour at the scaffold'.[26] 'Coarse behaviour' could break out 'at a whim'.[27] To take another way of looking at it, if the crowd's behaviour had been uniformly resistant, the public execution would soon cease to have much attraction for authority. Even in relation to the unruly English, Gatrell pours some scorn on those who would argue that 'it was the populace, not the law, that controlled the scaffold arena'.[28] My argument will suggest that it

was neither and both. With its own infliction of death, the law can present only its naked determining force. Adequacy is the principle of law's operation and, in dealing death, law becomes incomplete and inadequate. The crowd thus has a 'space' in which to be lawlessly effective as itself. Since neither the law nor the crowd could provide resolution, the outcome could only be persistently uncertain.

We could approach that outcome in another way by looking at the quality of the 'consent' which the public execution was supposed to have secured. What passed for the crowd's support of law could be more volatile and qualified than it seemed. One trigger for the crowd's rebellion was the law's failure to be less than determinative in effecting death – when, for example, the execution was botched or there was a last-minute reprieve.[29] Traitors and 'radicals', people whose offences denied law's conclusiveness, were notably able to excite the crowd's sympathies, as were those bold criminals who exhibited defiance and panache on the scaffold.[30] Law's inhibition in dealing death could also be revealed in the recognition by those in authority that there was a limit to the number of executions 'the people would tolerate'.[31] Perhaps even more revealing of the limits on law as violence was the fact that 'this insubordinate scaffold crowd touched the deepest anxieties of the polite classes'.[32] The introduction of the guillotine into Germany initially foundered on élite aversion to its revolutionary association.[33]

The debate over the behaviour of the crowd – 'carnival or consent?', to borrow Gatrell's chapter title[34] – confirms the chronic inadequacy of law when we come to consider a nice historical transition from consent to something more like carnival. Evans shows that the crowd was very much consensual at executions in Germany and the evidence, he adds, is to the same effect 'in other European countries'.[35] But this consent was somewhat constrained. Not only was the crowd restricted by the considerable presence of officials and troops buttressing law's violence but its energies were channelled into 'the ritual and ceremonial aspects' of the execution, and especially into religious observances.[36] Decline in these compensatory modes was matched by increase in the rebelliousness of the crowd.[37]

Such modes were clung to by the crowd even after official support for them declined. One of the most influential arguments among the élite for ending public executions was that, even with the spread of post-Enlightenment rationality, executions remained a backwater of religious and folkish superstition. Whenever in Germany there was 'a disruption of the symbolic economy of honour, magic, and religion that surrounded the execution', the crowd were 'moved to protest'.[38] Although Evans contrasts the unbridled English crowd with the German, contained as it was in elaborate ritual, Gatrell observes of English 'gallows hanging' that 'no ritual was so securely embedded in

metropolitan or provincial urban life'.[39] In both locations, the execution was saturated in exemplary religious ceremonial, and official religions were a mainstay of capital punishment.[40] Not every reliance on the sacred was for its immediately stabilising effects. Sometimes it could be purposively exploited in a semiotics of power:

> By passing outside the city walls into the world beyond, the execution procession crossed a number of symbolic boundaries ... between civilisation and the wild, between the community and the outer world, between life and death. This symbolism was maintained in rural areas by the erection of scaffolds and gallows at crossroads or on the boundaries of districts or parishes.[41]

The crowd itself made its own magico-religious contribution. The places of execution could be endowed by it with a consecrate aura and become a place of miracles and divine intervention.[42] Relics of the executed or of the event were prized – handkerchiefs dipped in the blood, strands unwound from the rope.[43] These relics were often ascribed the power of magical healing, as was stroking afflicted parts of the body with the hands of the executed: 'the hanged or about-to-be-hanged were converted into mediators between death and life, and harnessed to good'.[44]

But what of an administered world, to borrow the phrase, which admits of no such mediation, no transcendent reference, and tolerates no endemic rebelliousness? How can the law, left now to itself, cope with its own inadequacy in dealing death? How can it maintain a semblance of its necessary completeness and coherence? In engaging with these questions, I will look next at the judicial attempt in the United States Supreme Court to accommodate death to law and argue, of course, that the attempt reveals the pathological quality of law's relation to capital punishment which I have already delineated.

DEATH AND THE DECOMPOSITION OF JUDICIAL DISCOURSE

A brief answer to the question of how law maintains its integrity in judicial discourse when dealing death could be that it does not. To put the impossible combination of law's two dimensions, the determinative and the responsive, in an apt setting, we could refer to Dworkin's paean to United States law for its vital ability always to be responsively other than what it 'is' – to be incapable of finality.[45] The small problem with this is that such a law could never 'be' anything. Law, as we saw, is also that which 'is' finally. Roger Coleman's lawyer was three days late in lodging his appeal and that, for Coleman, proved to be quite

final.[46] This irresolution manifestly afflicts the Supreme Court's handling of death penalty cases. As we will see, the Court has become petulant and arbitrary in blocking appeals and reviews concerning the death penalty. In the Court's view, it would, without such drastic action, remain beleaguered by the endless machinations of 'death penalty lawyers' and no case involving the death penalty would ever be resolved. But in other moments, the Court recognises, at least implicitly, that it is not providing any percipient basis for resolving death penalty cases. The Court has for over twenty years repeatedly formulated the issue in irresolvable terms. These are terms which are well nigh indistinguishable from those encapsulating the earlier discussion of law and death, terms of an integral irresolution 'in' law and in death between certain determination and complete responsiveness. So, repeatedly, the Court feels that in deciding on the death penalty there must be a response to 'the uniqueness of the individual' or there must be 'fundamental fairness'. For these things an effective 'discretion' must be exercised. But there is also a monotonous accompaniment: 'unbridled discretion' produces 'arbitrariness' and the sentencing decision must manifest determined 'consistency' and 'objectivity'.[47] In all this we may readily concede that the Supreme Court aptly formulates the irresolution, even if it seems unstilled and at a loss when confronting it. It may, of course, be asking too much for a court of ultimate authority to confront law's ultimate irresolution. But the particular contribution of death here is that the confrontation becomes unavoidable.

Death, then, does make a difference. Law in its determining effect cannot be everything. Obviously it must choose and elevate some modes of existence and suppress or ignore others. So, to be more and aptly specific, law will give recognition to and sustain the mores of one ethnic or racial group and thereby subordinate those of another.[48] But law maintains its appeal to an-other by always being more than determined, by being ever able to be otherwise than what it determinately is. One day to come, law could actually be more and extend to the previously excluded. Death denies that promise. It effects a closure around the already determined and denies it the ability to be otherwise. So, in dealing death, law makes irremediable the exclusions that have gone to make it what it is. These exclusions are now revealed as intrinsically beyond law's reach. The very borders securing law and its domination can no longer be places of expansionary promise. Instead, they are turned around and become a ground challenging the law's rejections. Law's range is thus revealed as epistemically constrained in its truth, ethnocentrically exclusive in its favoured populace, and so on. There is, then, a point to that litany of complaint directed at capital punishment in its well-documented discriminations against

the disadvantaged. Such discriminations are part of numberless other areas of law, but what peculiarly concentrates them in relation to the death penalty is that it has, to borrow a helpful judicial phrase, a 'unique finality'.[49] When it is not effected in death, law's finality can always be rendered less so. Law can always extend itself differently. But with the 'unique finality' of death, law remains fixed and monotonously the same. It is revealed as intrinsically rejecting of the racially oppressed and the impoverished, and its decisions become axiomatically partial.[50]

None of which is, or can be, allowed to disrupt or dissolve the usual course of law. The death penalty is simply taken into law in its usual course, even if the resulting absurdities do indicate persistently that it should not be there. What law operatively does, or tries to do, is to fragment death's force in reifications of the process producing it. The form of judicial judgment, as an instance of the 'metaphoric writing of the West' seeks to convey 'the immediate vision of the thing, forced from the discourse which accompanied or even encumbered it'.[51] So, for instance, law is able to constitute or determine 'responsibility' – to determine the indeterminable. This is not only a matter of responsibility for the criminal act. It is also a matter of determining whether the 'individual' responsibility of the defendant warrants a sentence of death. All of which takes a particular effrontery in the criminal trial where responsibility's indetermination is close to manifest in the almost routine conflict in 'expert' psychological ascriptions of responsibility and in the infinite vagaries of jury selection and decision making: 'No one really knows what happens in the course of a trial.'[52] The prospect of death intensifies our awareness that responsibility cannot be ascertained definitively. Rather than that awareness pervading all judging of responsibility, the direction of judicial thought is the reverse: responsibility can be determined generally in the judicial process and the infliction of death is a particular consequence of such determination.[53] The death penalty then becomes one form of another distinct 'thing' called punishment which simply follows the judgment. There are some supplementary tricks which would situate death within a norm of 'punishment'. One involves the idea of proportionality. There is the judicial requirement derived from the Constitution that the death penalty not be disproportionate to the crime, or there is the use in many states of 'proportionality review' to determine 'whether the death penalty is excessive or disproportionate to the penalty imposed in similar cases'.[54] This, obviously, is to assume that incomparable death can be brought into a proportionate relation to other forms of punishment – that it becomes generically the same as them. Another trick is to recognise that death is different but not too different by providing that, where there is a sentence of death, there should be

something like a further step in the legal process to ensure that the death sentence is appropriate or justified.[55]

There is an even more audacious judicial trick played on death, however. This enfolds death into the 'things' that make up the judicial process in such a way as to affirm their integrity. Let us take as an initial instance the idea of fairness, both as a general notion and as it inhabits the constitutional guarantee of the due process of law. I will look first at the invocation of fairness in two notable judicial condemnations of the death penalty. One comes from Justice Brennan in *Sawyer* v *Whitley* (1992) where he 'expressed' his 'ever increasing scepticism that, with each new decision from this court constricting the ability of the Federal Courts to remedy constitutional errors, the death penalty can really ever be imposed fairly.'[56] Here there is an implied affirmation: if the courts' ability were not so constricted, the death penalty could 'really' be imposed fairly. For the other judicial condemnation, the stakes can be raised by invoking Justice Blackmun's famous dissent in *Callins* v *Collins* (1994).[57] His tearing eloquence on that occasion has been much discussed but the basis of his objection is plain enough: error was inevitable and so some defendants were going to be wrongly killed. But even this potent, if not unusual, point still imports a singular and knowable truth which can be discovered in the absence of error. The death penalty would still remain apt when there is no error and, of course, more can or should be done to counter error and advance truth.[58] To take a commonly adduced example, there is the constant advocacy of 'effective' legal representation in death penalty cases. But how can representation ever 'be' fully effective? The constitutional guarantee of the due process of law leaves us in the same problematic. To apply due process to cases involving capital punishment is to say that there is – that there can 'be' – a process which ensures all that is due to a person who is to die as a consequence of what that process determines. But such process is incapable of being 'due' enough. Something of this inherent inadequacy can be detected in the oxymoron of 'super due process' considered apt for death penalty cases. If all that is 'due' has been provided for, how can there be a super-saturated something still owing?

Of course, the imperative of law as determining always stands ready to negate the infinite demands of fairness, or of effective representation, or of what is procedurally due. This imperative tends to be rendered in death penalty cases as law's finality. My argument has been that law cannot be tied to finality and that when it purports to be it is less than law. Or, as it could be put somewhat more positively, law is an impossible combination of determination with responsiveness – or, in other words, with non-finality. The death penalty effects a hiatus between these, elevating an absolute determination over responsiveness. So, in *Herrera* v *Collins* (1993): 'Under Texas law, post-conviction

evidence must be filed within thirty days of the end of the trial, but the evidence Herrera's attorneys believe would have acquitted him *was not available to him* until eight years later.'[59]

The Supreme Court upheld the determinative effect of the time limit, urging the petitioner instead to seek executive clemency which he did, and was then executed. Further and particularly telling examples can be found in *Smith* v *Kemp* (1983) and *Machetti* v *Linham* (1983), both in the Supreme Court:

> In a Georgia case two co-defendants were both sentenced to death in separate trials within a few weeks of each other in the same County. The composition of the juries in both of the trials violated constitutional standards ... The appellate lawyer for one of the co-defendants challenged the selection process and was granted a new trial, whereas the court appointed counsel for the second defendant was unaware of any basis for challenge and his client was sentenced to death and executed.[60]

Let me continue with what is becoming a conclusion by taking a famous example of finality so as to show how law is decomposed and made inadequate by the death penalty in its denial of law's responsiveness. This is *McCleskey* v *Kemp* (1987), a death penalty case coming out of Georgia, like so many others.[61] Here the Supreme Court had to decide whether a death sentence on a black defendant was a violation of the constitutional guarantee of 'equal protection of laws'. Of course it is a common objection to the death penalty in the United States that it is racially discriminatory in its imposition, and in this case there was cogent evidence showing statistically that in Georgia black defendants were overwhelmingly discriminated against in the imposition of the death penalty. The court held, however, that violation of the constitutional guarantee could not be established unless there had been intentional racial discrimination. But it is well known that the Supreme Court accepts a similar type of statistical evidence in proving or correcting racial discrimination in other areas such as voting and employment. Doubtless, there are problems in these areas with accommodating such evidence to the law's characteristic modes of determination, but such an accommodation is effected in various ways. Death, however, is not so adjustable and this kind of responsive possibility can hardly be made available in capital cases. If the evidence were to be allowed cogency in such cases, then the black defendant should never be executed. Comparable evidence would serve also to exempt people denied equal protection for other reasons such as poverty. The outcome would be that only people not so discriminated against could be executed. But immediately that solution is adopted, black and impoverished defendants are no longer being discriminated

against so they could (continue to) be executed, an uncomfortable conclusion in itself. But then the statistical evidence could again be resorted to so as to show they were being discriminated against and should not be executed. And so on. 'Finality' thus produces a *reductio ad absurdum*. Another terminal variation can be found in *Vasquez* v *Harris* (1994) where, in manifest desperation at law's impertinent responsiveness, the Supreme Court proclaimed that 'no further stays of Robert Alton Harris' execution shall be entered by the federal courts except upon order of this Court' – a diktat of primal violence aptly described as 'lawless'.[62]

CONCLUSION: THE LIMITLESS LIMIT

Law, as we saw, is tied to the irresolution of the horizon – the horizon as a condition and quality of its contained being, and the horizon as opening on to all which lies beyond that being. The separate insistence on either dimension would be death – death as a terminal fixity or as a dissolving responsiveness to what is beyond. Life, or law, subsists in between these two dimensions. For law, it was the relatively neglected dimension of responsiveness which was emphasised here.

Law could not be complete, fully determined and fully determining, because it must ever extend beyond determination. It could not be integral and achieved because it must always be responsive to what is beyond. Law cannot be law when it definitively denies this responsibility or, in archaic usage, responsibility within itself by dealing death. The 'law' that attends these denials is an impossibility – inanimate, a pure and desolate stasis. I followed that dismal and deranged scene into two of its more palpable, if not always palatable, locations – into the crowd at executions and into the failures of judicial discourse in the Supreme Court of the United States on the death penalty. The idea in so doing was to identify and illustrate a lack of law when the putatively legal engages in capital punishment. And the point was, hopefully, reinforced by showing that it can be made in two such disparate locations.

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NOTES

1. Jacques Derrida, 'Force of Law: "The Mystical Foundations of Authority"', trans. Mary Quaintance, in Drucilla Cornell et al. (eds), *Deconstruction and the Possibility of Justice* (New York: Routledge, 1992) pp. 3–67, p. 42; cf. Michel Foucault, *The History of Sexuality. Vol. 1: An Introduction* (Harmondsworth: Penguin, 1981) p. 144.
2. See, for example John Locke, 'The Second Treatise of Government', in *Two Treatises of Government* (New York: New American Library, 1965) p. 308 (para. 3); Immanuel Kant, *The Metaphysical Elements of Justice*, trans. John Ladd (Indianapolis, IN: Bobbs-Merrill, 1965) pp. 331–3; and Michel Foucault, *Discipline and Punish: The Birth of the Prison*, trans. Alan Sheridan (Harmondsworth: Penguin, 1979) p. 49.
3. Maurice Blanchot, *The Step Not Beyond*, trans. L. Davis (Albany, NY: SUNY Press, 1992) pp. 24–5.
4. Maurice Blanchot, *The Madness of the Day*, trans. L. Davis (New York: Station Hill Press, 1981) p. 16; cf. Maurice Blanchot, *The Infinite Conversation*, trans. Susan Hanson (Minneapolis: University of Minnesota Press, 1993) p. 225.
5. David Lieberman, *The Province of Legislation Determined* (Cambridge: Cambridge University Press, 1989) p. 281.
6. Jean-Luc Nancy, *The Inoperative Community*, trans. Peter Connor (Minneapolis: The University of Minnesota Press, 1991) pp. 12–13.
7. See Maire Jaanus, '"A Civilization of Hatred": The Other in the Imaginary', in Richard Felstein et al. (eds), *Reading Seminars I and II: Lacan's Return to Freud* (Albany, NY: SUNY Press, 1996) pp. 323–54, at pp. 344–5, 347.
8. Blanchot, *The Step Not Beyond*, p. 24, for the quotation.
9. V.A.C. Gatrell, *The Hanging Tree: Execution and the English People 1770–1868* (Oxford: Oxford University Press, 1994) and Richard J. Evans, *Rituals of Retribution: Capital Punishment in Germany 1600–1987* (Oxford: Oxford University Press, 1996).
10. Cf. E.P. Thompson, *Customs in Common* (London: The Merlin Press, 1991) ch. IV.
11. Gatrell, *Hanging Tree*, p. 76.
12. Ibid., p. 99.
13. Ibid., pp. viii, 606, 608.
14. Ibid., p. 608.
15. Ibid., pp. 98–9.
16. Ibid., p. 103.
17. Ibid., pp. 32, 603 and Evans, *Rituals of Retribution*, pp. 209–10.
18. Gatrell, *Hanging Tree*, p. 59.
19. See ibid., pp. 74, 604.
20. See ibid., p. 60.
21. See ibid., p. 609.
22. Foucault, *Discipline and Punish*.
23. Evans, *Rituals of Retribution*, p. 876 and Gatrell, *Hanging Tree*, p. 90.

24. Evans, *Rituals of Retribution*, pp. 106–7.
25. Ibid., p. 195.
26. Gatrell, *Hanging Tree*, p. 75.
27. Evans, *Rituals of Retribution*, p. 263.
28. Gatrell, *Hanging Tree*, p. 90.
29. Ibid., pp. 50, 68 and Evans, *Rituals of Retribution*, p. 220.
30. Gatrell, *Hanging Tree*, pp. 30, 98–9, 103.
31. Ibid., p. 103.
32. Ibid., p. 56 and see Evans, *Rituals of Retribution*, p. 202.
33. Evans, *Rituals of Retribution*, p. 221.
34. Gatrell, *Hanging Tree*, p. 90.
35. Evans, *Rituals of Retribution*, pp. 106–7.
36. Ibid., pp. 107, 881.
37. E.g. ibid., pp. 209–10.
38. Ibid., p. 195.
39. Ibid., p. 107 and Gatrell, *Hanging Tree*, p. 30.
40. Evans, *Rituals of Retribution*, p. 902 and Harry Potter, *Hanging in Judgement: Religion and the Death Penalty in England* (New York: Continuum, 1993).
41. Evans, *Rituals of Retribution*, p. 78.
42. Gatrell, *Hanging Tree*, pp. 30, 81, 89.
43. Ibid., p. 69 and Evans, *Rituals of Retribution*, p. 307.
44. Gatrell, *Hanging Tree*, pp. 80–1, and Evans, *Rituals of Retribution*, p. 195.
45. Ronald Dworkin, *Taking Rights Seriously* (London: Duckworth, 1977) ch. 8.
46. See Roger Hood, *The Death Penalty: A World-wide Perspective* (Oxford: Clarendon Press, 1996) p. 23.
47. Justice Blackmun's dissent in *Callins* v *Collins*, 114 S.Ct. 1127 (1994) provides a good coverage in these terms.
48. See e.g. Peter Goodrich, *Languages of Law: From Logics of Memory to Nomadic Masks* (London: Weidenfeld and Nicholson, 1990) ch. 6.
49. See Peter Hodgkinson et al., *Capital Punishment in the United States of America: A Review of the Issues* (London: Parliamentary Human Rights Group, 1996) p. 18.
50. Cf. ibid., pp. 19, 26 and Norman Mailer, *The Executioner's Song* (London: Arrow Books, 1979) pp. 374–5, 399.
51. Jacques Derrida, *Dissemination*, trans. Barbara Johnson (Chicago, IL: Chicago University Press, 1981) pp. 189–90.
52. Michel Foucault, *Foucault Live*, trans. John Johnston (New York: Semiotext(e), 1989) p. 158.
53. Reversing the dynamic, it could be said that the 'absolute immanence' of responsibility, or its becoming 'fully realised' encompasses the death of those held responsible: cf. Nancy, *Inoperative Community*, pp. 12–13. Yet we seem unable to face the consequences of such an absolute or monadic responsibility. If its inevitable arbitrariness is translated into purely statistical calculations about who should be convicted and executed, the reaction is

one of horror: Ian Hacking, *The Taming of Chance* (Cambridge: Cambridge University Press, 1990) ch. 11. Our sentimentality in this is revealed through the ready acceptance of no less arbitrary outcomes in convicting and killing. For example, the psychological sciences in one age would justify the execution of the 'degenerate' criminal, yet in another these sciences would constitute moral unfitness as excuse or mitigation. Another example: we attach execution to responsibility monadically but there is often a sharp diversity of judicial views in a case. Difference is eliminated by voting and, for good measure, it will not always be a view of the majority of the judges eventually involved in a case that prevails.

54. See Hood, *The Death Penalty*, p. 152 and *Gregg* v *Georgia* 428 U.S. 153 (1976) at 183. Dastur writes of 'the magnitude of death, that respect in which its refuses to be thought, pondered, weighed according to any system of equivalences'. It is 'incomparable with other kinds of knowledge because it exposes us to the immeasurability of something we can never experience'. Françoise Dastur, *Death: An Essay on Finitude*, trans. John Llewelyn (London: Athlone, 1996) pp. 3–4.
55. See Hood, *The Death Penalty*, pp. 199–20, 126.
56. See Hodgkinson et al., *Capital Punishment in the United States*, p. 25.
57. 114 S.Ct. 1127 (1994).
58. Cf. Hodgkinson et al., *Captial Punishment in the United States*, p. 14.
59. Michael L. Radelet et al., *In Spite of Innocence, Erroneous Convictions in Capital Cases* (Boston, MA: Northeastern University Press, 1992) p. xii, their emphasis. This was a stunning addition made to the preface in 1994 – whilst the book was still in press, it would seem. In pointing out the aptness of executive clemency in this case, the Supreme Court had referred to this study, presumably in manuscript. However, as the authors point out, 'the Court failed to mention the twenty-three cases we record in which no clemency was granted and a defendant we believe to have been innocent was executed', ibid.
60. See Hodgkinson et al., *Capital Punishment in the United States*, p. 12.
61. Ibid., pp. 29–30.
62. See Evan Caminker and Erwin Chermerinsky, 'The Lawless Execution of Robert Alton Harris', 102 *Yale Law Journal* (1992) pp. 246–52. Comparable desperation can be found in defences of this draconian prohibition. As Judge Kozinski opined, 'the drama had no other possible outcome' and, in the ultimate tautology, 'enough is enough': see Alex Kozinski, 'Tinkering with Death', *New Yorker* (10 February 1997) pp. 50–1.

2
Et Lex Perpetua: Dying Declarations and the Terror of Süssmayr

Desmond Manderson

INTRODUCTION

Requiem aeternam dona eis Domine
Et lux perpetua, luceat eis
(Grant them eternal rest, Lord
And let perpetual light shine upon them)

The death of William Woodcock was sudden but expected. In 1788, his wife, Silvia, had been bludgeoned and left to die in a ditch. Early the following year, on trial in the Old Bailey for her murder, William was sentenced to death. On Monday, 19 January, he was taken to 'Tyburn's tree' in London, and, with a scarcely audible snap of the neck, and a sigh or a moan from the milling crowd, he was hanged. He was not the only one to meet such a fate. In the following twenty years, in the face of perceptions of increased lawlessness, and fear of political contagion brought on by the French Revolution, the number of crimes punishable by death exploded to over two hundred.[1] Undoubtedly, the death penalty was enacted to serve substantially symbolic and ritual purposes; a lesson in the terror and majesty of the law, whose harshness was frequently ameliorated by dispensation of the Courts.[2] But for the not inconsiderable number for whom no mercy awaited, a death sentence was a brute reality. It was the final law, and it ushered in perpetual darkness.

We know more about William Woodcock than most who met this fate, because he left behind an unwitting legacy. *R* v *Woodcock* is one of the seminal cases in the development of the law of evidence.[3] For the only evidence of what happened to Silvia came from Silvia herself. In the Chelsea Poorhourse she recovered her senses and lingered two days before she died. A magistrate came to her bedside and, acting in an informal capacity, took down her story of the events that befell her that night. The question that arose for the Court was therefore crucial: according to the hearsay rule, the magistrate's evidence of what

somebody else had told him to be the truth was inadmissible, and Silvia herself was no longer able to tell her story. As Chief Baron Eyre said:

> Great as a crime of this nature must always appear to be, yet the inquiry into it must proceed upon the rules of evidence. The most common and ordinary species of legal evidence consists in the depositions of witnesses taken on oath before the Jury, in the face of the Court, in the presence of the prisoner ...[4]

R v *Woodcock* establishes an exception to the hearsay rule in the case of a dying declaration by a person who has received a fatal blow:

> [T]hey are declarations made in extremity, when the party is at the point of death, and when every hope of this world is gone: when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth; a situation so solemn, and so awful, is considered by the law as creating an obligation equal to that which is imposed by a positive oath administered in a Court of Justice.[5]

The exception, therefore, requires the following circumstances:[6] the death of the declarant, a trial for murder or manslaughter, a statement which relates to the cause of the declarant's death, and a 'settled hopeless expectation of death'[7] in the mind of the declarant. It was this combination which allowed Silvia to speak from beyond the grave, and condemn William to death as he condemned her.

The courts have never shown themselves happy with the exception. Concerned that its only justification was as a moral necessity, the operation of the exception has been clearly circumscribed, and both judges and textbook writers find little to justify it in theory: 'Being a concession to moral sentiment the exception concedes the bare minimum, hence its limitations.'[8] Yet while the traditional approach of providing the exception with fixed criteria demonstrated discomfort, the approach in recent cases of treating the principle of dying declarations as part of the *res gestae* is hardly more satisfactory. The approach of the Privy Council in *Ratten* and of the House of Lords in *Andrews* seeks to do away with the separate status of the exception altogether, and to replace it with a more general test of 'reliability' in circumstances which 'exclude the possibility of concoction or distortion'.[9] In jurisdictions in which the rules of evidence have been codified, such as the Commonwealth of Australia, the dying declarations exception and indeed the historical rigours of the rule against hearsay have largely been abandoned.[10] This approach concedes that the formalistic approach to the laws of evidence of which the hearsay rule is the gatekeeper and talisman, cannot be made compatible with the

principle of dying declarations at all. As a solitary exception or as part of reconception of how the laws of evidence operate to determine the truth, the principle remains a fragment, an indigestible supplement to the hearsay principle and the law of evidence.[11] For two hundred years, the moment of death has challenged law's rules as to the constitution of truth.

Contrary to this received wisdom and regardless of its current status within the laws of evidence of particular jurisdictions, the principle of dying declarations sheds a great deal of light on the very foundations and structure of the laws of evidence as a whole. The next section, A, argues that, far from being the problematic exception it appears to be, the law's treatment of statements made on the point of death is paradigmatic of the law of evidence as a whole. The dying declaration is *not* an exception to law's demand for an oath administered before a jury; it is the origin and model of it. The rules of evidence, understood as guarantors of truth, rely on the supplement they appear to banish. Having bound together rule and exception as part of the same conceptual framework, Section B goes on to demonstrate the problems with such an approach in a world profoundly different to that which first developed the principle. The values which formed the basis of the principle of dying declarations and the rules of evidence alike no longer hold so strongly, and in their absence, the extent to which the *truth* of a dying declaration can be guaranteed, must be doubted. The theory of the truth of dying declarations, dependent on the contingencies of a certain world view, seems in these changed circumstances to deconstruct itself. The formal constraints which characterise the principle appear no longer to ensure its truth but rather to undermine it.

The final step of the argument seeks to reconcile the arguments of the previous two sections. Law is a formal system, and its legitimacy is founded not on a promise of truth but by the enactment of ritual. If we understand the laws of evidence as part of a formal structure, to which entry is governed and guarded by rites of passage, then both the oath taken before a court, and the dying declaration given beyond it, can be seen as enacting the same ritual of purification. It is consistency not truth, ritual not substance, which governs the legal constitution of evidence.

In this, law's protection of its own seamless interiority against any external scrutiny, the dying declaration and the evidential oath are different moments directed towards the same purpose. This time from the point of view of form and not of truth, the dying declaration – a formal model of transfiguration wrought at the moment of death – again emerges in Derridean terms as the supplement which, because it takes place outside the court, cannot be assimilated within the formal structure, and which is yet needed to explain its operation. The

dying declaration and the oath are both rituals that ensure our transmission from one jurisdiction (the social and the earthly) and our submission to another (the legal and the heavenly). Together, they tell us something of the power of formalism. As we shall see, formalism in law owes a great deal to the aesthetic of classicism which coloured the moment of its birth. There is something quintessentially classical in the rules of evidence and of dying declarations, an aesthetic which we will have to draw on if we are to appreciate fully their force.

A

> *Dies irae, dies illa …*
> *Quantus tremor est futurus,*
> *Quando judex est venturus,*
> *Cuncta stricte discussurus*
> (A day of wrath, that day …
> What trembling there will be,
> When the judge will come to examine us all with strict justice)

I

The death of Wolfgang Amadeus Mozart was protracted but unexpected. Through the months of 1791 he sickened, neglect and fragility each compounded by the restless urgings of his own demonic creativity. Yet the *Dies Irae*, the day of terror on which Mozart faced death for the last time, was not set in advance by some judicial fiat. Death caught him in the midst of life, with incomplete projects all about him. By his bed lay the fragmentary draft of his *Requiem*,[12] his 'great Mass for the dead', the ghostly commission which perhaps he understood to presage his own doom. In the middle of the night, so the story goes, came a man dressed in black who commissioned a Requiem but refused to disclose for whom it was to be undertaken. Did Mozart take this man as an omen? Was he conscious of composing his own Mass and epitaph, or is that just the interpretative conceit of later generations?

We cannot say, yet in a literal sense, Mozart's *Requiem* was his dying declaration. Certainly it conforms to most of the strictures laid down in *Woodcock* only the year before. It was the last will and testament of Wolfgang Amadeus Mozart; the final product of a mind labouring under a 'settled hopeless expectation of death', 'when the party is at the point of death, and when every hope of this world is gone'.[13] Moreover, what is a Requiem Mass but a statement, if not as to the cause of the declarant's death, then as to the nature of death itself? The dying declaration and Mozart's *Requiem* are each statements whose truth is guaranteed by the immediate and necessary connections

between their subject, object and occasion: they are insights into and before death.[14]

Why this context should be treated by Chief Baron Eyre as 'creating an obligation equal to that which is imposed by a positive oath administered in a Court of Justice'[15] is nowhere made clearer than in the *Requiem*. For the text and music of the *Requiem* sound with two themes: the certainty of divine judgment, and the terror of divine punishment. In this classical document, we hear/say a spiritual world view in which the imminence of death did indeed guarantee truth. The dying declaration was a statement made not just in the absence of life – 'when every hope of this world is gone: when every motive to falsehood is silenced' – but rather in the presence of a judge more solemn and awful than any human institution.

It is significant that the *Requiem* contains no '*Miserere nobis*' or '*Pie Jesu*'. The only reference to mercy is in the '*Kyrie*' at the very beginning of the Mass: – *Kyrie eleison, Christe eleison, Kyrie eleison* – Lord have mercy, Christ have mercy, Lord have mercy. And here for the only time, the text reverts from the Latin to the ancient Greek. Mercy is set apart, structurally and linguistically, from the remainder of the *Requiem* because it is, the '*Kyrie*' apart, a resolutely legal document, a paean to the reality of God's rational and judicial role in consigning his subjects to heaven or to hell. *Quantus tremor est futurus, Quando judex est venturus, Cuncta stricte discussurus!* – How great a terror there will be when the Judge shall come who will thresh out everything strictly! And it is the promise of a strict and uncompromising discourse which grounds the *Requiem*: *Liber scriptus proferetur, In quo totem continetur, Unde mundus judicetur* – A written book will be brought forth which contains everything for which the world will be judged. The infallibility of divine judgment, and indeed its textual nature, awaits us all with certainty.

To those whom God convicts, only terror awaits. It is that terrible exercise of deic reason, *dies irae, dies illa* – a day of wrath, that day – which the *Requiem* anticipates and reflects on. And it is to be heard in Mozart's music as it is spoken by his text. The running passages of the orchestra set against the long unison of the choir convey a sense of the ineluctable force of God's gaze and judgment. The '*Confutatis*' which follows only reinforces these feelings of doom, judgment and finality. *Confutatis maledictis, flammis acribus addictis* – The damned are confounded, And consigned to keen flames – cry the male voices with limping echoes, over a fervid and insistent accompaniment that connotes nothing but the licking flames of hell itself. Music and text work together not just to express terror, but to instil it.

In Mozart's *Requiem* there is something comforting in this promise, since the very infallibility of God's judgment offers, to those who pass the test, eternal peace and perpetual light. The licking flames subside

and give way to calming flutes, over which the female voices whisper a quiet entreaty: *Voca me cum benedictis* – Call me with the blessed. The decision is God's, his light searching and inescapable, and we can only hope and pray. Death is a call to judgment, a summons to the divine court. Oh, call me with the blessed; we fear and trust His ruling.

This is the world of the *Requiem*. Death was not the end of life but the beginning of eternity, guarded by a waiting God. In the late eighteenth century, this was not a myth but a reality. Mozart's *Requiem* gives us an insight into this world. As part of the great tradition of Western religious music, the sung Mass did more than depict this world view: together with the great cathedrals and churches that studded the topography of Europe, and the great art they housed, music helped to constitute it. After all, a *nomos,* Cover's 'universe of norms',[16] is not just formed by legal sources, narrowly construed. Its values are developed through the multiple expressions of life in a community, and they are to be found in the art and architecture, no less than the precedents and statutes, that every day surround its inhabitants and through which they absorb the pattern of their relationships to God and to each other. Art and music serve a normative and so a legal function, establishing the conditions of life of which the law is but a particular expression.[17]

II

As an exception to the hearsay principle, the dying declaration made sense because the impending judgment of God really did impose a duty of honesty upon the dying. This was indeed 'a situation so solemn, and so awful' as to compel the declarant to tell the truth. But does not the judgment of God precede the laws of Man? Is not God the first and the greatest of all judges? In the *nomos* of the eighteenth century, it is more than a little ingenuous to claim that the fear of death creates an obligation '*equal to* that which is imposed by a positive oath administered in a Court of Justice' (emphasis added).[18] The structure and ritual of the courtroom, its language, costume and setting, were intended by their majesty to instil an awful terror in those who came before it. As Douglas Hay argued, that terror was essential to the successful operations of the legal system.[19] But this terror appealed to the judgment of God to ground and legitimate it. The iconography and costumery is religious in its overtones, and no more so than in the taking of the oath, which is a ritual promise extracted on a Bible and to God, 'to tell the truth'. The prohibition against dishonesty is expressed in the crime of perjury, but its sanction is spiritual as well as secular. The ritual of the oath therefore attempts to bring the witness before God. On the one hand, the judge and the courtroom are designed to replicate the ideal of a certain and infallible judge; while on the other, the oath itself makes specific appeal to God

in order to generate the feeling of terror which will make deception not just reprehensible but impossible.

Chief Baron Eyre, therefore, has his argument precisely upside down. It is the last judgment which really summons us to tell the truth, and the oath is only a pale imitation of it, administered in a Court of Justice as an attempt to capture some of that solemnity and awe. In dying we are face to face with the final reckoning, and the oath is a legal dying, a ritual which attempts to remind us and prefigure for us the death to come. The rule of dying declarations is *not* an exception to the requirement of an administered oath, but rather the origin and paradigm of that requirement. The oath could have no force without the infallible judgment of God which death ushers in, and in which the dying declarant, having already left this world, already partakes. If we were all always labouring under a 'settled hopeless expectation of death', the imminent presence of God would make the positive oath unnecessary. We would all speak the truth. But we strive to pretend that death sleeps elsewhere than in our own breasts, and so the oath is required to bring the judgment of God present to our mind: by metaphors which attempt to make a judge seem like a God, and by metonyms which remind us of the final arbitration which awaits us. Iconography and rhetoric combine to ensure that the oath imparts, with effort, the terrible majesty which the dying declaration achieves effortlessly.

First, then, the principle of dying declarations is no exception to the hearsay rule, but the grounds of its possibility. In law and in spirit, the rule of dying declarations is the supplement: the necessary precondition for the very rule that seeks to create its character as something exceptional and marginal. Secondly, Mozart's *Requiem* and the religious choral tradition to which it belongs not only conveys the *nomos* in which these legal principles developed, but were a significant part of its constitution. Music is a description and a source of law.

B

Rex tremendae majestatis
Qui salvandos, salvas gratis,
Salva me fons pietatis
(King of awesome majesty, who gives grace to those that are to be saved,
Save me, font of pity)

I

If the oath and the dying declaration are bound together by a world view in which the judgment of God is the sanction both ultimate and

imminent, how can this legal principle be legitimated two centuries on, in a world whose philosophy is so profoundly secular? There seem to be several interrelated problems with the rule in *Woodcock* which make its approach now untenable as a guarantor of the truth of a dying declaration. Further, the very limitations on the application of the 'exception', imposed by Chief Baron Eyre and later courts, appear to work against its underlying rationale. Together, these analyses suggest that the principle of dying declarations no longer promises truth in utterances, and neither is it meant to.

It is no overstatement to claim that our society has a radically changed consciousness of death from that of the eighteenth century. The point of the death of God is too obvious to bear repetition. Suffice it to say that, for most of us, the afterlife does not have the reality that it clearly possessed two centuries ago. With that change, moreover, has come a whole changed perception as to the meaning and role of death in our lives. No one has done more that Philippe Ariès to define and demonstrate this change.[20] The hour of our death has changed from a moment of clarification to a moment of dissipation. Our soul is not mustered but dismissed by the action of death. At the same time, many are the historians who have traced the rise of individualism in our self-understanding under conditions of modernity. The individualism which Ariès discusses began in the late Middle Ages, but, as Foucault has argued, it has undoubtedly gathered pace over the past two hundred years.[21] This too has consequences for how we understand death, and indeed Ariès argues that it was only with the rising Western consciousness of 'the self' as something individual and irreplaceable that death took on the dimensions of terror that it did. If the self is an atomic isolate, a being whose value lies precisely in their unique and individual identity, then we can never be reconciled to our death. The pattern of the modern world, then, has been to remove from our understanding of what it is to die, that is, on the one hand the promise of life after death, and on the other the consolation of membership in a continuing community. There is nothing left to bridge the great canyon which marks off the living from the dead: neither God hereafter nor society therebefore can heal the gaping wound.

More recent classical music evidences the nature of these changes. Benjamin Britten's *War Requiem,* composed in 1961 to the war poems of Wilfred Owen, suggests how far we have come.[22] This remarkable work focuses on death as a human tragedy and not a divine transition:

> Out there, we've walked quite friendly up to Death;
> … We've sniffed the green thick odour of his breath[23]

There is nothing divine here, and no sense of judgment or justice. It is the devouring evil of Death rather than the terrible eternity of Hell which governs our thoughts. There is no afterlife in the poems of Wilfred Owen, only an emptiness which cannot be undone. The focus of Britten's *Requiem* on war continues this theme of death as a human act, with human consequences. The experience of 'the dead' is in fact entirely absent: the denial of death takes the form specifically of death as an event which happens to others, whose tragedy lies in the emptiness felt by those who are left behind.

Richard Strauss's *Four Last Songs*, written just a few years after the end of the war, presents a contrasting perspective on the nature of death. This too is a dying declaration, a work written in the settled knowledge of the composer's imminent death. With his last creative effort, Strauss penned the music to accompany Hesse's poem whose last line asks, 'Can this, perhaps, be death?' But there is a gorgeous cautious peace here, an acceptance which one does not find in either Mozart or Britten. The theme of transfiguration sounded by the horn, and the birdsong of the flutes suggests why: it is neither divine judgment nor human folly which governs death here, but the ineluctable workings of nature from which we arose and to which at last we must subside. Nevertheless, in Strauss as in Britten, the divine and the afterlife are entirely absent. Certainly, while Britten focuses on death as caused by humans, Strauss sees instead something natural. But here too the soul does not *migrate* anywhere, let alone to meet its maker. In Britten it ends, just ends, and that is the tragedy. In Strauss it dissipates, it merges with the earth, and that is the triumph. In Mozart, both the tragedy and the triumph of death come from our righteous confrontation before the court of the divine. But in the twentieth century we can hear how the secular age has reconstituted death without a God to judge us.

In such a world, how can the truth of a dying declaration ever be assured? Where is the punishment, where the judgment? Why is 'all motive to falsehood silenced'? If death is a nothingness, why should we tell the truth in its shadow, or not tell the truth, or say anything at all? The attempt in recent cases to secularise the rule of dying declarations finds no way around this problem. *Andrews* shifts the question of admissibility 'from a fixed definition to a test of trustworthiness' in circumstances in which 'the possibility of concoction of distortion [can] be disregarded'.[24] But the idea that somehow the realisation of imminent death will overwhelm all sense of calculation and lead to an outburst of uncensored and instinctive honesty is no more or less likely than the opposite. Whether viewed as a tragedy, like Britten, or an apotheosis, like Strauss, in the twentieth century we have begun to think about death, without a sanction, as the most isolated moment of our lives. In this world view, we revert at last to

the Hobbesian state of nature, entirely alone and without a responsibility beyond the self.[25]

Faced with nullification, in that solitary moment, we do not look beyond or after life, but rather continue to hold tight to the individual interests which are to be taken from us. Perhaps it is for this reason that we pay particular attention to statements of all kinds made on the point of death, as a way of *extending* the life and will of the deceased a little further. What is a *will,* but a desire to live a little longer, a pact made by the living to honour the dead and extend their life in return for similar treatment in due course? The rule of dying declarations characterised the declarant as having an outsider's interest in the truth of the matter. This no longer applies. Far from a promise of truth grounded in the renunciation of earthly concerns, the desire for eternal life suggests that the point of death is, on the contrary, marked by an almost desperate attempt to cling to those concerns.

In this respect, our salvation may appear to lie not in the individual for whom death marks the end, but in the community which continues on after our death. But this notion of community is not entirely selfless either. A raised consciousness of death seems to lead people to a closer identification with the community which will survive them, and to demonstrate a greater intolerance for those who are perceived to violate its norms.[26] In short, the dying have a vested interest in the community they leave behind: its functioning, its structure, its system of justice, is our legacy. Different people will, obviously, perceive their interest in a different way, but the point is clear: the dying do not leave the world behind, for they no longer have anywhere else to go. We do not surrender the world, but are wrested from it.

This raises an additional problem with the theoretical justification of the rule. The assumption behind the rule is that our death is accompanied by a 'settled hopeless expectation of death'. The dying declaration forms, then, a closing of accounts; it is an act of completion. Although death does not have to be immediate, there can be no hope of recovery, and the dying declaration must be *conscious* of this inexorable and impending finitude.[27] Perhaps it would be as well to note that we are, as human beings, always under such a settled hopeless expectation since our mortality is a truth from which there is no escape. For none of us can there ever be a question of any hope of recovery; only the timing of our death is ever at issue. But our lives, to be sure, are not lived that way. The opposite is more strongly true. Death rarely comes to us as a resolution, settled and complete. It is *avenir* until the very moment has passed by, leaving not a self but a corpse in its wake.

The death of Wolfgang Amadeus Mozart exemplifies this predicament. The strewn papers, the unfinished compositions, give

evidence of death which caught a man in the midst of life. His death was untimely as all our deaths are. His *Requiem*, his dying declaration, was incomplete – as incomplete as all our final statements are. It does not manifest a definitive moment under the settled hopeless expectation of death, but rather a continuing and ceaseless desire for life. It was left, then, for Franz Xavier Süssmayr, an unremarkable but determined contemporary, to fill in the missing pieces of the *Requiem* and present to the world as a rounded form that which was in fact only a fragment. It is the work of Süssmayr which creates for us the myth of death as a cenotaph; the work of Mozart himself shows us instead how a dying declaration is but a hastily half-erected scaffold. And the myth of the finality of death places Chief Baron Eyre in the role of Süssmayr: those mediocrities who come along after death, tidying up the pieces, squaring off the awkward corners, and reading settled verities into final snatched breaths of life.

II

We do not live in Süssmayr's world, or in that of Chief Baron Eyre. In a world in which the very factors that guaranteed the veracity of the dying declaration no longer hold, how can the rule be justified? Ironically, faced with such problems, the rule in *R* v *Woodcock* is itself structured to prevent the kind of inquiry which might establish whether a particular declarant could or could not be demonstrated to fall in fact within the exception.

In the first place, one might want to inquire whether the declarant actually believed in God. But the courts have held that such an inquiry is 'wholly rejected'.[28] Neither is allowance made for the fact of cultural or religious differences, which might lead to a radically different conception of the nature of death and the responsibilities which surround it. The rule, in other words, resolutely assumes the conditions of its legitimacy which are less and less likely in fact to be fulfilled.

Secondly, the rule only applies to statements made as to the cause of death of the declarant, and at a trial for murder or manslaughter arising out of that death. Yet if the rule is to be believed, it is the 'settled hopeless expectation of death' which gives rise to a promise of truth. Why is this not good enough evidence as to any matter within the knowledge of the declarant? Why does the rule of dying declarations not apply equally to trials for fraud or defamation? It seems incongruous that if imminent death creates an obligation 'equal to that which is imposed by a positive oath' that the circumstances of its application should be so limited.

In both cases, the application of the rule undermines its underlying rationale. Its formal structure of certain, fixed criteria for application in certain, fixed circumstances, leaves no room for a consideration of factors which would distinguish those situations in which a dying

declaration might be true, from those in which it might not. The formal resistance to any consideration of specific cases forces us to accept a rule, holus bolus, which appears to make less and less sense.

C

> *Agnus Dei, qui tollis peccata mundi:*
> *Dona eis requiem*
> (Lamb of God, who takest away the sins of the world: Grant them rest)

I

The paradox of the law's refusal to inquire into the beliefs of the declarant, and at the same time its restriction of the exception to certain narrow circumstances, appears to undermine the dying declaration's claim to truth. But this paradox at the same time points us to something of broader significance. For both these aspects of the rule prevent us from inquiring into the *fact* of the truth or otherwise of the declaration. Lord Reid, speaking of the whole law of evidence, said, 'The whole development of the exceptions to the hearsay rule is based on the determination of certain classes of evidence as admissible or inadmissible and not on the apparent credibility of the particular evidence tendered.'[29]

The assumption that a dying declaration is true is not to be investigated, for we may find that it is not. Rather, the structure of the law is designed to protect the myth of the truth of evidence by preventing any inquiry into it.[30] This is surely the essence of a formalist approach: by establishing formal criteria and *preventing* a substantive inquiry, the legal system effaces the contingency of its own origins. The formal requirements are a mask behind which we cannot go.

In this way too, the problems we have discerned with the rule of dying declarations, far from proving an abnormal growth grafted on to otherwise coherent principles, turn out instead to be paradigmatic. Again the so-called exception to the legal process of evidence turns out to be a model for its operation, a 'supplement' which is 'dangerous' because of what it reveals about the operation of the legal system as a whole.[31] The law protects its legitimacy as a system – not a system of truth but of belief, closed and therefore impenetrable to interrogation. A formal legal system conceals its origins and its values behind an insistence on procedural requirements and supposedly 'bright-line rules'.[32] It does so in order to render impossible any substantive challenge to its legitimacy by pretending to an objectivity which is mythic. Formalism forms a closed system, a circle which cannot be broken.

It is no coincidence that formalism in law and classicism in the arts both emerge in recognisably modern form at around the same time, at the end of the eighteenth century. Woodcock's and Mozart's dying declarations were both uttered in the shadow of the French revolution. 'I am the body of the law', said James I; '*l'état, c'est moi*', declared Louis XIV. In response, the philosophy of the Enlightenment and the concept of the rule of law both displaced the subjectivity of autocracy – a cult of political personality – by a commitment to abstract rules incapable, so it was hoped, of subversion. Formalism guarantees the legitimacy of the law by the creation of a Newtonian system, a clockwork law structured around rules whose authority is independent of their author, whose meaning can be objectively determined, and whose content is not to be interrogated. Formal law is hermetically sealed, its meaning and therefore its legitimacy internal to itself.

Classicism is the aesthetic expression of these ideals. The bright lines of classical music or architecture displaced the decadence of baroque court music – a cult of artistic personality – by a commitment to abstract rules of composition and proportion. Here too, structures become more rigid and norms of performance codified. Even more notably, aesthetic value is judged against Platonic forms based on structure, not emotion or content. In stark contrast to both the baroque music that preceded it, and even more so the Romantic music that followed it, the value of a piece of music is judged by its internal proportions and fitness, rather than what it depicted or represented outside of itself. Classical music, to put it at its boldest, is not in service to a court or a king, still less to nationalism or the depiction of nature or the narration of a myth or the conveying of an emotion. It is in service purely to itself. The forms of classical music – the sonata, the symphony, the concerto – find no reflection in the living world. Their instances are judged according to how well they achieve purely internal and abstract criteria of value. Classicism, too, is hermetically sealed.

Formal law is the death of the author in the preservation of authority. Classical music likewise privileges the perfection of form over authorial intention. And while in many respects Mozart's *Requiem* is too individual, too emotional, to serve as the paradigm of classicism, in this particular it demonstrates the point vividly. Can we imagine Schubert's *Unfinished Symphony,* written only a generation later, being finished by some well-meaning journeyman? Not at all. By then the philosophy of individualism – think of Kant's theory of 'the genius' – had made such an intrusion seem sacreligious. But in the case of Mozart's *Requiem,* along comes Süssmayr to do the deed. Why? Because Mozart's Mass was not just a collection of individual pieces: it was a particular and definite genre and the aesthetic norms of classicism

required that it adhere to a particular formal structure. Süssmayr was better than an absence, because formal completion was imperative.

Such an absence would indeed have undermined the very message of certainty and closure which is at the heart of the Requiem Mass. It would have suggested incompleteness and emptiness where the *Requiem* insists instead on conclusion and eternity. It would have revealed what in the following two centuries scholars and artists have continued to find wherever they have looked: an empty space where God ought to be. It is that gaping imperfection[33] which formalism and classicism cannot abide. And so instead we have Süssmayr's '*Sanctus*' and Süssmayr's '*Benedictus*' in Mozart's *Requiem*; filling the void, closing the circle.

II

The problem with a closed system is how you get inside it. Once you are part of a formal structure, its internal consistency is the sole criteria for validity. But to enter any such structure requires a transition, a concession to be bound by and only by the internal norms of the system. Rites of passage mark the osmotic crossing of this boundary, an entrance to something which has, and in terms of the arguments of its legitimacy, can have no outside. Rites of passage give the promise to be bound a corporeal reality, and reinforce it by a continual re-enactment of bodily rituals. Our subservience is inscribed and then reinscribed upon the body.[34]

Entry to the community of a church, for example, is accompanied by Baptism, a ritual purification and rebirth in which the corporeal element is more or less aggressively acted out. To be immersed in water not once but three times is a kind of physical assault intended to leave the initiate with a bodily memory of a transition to a new state of being. And every Communion reiterates by physical repetition, membership and obedience. It is the iteration of precisely the same words and bodily actions – the same gestures, repeated by every one, every time – which reminds and inscribes the members of a church with the shared mark of the system to which we they are bound. So too, the army. Often violent rites of initations physically break the novitiate's connection with the outside world and enforce their subjection to a closed system of norms. And the daily rituals of marching and saluting inscribe by constant repetition a hierarchy and a collectivity, a shared and unchallengeable order.

To be clear: the purpose of ritual is not to convey information. It is not about thinking but about feeling, not about the mind but the body, about the creation of an allegiance which is *habitual* in Bourdieu's sense of a belonging which our body inhabits. 'The body,' says Bourdieu, 'is the site of incorporated history.'[35] The rites of passage which transport us into a system and the rituals that hold us there, like

the internal workings of the system itself, are formal and not substantive: empty of *reasons* and therefore unable to be reasoned against. Ironically, formalism establishes obedience not by logic but through emotional and physical memory.

Law also constitutes its subjects by formal rites. It is not the *truth* of evidence given under oath which maintains the legitimacy of the legal system, but its ritual incantation of formulae which reinscribe and reinforce the unchallengeable authority of the rules laid down. An oath, like a vow, is a ritual form – an unalterable formula of words and gestures – which, although it says it is about 'truth', is in fact about the submission of the witness to the internal and formal norms of the system. Rites mark the transition of the subject from the external world, to the internal order of legal process and to the fixed criteria of relevance which govern it. The giving of evidence before a court requires the administration of a solemn oath not as a guarantee of truth before the law but rather as an act of submission to it.

Once we understand the evidential oath as the necessary marker of a rite of passage, the nature of the dying declaration also comes more clearly into focus. Our journey from life to death is also a grievous transition. The dying declaration, the last words, the will and testament are rites which mark our departure, and our conscious submission to a new jurisdiction, whose nature we cannot know in advance.

A rite of passage requires a purification and a sacrament. We are asked to 'come clean' so we can enter our new state reborn. But what is to be purified is the *passage itself,* and consequently the oath or vow asks us to focus only on this transition as we move from one state to another. The sacrament of Marriage, for example, places us before God and cautions us to speak the truth. But it is not truth in general which is commanded of us, but only as it concerns the rite being undergone: 'if any amongst you know any reason for this marriage not to proceed, speak now or forever hold your peace'. The dying declaration is another such transition, and the 'coming clean' that it demands is similarly circumscribed. We are urged to speak the truth as to the journey we are about to undergo, which is to say, *about our own death.*

It is for this reason that the admissibility of the dying declaration is so severely limited. Cross asks, without a satisfactory answer, 'And why, above all, is such a declaration only admissible when the accused is charged with the homicide of the declarant himself and is not admissible when he is charged with the homicide of another person?'[36]

The puzzle resolves itself as soon as we appreciate that the rule is part of a formal structure of ritual and not a rational structure of truth. In this rite of passage from life to death, it is only the declarant as journeyman whose purity must be ensured. Accordingly, the dying declaration

is an oath, a rite of passage, a formality. All that is in question is the journey that is being undertaken; that is to say, the only thing which is in question *is* the nature and circumstances of the declarant's own death.

CONCLUSION

Lex aeterna luceat eis, Domine
(Let eternal law shine upon them, Lord)

Before the law, as before death, we undergo a rite of submission to mark our transition to its unchallengeable jurisdiction.[37] But what lies behind the law? The answer in Mozart and indeed in *R* v *Woodcock* is straightforward: the terror of God. And the evidential oath in its traditional form, likewise extracts from us a promise to tell the truth, given on a Bible 'so help me God'. But we have seen the difficulties with sustaining this position in the modern world. Yet the power of a formal system is that, from our position within it, it is impossible to ask the question as to what grounds its legitimacy. The *Grundnorm* of the legal system, like that of a religious system, simply declares *I am that I am.*

Without God and eternity, we have seen how death has been reconstructed as a final silence. But this has not made death any easier to bear. Far from it. The result has been the great concealment of death: we do not talk about it, and we banish it from our thoughts. The dying are cloistered away in sick beds or hospital wards – we draw the curtains, speak in whispers, and tip-toe past their rooms. Not so as not to disturb them; so as not to disturb us.[38] Death therefore has been rendered more terrible by the silence that surrounds it, by its reconceptualisation as an absence, a negativity.[39]

So it is with law. Legal formalism replaces God with a threat equally powerful: the terror of nothing. Formalism conceals this nothing, and thus intensifies its power. The absence of criteria for determining what we might mean by substantive justice becomes a terror which, like death itself, we do not have the courage to face directly. The fear of an absence of absolute or substantive norms against which to judge the legal system has, if anything, increased law's emphasis on judgments of process and form. In our peripheral vision is a fear that if we question the hermetic circle of *legal* reasoning, and try to find principles of justice by which to judge its operations, we might find nothing. The terror of the anarchy of judgment legitimates the formal structures of law just as it forces our attention away from justice and towards the purely interior logic of the system. Justice, like death, has become the great unspoken.

Three aspects have guided our consideration of the way in which formal law restricts our thinking and binds us to it. First, the historical and aesthetic moment of its modern formulation goes some way to explaining the problems which formalism set out to address and demonstrates, as any lover of classical music will tell you, its power and self-sufficiency. Secondly, the dying declarations exception to the rule against hearsay has demonstrated that its status as a supplement points to its *revelatory* power in relation to the system which attempts to deny it any relevance. This symbiotic relationship of rule and exception reveals that the laws of evidence are constructed not as a promise of substantive truth, but as a constitution of formal validity. Finally, the commitment to treating formalism not just as a concept but as an institution, has emphasised how closely its realisation is connected to bodily practices of rite and ritual.

This is an obituary, not a eulogy. The dream of *lex perpetua,* an eternal and groundless law, is beset by weaknesses. We cannot abandon our desire to make substantive judgments because we all belong simultaneously to multiple systems of norms at once. Our submission to a particular normative structure, or indeed to a community, is therefore only ever partial.[40] This multiple belonging allows us to talk about justice, however problematic the task.

Franz Xavier Süssmayr has suffered for the sin of not being Mozart. But not only does his work on the *Requiem* exemplify the formalist need for structural integrity and completion. At heart, the formalist legal system is a claim about a system of purely internal reference, certain, objective and complete. Süssmayr reminds us of the utter and arrogant futility of such a claim. Yet no conclusion could be more optimistic. We are all in the position of Süssmayr, filling in the gaps in others' statements with interpretative hunches of our own. That is how communication takes place. It is completion, after all, that would constitute the real death here. Interpretative dialogue, imperfectly between societies and within communities, is immortal though our lives are not. Occasioned not by terror but by hope, this dialogue continues to keep alive the possibility of justice.

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29. [1964] 2 All ER 881, 887 *per* Lord Reid.
30. P. Fitzpatrick, *The Mythology of Modern Law* (London: Routledge, 1992).
31. Fitzpatrick, *Dangerous Supplements*.
32. D. Kennedy, 'Legal Formality', 2 *Legal Studies* (1973) p. 351; 'Form and Substance in Private Law Adjudication', 89 *Harvard Law Review* (1976) p. 1685; D. Patterson, 'The Metaphysics of Legal Formalism' 77 *Iowa Law Review* (1992) p. 741; K. Kress, 'Coherence and Formalism', 16 *Harvard Journal of Law and Public Policy* (1993) p. 639; E. Weinrib, 'The Jurisprudence of Legal Formalism', 16 *Harvard Journal of Law and Public Policy* (1993) p. 583.
33. J. Derrida, 'Force of Law: The Mystical Foundations of Law's Authority', 11 *Cardozo Law Review* (1990) p. 919.
34. See P. Cheah et al. (eds), *Thinking Through the Body of Law* (Sydney: Allen & Unwin, 1996).
35. P. Bourdieu, *Language and Symbolic Power* (Cambridge, MA: Harvard University Press, 1996) p. 13.
36. *Cross on Evidence,* p. 203.
37. F. Kafka, 'Before the Law', from *The Trial*, in *The Penguin Complete Novels of Franz Kafka* (Harmondsworth: Penguin, 1967) pp. 161–2; J. Derrida, 'Before the Law', in *Acts of Literature* (New York: Routledge).
38. Ariès, *Homme devant le mort*, Part III: The Hidden Death, p. 559 *et seq.*; E. Becker, *The Denial of Death* (New York: Free Press, 1973).
39. S. Critchley, *Very Little … Almost Nothing: Death, Philosophy, Literature* (London & New York: Routledge, 1997).
40. This point escapes the rather static analysis of legal interpretative communities to be found in Stanley Fish, 'Dennis Martinez and the Use of Theory', 96 *Yale Law Journal* (1987) p. 1773; *Doing What Comes Naturally: Change, Rhetoric and the Practice of Theory in Literary and Legal Studies* (Durham, NC: Duke University Press, 1989).

3
Killing Me Softly: Capital Punishment and the Technologies for Taking Life

Austin Sarat

> *There is no law that is not inscribed on bodies. Every law has a hold on the body ... Every power, including the power of law, is written first of all on the backs of its subjects.*
> Michel de Certeau, *The Practice of Everyday Life*

> *Make a good job of this.*
> William Kemmler, first person electrocuted in the United States, 1891

> *Do they feel anything? Do they hurt? Is there any pain? Very humane compared to what they've done to our children. The torture they've put our kids through. I think sometimes it's too easy. They ought to feel something. If it's fire burning all the way through their body or whatever. There ought to be some little sense of pain to it ...*
> Mother of a murder victim on being shown the planned death by lethal injection of her child's killer

> *People who wish to commit murder, they better not do it in the state of Florida because we may have a problem with our electric chair.*
> Robert Butterworth, Attorney General, State of Florida, remarking on a malfunction that caused a fire during an electrocution

> *Though our brother is on the rack ... our sense will never inform us of what he suffers ... By the imagination we place ourselves in his situation, we conceive ourselves enduring all the same torments, we enter as it were into his body, and become in some measure the same person with him.*
> Adam Smith, *The Theory of the Moral Sentiments*

INTRODUCTION

In March 1997, newspapers all over the United States trumpeted the 'botched' electrocution of Pedro Medina, a 39-year-old Cuban

immigrant convicted and condemned for the stabbing of a Florida high school teacher.[1] After the current was turned on, as one newspaper put it, flames 'leaped from the head' of the condemned. 'It was horrible', a witness was quoted as saying, 'a solid flame covered his whole head, from one side to the other. I had the impression of somebody being burned alive.'[2] Another newspaper wrote:

> The electrocution of Pedro Medina on Tuesday was the stuff of nightmares and horror fiction novels and films. A foot-long blue and orange flame shot from the mask covering his head for about 10 seconds, filling the execution chamber with smoke and sickening witnesses with the odor of charred human flesh. One witness compared it to 'a burning alive.'[3]

Yet news reports also conveyed the 'reassuring' reaction of Dr Belle Almojera, medical director at Florida State Prison, who said that before the apparatus caught fire Medina already had 'lurched up in his seat and balled up his fists – the normal reaction to high voltage ... "I saw no evidence of pain or suffering by the inmate throughout the entire process. In my professional opinion, he died a very quick, humane death."'[4] Still others defended even this botched electrocution by noting that it 'was much more humane than what was done to the victim'.[5]

Despite these attempts to contain adverse public reaction, the Medina execution made headlines because it suggested that law's quest for a painless, and allegedly humane, technology of death was by no means complete. It did so, also, because it reminded us of the ferocity of the state's sovereign power over life itself.[6] Yet these news stories also contained a hint of relief for supporters of capital punishment: most treated the Medina story as a mere technological glitch rather than as an occasion to rethink the practice of state killing. The state of Florida, the Fort Lauderdale *Sun-Sentinel* opined, 'is justified in imposing the death penalty ... But it has no justification for retaining a method ... that is so gruesome and violent and sometimes flawed.'[7] What might have been a challenge to the legitimacy of the killing state was quickly written off as the failure of one state to keep up with the technology of the times.

Almost immediately after the Medina execution, some death penalty proponents denounced electrocution as an out-of-date, unreliable technology of death and called for its replacement in Florida by lethal injection, the current technology of choice when the state kills.[8] 'Under lethal injection', one newspaper explained, 'the condemned is first sedated, then injected with deadly chemicals that painlessly and quickly paralyze the lungs and stop the heart.' [9] And, indeed, several months after the Medina execution, Florida enacted legislation

providing those condemned to die with the choice of lethal injection as an alternative to electrocution.

The botched execution of Pedro Medina clearly was an embarrassment to a legal order seeking to put people to death, but to do it quietly, invisibly, bureaucratically.[10] Executions, in such a system, are not supposed to make headlines. Despite the statements of people like Florida's Attorney General – gruesome cruelty might, they said, be a better deterrent than death itself[11] – the Medina execution provided one of those periodic, though increasingly rare moments, when today law's dealing in death is thrust into the public eye.[12] The commentary on this execution is particularly revealing in what it says about how we understand the law's own dealing in death. This commentary, first, is striking for what it did *not* say. Neither death itself, nor state killing, generated public horror; there was little investment in trying to understand either what it means for the state to deal in death, or for citizens of the United States to live in a killing state.[13]

That today most executions in the United States are not newsworthy[14] suggests that the killing state is taken for granted. If there is any issue at all left to the public debate about capital punishment, it is a debate about how the state kills.[15] As the news stories about the Medina execution suggest, the state's dealing in death is displaced by a concern for technological efficiency in which we are invited, following Dr Almojera, to imagine the body as a legible text, as readable for what it can tell us about the capacity of technology to move us from life to death swiftly, painlessly. But one might ask why the state should be concerned about the suffering of those it puts to death. Painful death might be both more just and more effective as a deterrent than one which is quick, quiet and tranquil.[16]

Law's discursive construction of the technologies for taking life is the subject of this chapter. I am concerned about what it means for law to imagine itself a master of the technologies of death, or whether the relationship that is really imagined is a relationship of mastery or of subservience. Technology mediates between the state and death. It does so in the first instance by masking physical pain and allowing the citizens to imagine that state killing is painless. But, in addition, the discursive apparatus of law works to separate cause and effect, to mask the agency responsible for execution. In this chapter I show how the search for ever more invisible, 'humane', methods for state killing depends upon certain assumptions about the legibility of the body in its journey from life to death. I am concerned, in particular, to show how the legal construction of state killing, while it appears to reveal an assumed empathy or identification between the state and those it kills, works primarily to differentiate state killing from murder and to hierarchise the relationship between the state and those whose lives it takes. We are invited to read the body and to search through that

reading for a way of taking life that signals our superiority and that marks the distinction between law's violence and violence outside the law, between a death we call capital punishment and a death we call murder. As one commentator on the Medina execution and its aftermath correctly observed, 'Let's be honest: Seeking a "humane" form of execution has nothing to do with it. It is not about sparing the condemned, but sparing ourselves. We like to keep the whole awful business at arms length, to tell ourselves capital punishment is civilized.'[17]

DOING DEATH SILENTLY, INVISIBLY

The recent history of state killing in the United States reads like someone's idea of a story of the triumph of the idea of progress applied to the technologies of death. From hanging to electrocution, from electrocution to lethal gas, from electricity and gas to lethal injection, the law has moved, though not uniformly, from one technology to another.[18] With each new invention of a technology for killing, or more precisely with each new application of technology to killing, the law has proclaimed its own previous methods barbaric, or simply archaic. Nothing but the best will do in the business of state killing.[19]

This search for a technological fix contrasts markedly with the execution business of another era. Historically executions were, in Foucault's words, 'More than an act of justice'; they were a 'manifestation of force'.[20] They were always centrally about display, in particular the display of the majestic, awesome power of sovereignty as it was materialised on the body of the condemned. Public executions functioned as public theatre, but also as a school for citizenship.[21] Choosing the right method to kill was a matter of sovereign prerogative. Methods were chosen for their ability to convey the ferocity of the sovereign's vengeance.

The act of execution helped constitute citizens as subjects. On Foucault's account, state killing produced a sadistic relation between the executioner, the victim and the audience. The pleasure of viewing, as well as the instruction in one's relation to sovereign power, was to be found in witnessing pain inflicted. The excesses of execution and the enthusiastic response of the attending crowd blended the performance of torture with pleasure, creating an unembarrassed celebration of death[22] that knew no law except the law of one person's will materialised on the body of the condemned. The display of violence, of the sovereignty that was constituted in killing, was designed to create fearful, if not obedient, subjects.

The act of putting someone to death contained a dramatic, awe-inspiring pedagogy of power. 'The public execution,' Foucault explained,

> ... has a juridico-political function. It is a ceremonial by which a momentarily injured sovereignty is reconstituted. It restores sovereignty by manifesting it at its most spectacular. The public execution, however hasty and everyday, belongs to a whole series of great rituals in which power is eclipsed and restored (coronation, entry of the king into a conquered city, the submission of rebellious subjects) ... There must be an emphatic affirmation of power and its intrinsic superiority. And this superiority is not simply that of right, but that of the physical strength of the sovereign beating down upon the body of his adversary and mastering it.[23]

Doing death was precisely about the right of the state to kill as it pleased. Sovereignty was known, as Locke reminds us, in and through acts of taking life.[24] Executions were designed to make the state's dealing in death majestically visible to all.[25] Live, but live by the grace of the sovereign, live but remember that your life belongs to the state – these were the messages of the state killing of an earlier era.

Without a public audience, state killing would have been meaningless. As Foucault put it, 'Not only must the people know, they must see with their own eyes. Because they must be made afraid, but also because they must be witnesses, the guarantors of the punishment, and because they must to a certain extent take part in it.'[26] In this understanding of the relationship of punishment and the people, 'the role of the people was an ambiguous one'.[27] At one and the same time, they were fearful subjects, authorising witnesses, and lustful participants.[28]

Today the death penalty, with some notable exceptions, has been transformed from dramatic spectacle to cool, bureaucratic operation, and the role of the public now is strictly limited and strictly controlled.[29] The modern execution is carried out behind prison walls in what amounts to semi-private, sacrificial ceremonies in which a few selected witnesses are gathered in a carefully controlled situation to see, and in their seeing, to sanctify the state's taking of the life of one of its citizens. As Richard Johnson suggests:

> In the modern period (from 1800 on), ceremony gradually gave way to bureaucratic procedure played out behind prison walls, in isolation from the community. Feelings are absent, or at least suppressed, in bureaucratically administered executions. With bureaucratic procedure, there is a functional routine dominated by

> hierarchy and task. Officials perform mechanistically before a small, silent gathering of authorized witnesses.[30]

Capital punishment becomes, at best, a hidden reality. It is known, if it is known at all, by indirection.[31] As Hugo Bedau puts it, 'The relative privacy of executions nowadays (even photographs of the condemned man dying are almost invariably strictly prohibited) means that the average American literally does not know what is being done when the government, in his name and presumably on his behalf, executes a criminal.'[32] What was public is now private. What was high drama has been reduced to a matter of technique.

Whereas once the technologies of killing deployed by the state were valued precisely because of their gruesome effects on the body of the condemned, today we seek a technology that leaves no trace.[33] Whereas in the past the technologies were valued as ways of making the sovereign power awe-inspiring and fearsome, today the process of state killing is medicalised; it is less about sovereignty than science. As Madow notes:

> Executions were progressively stripped of their ritualistic and religious aspects ... [A]s Americans developed a keen dread of physical pain, medical professionals teamed up with ... engineers to devise a purportedly 'painless' method of administering the death penalty ... The condemned man ... had now become simply the object of medico-bureaucratic technique – his body read closely for signs of pain ... The overriding aim of the state functionaries charged with conducting executions nowadays is to 'get the man dead' as quickly, uneventfully, impersonally, and painlessly as Nature and Science permit.[34]

Since the earliest recorded execution in the United States in 1608, more than 16,000 people have been put to death at the hands of the state:[35] 'We've sawed people in half, beheaded them, burned them, drowned them, crushed them with rocks, tied them to anthills, buried them alive, and [executed them] in almost every way except perhaps boiling them in oil.'[36] Today, however, five methods of execution are currently available: firing squad, hanging, lethal gas, electrocution and lethal injection. The first two are authorised in just a few states, six states use lethal gas, six more authorise electrocution as the sole method of state killing, and lethal injection is available in 32 states.[37]

When, in 1888, New York became the first state to institute death by electrocution, it did so because an expert commission found it to be 'the most humane and practical method known to modern science of carrying into effect the sentence of death'.[38] States that eventually followed New York's lead 'viewed ... [electrocution] as less painful

than hanging and less horrific than having the condemned swing from the gallows'.[39] States that rejected hanging in favour of the gas chamber viewed it as 'more decent' than electrocution since it seemed less violent and did not mutilate the body.[40] Thus the original legislation authorising the use of gas stipulated that the condemned was to be put to death, 'without warning and while asleep in his cell'.[41]

These same concerns have been echoed in the most recent fad among the technologies of state killing, lethal injection.[42] As a federal district court recently put it in upholding the constitutionality of lethal injection, 'There is general agreement that lethal injection is at present the most humane type of execution available and is far preferable to the sometimes barbaric means employed in the past.'[43] This is hardly the language of the awe-inspiring sovereignty about which Foucault wrote. Still one might ask what is at stake in the construction of state killing when the state imagines itself killing decently, painlessly, humanely.

ON THE INVISIBLE BODY OF THE CONDEMNED

Cases challenging the constitutionality of particular methods of execution are regularly, though not frequently, brought before courts in the United States.[44] In the only two such cases to reach the United States Supreme Court, that Court upheld first the use of firing squads[45] and then electrocution as a means through which the state could take life.[46] In the latter case, the Court proclaimed that no method of execution could be used that would 'involve torture or a lingering death'.[47] The Court went on to say that the state could kill so long as it used methods that did not impose 'something more than the mere extinguishment of life'.[48]

This is quite a remarkable sentence, remarkable in the casual way in which it purports to limit sovereign prerogative, in the juxtaposition of the word 'mere' with an awkward circumlocution for death, and in its seeming acquiescence in the view that 'mere' death at the hands of the state gives no grounds for complaint. It condemns excess – 'something more' – as if state-imposed death itself was not already an excess, that marks the limits of the state's sovereignty over life.[49] The state can spare life, or extinguish it, but it cannot require its victims to 'linger' between life and death. Law stands ready to police the excesses of sovereignty, but it still grants sovereignty its due. The domain of sovereignty extends to deciding who shall die and to death-imposing acts; what is left for law is to police the technologies through which the state takes life.

Sometimes, however, even this jurisdiction has seemed more than the law could, or would, handle. Indeed, more often than not, the law has stayed its hand in the face of allegations about the excesses of the state's dealing in death. Perhaps the most famous instance of such inaction occurred in the case of *Francis* v *Resweber*,[50] a case in which the United States Supreme Court allowed the state of Louisiana to execute a convicted murderer twice.[51] As the Court recounted the relevant facts, 'Francis was prepared for execution and on May 3, 1946 ... was placed in the official electric chair of the State of Louisiana ... The executioner threw the switch but, presumably because of some mechanical difficulty, death did not result.'[52] Sometime later Francis sought to prevent a 'second' execution by contending that it would constitute cruel and unusual punishment.[53]

Justice Reed, writing for a majority of the Court, responded to both of these claims in what initially appears to be a rather unusual way. For him the cruelty of Louisiana's plan had little to do with Francis,[54] any pain he might have suffered during the first execution and his painful anticipations of the second. The Constitution, as Reed understood it, clearly permits 'the *necessary* suffering involved in any method employed to extinguish life humanely'[55] (emphasis added). Note how in Reed's formulation some suffering, suffering deemed 'necessary', is fully compatible with humane killing. Something more than the mere extinction of life is permissible so long as that excess inheres in the 'method' and so long as it is impossible for the state to kill without it.

What the Constitution permits, dutiful judges, on Reed's account, should not prohibit. If Francis had to undergo a second, more lethal, dose of electricity, it was because the rules not the judges allow it. According to those rules, the fact of the first, unsuccessful execution would not 'add an element of cruelty to a subsequent execution'.[56] The constitutional question, as Reed saw it, turned instead on the behaviour of those in charge of Francis' 'first' execution, those authorised to unleash law's violence. Their acts and intentions were decisive in determining whether a second execution would be unconstitutionally cruel.

From the facts as he understood them, Reed found those officials to have carried out their duties in a 'careful and humane manner' with 'no suggestion of malevolence'[57] and no 'purpose to inflict unnecessary pain'.[58] He described diligent, indeed even compassionate, executioners frustrated by what he labelled an 'unforeseeable accident ... for which no man is to blame',[59] and concluded that the state itself would be unfairly punished were it deprived of a second chance to execute Francis.[60]

So remote was the Court's interest in Francis, in the death it was condoning, or in the pain that he had already experienced and would

again experience, that only late in the dissenting opinion of Justice Burton was any reference made to the effect of the first execution attempt on Francis himself.[61] There we are told that his 'lips puffed out and he groaned and jumped so that the chair came off the floor.'[62] None the less, even here the significance of Francis' impending death is deferred as is his pain. References to that pain, taken from affidavits by witnesses to the first execution, were included solely to point out a 'conflict in testimony'[63] which made it impossible, in Burton's view, to determine whether any electricity actually had reached Francis during the abortive execution attempt.

Burton did worry about the number of failed executions the majority might tolerate before declaring subsequent attempts to be cruel and unusual. Yet while he labelled the state's desire to carry out a second execution 'death by instalments',[64] most of his opinion was devoted to a careful scrutiny of Louisiana's death penalty statute. Death itself is not the object of attention. Instead Burton seeks to affirm the possibility of law's mastery over death as well as law's fidelity to its own rules for taking life. A proper execution is one whose occasions and procedures are prescribed by law just as a proper judgment is one governed by the law and the law alone. Since the statute made no provision for 'a second, third or multiple application of [electric] current',[65] a second execution should not, in Burton's opinion, be permitted. Though differing as to the correct result, Burton joined Reed in severing the connection between their acts of judgment and the fate of Willie Francis. They both treated the behaviour of the state rather than the experience, and prospective death, of its intended victim as constitutionally significant.

The way both Burton and Reed proceeded in *Francis* seems, in the end, all too familiar and yet, from the perspective of the reactions to the Medina execution, somewhat strange. In *Francis*, death, the very business of the case, is but a shadowy presence, barely acknowledged. Where it is, as it were, inadvertently glimpsed, Francis' return date with electrocution is presented as the deed of some abstract, impersonal set of written rules; the judge's own hand is stayed. In the opinions of both Burton and Reed, death is the absent subject, but so is pain and the search for a humane way of killing.

THE 'BODY IN PAIN'

Today, death still appears to be the absent subject when courts confront challenges to the state's technologies of death. However, unlike in the *Francis* case, where the body of the condemned was almost completely elided, courts faced with challenges to the state's technologies for taking life focus, almost obsessively, on that body.[66]

They treat it as a legible text on which can be read the signs of excess, the signs that the state's chosen method imposes something more than the mere extinction of life. Yet the law's increasing obsession with the body is really an obsession with the body as it appears to those of us as witnesses, real or imagined, of state killing. It is the experience of execution by its witnesses, and a concern for their 'suffering', that fuels the search for painless death.

Let me focus on two recent examples to highlight this continuity and this difference. The first, *Campbell* v *Wood*,[67] dealt with the constitutionality of hanging as a method of execution; the second, *Fierro* v *Gomez*,[68] with the constitutionality of execution by lethal gas. The former upheld the use of hanging; the later prohibited the state of California from using gas to kill.

Judge Beezer, writing for the majority in *Campbell*, framed the question presented in that case as 'whether hanging comports with contemporary standards of decency'.[69] He noted that, while few states now use hanging, no court in the United States had ever found execution by hanging to violate the Constitution. Nor, in his view, does the 'mere' fact that hanging causes death render it unconstitutional. Instead Beezer argued that the question of whether hanging was acceptable depended on 'the actual pain that may or may not attend the practice'.[70] Determining the constitutionality of this method of execution required the court to engage in a complex semiotic activity: to read the body of the condemned for what it reveals of its suffering as it moves from the world of the living to death. Beezer took note of the fact that the district court had heard extensive expert and eye-witness testimony concerning the way hanging causes death and the pain that is associated with it. He wrote confidently about the court's ability to know the pain of the condemned even as he noted that pain itself would not render hanging invalid. A method of execution, he claimed, relying on *Kemmler* and *Francis*, is only unconstitutional if it 'involves the unnecessary and wanton infliction of pain'.[71]

With this as the standard, Beezer provided an extended discussion of the methods used in hanging, contrasting in particular the so-called 'long-drop' with the 'short-drop' method.[72] He found that several factors contribute to making death by hanging 'comparatively painless',[73] for example, the length of the drop, the selection and treatment of the rope, the positioning of the knot. Washington's use of the long-drop method of hanging, he said, is designed 'to ensure that forces to the neck structures are optimized to cause rapid unconsciousness and death'.[74] The result of the methods deployed in Washington, Beezer argued, was that 'unconsciousness and death ... occur extremely rapidly, that unconsciousness was likely to be immediate or within a matter of seconds, and that death would follow

rapidly thereafter'.[75] He ended his opinion by reiterating that 'Campbell is not entitled to a painless execution, but only one free of purposeful cruelty.'[76]

With this argument Beezer seems to return us, at least partially, to the world of *Francis*, in which attention moves from the executed to the executioner, from the body in pain to the intentions of the executioner.[77] But there is a crucial difference; unlike in *Francis* where the subject of pain is almost completely avoided, in *Campbell* reading the body for what it can tell us about the pain associated with one or another technology of death is always a necessary, though not sufficient, first step. If such a reading suggests that the condemned is subject to pain, the court must then, but only then, inquire into the purposes of the state in imposing death through that method. The body left in pain suggests barbarism on the part of those who take life. Pain is thus the dangerous supplement of death, signalling as it does excess or the sadistic pleasure associated with the wilful taking of human life.

Judge Reinhardt dissented from Beezer's view in *Campbell* because it seemed to equate the 'evolving standard of decency standard' of Eighth Amendment jurisprudence solely with an inquiry into pain and its purposes. In his view the development of 'new and less brutal methods of execution, such as lethal injection ... as well as the risks of pain and mutilation inherent in hanging' make it constitutionally defective.[78] The fact that, by the time of *Campbell*, all but a few state legislatures had abolished hanging provided, for Reinhardt, an additional but still crucial indicator of its incompatibility with contemporary standards of decency. Moreover, if the reduction of needless pain were to be taken as the exclusive measure of a technique's constitutionality, 'barbaric and savage' forms of punishment such as the guillotine would not be constitutionally impermissible.

In the end, even if the Constitution were to mandate only an objective inquiry into pain and its purposes, judicial hanging would still, in Reinhardt's view, be unacceptable because it is

> ... an ugly vestige of earlier, less civilized times when science had not yet developed medically-appropriate methods of bringing human life to an end. Hanging is a crude, rough, and wanton procedure, the purpose of which is to tear apart the spine. It is needlessly violent and intrusive, deliberately degrading and dehumanizing. It causes grievous fear beyond that of death itself and the attendant consequences are often humiliating and disgusting.[79]

It carries with it a 'high risk of pain far more than is necessary to kill a condemned inmate. If the drop is too short, the prisoner will strangle

to death, a slow and painful process ... [if the drop] is too long the prisoner may be decapitated.'[80]

A punishment can be cruel, Reinhardt contended, even if it is not painful. Cruelty can arise 'from the relatively painless infliction of degradation, savagery, and brutality ... Indignities can be inflicted even after a person has died.'[81] The Constitution *obligates* the state, when it chooses to kill, to 'eliminate the degrading, brutal, and violent aspects of an execution, and substitute a scientifically developed and approved method of terminating life through appropriate medical procedures in a neutral, medical environment'.[82] Where science makes available technologies for ending life that serve the same penological goals, but with markedly lower risk of imposing pain, the Constitution *requires* that the state follow science. On Reinhardt's reading, the state is not master of technology; it is instead subservient to it. Whereas Beezer imposed few limits on the sovereign's choice of the method of execution, Reinhardt would eliminate much, if not all, of the sovereign's discretion.

While Beezer and Reinhardt differ on the sufficiency of pain as a standard in determining the constitutionality of a method of execution, both treat the body as a legible text on which pain is registered. Both assume that they can know the pain of another and that they can represent it faithfully in their opinions. As Reinhardt put it:

> There is absolutely no question that every hanging involves a risk that the prisoner will not die immediately, but will instead struggle or asphyxiate to death. This process, which may take several minutes, is extremely painful. Not only does the prisoner experience the pain felt by any strangulation victim, but he does so while dangling at the end of a rope[83]

While neither Beezer nor Reinhardt may know, or be able to accurately represent, death, they write with no hesitancy about their ability to know the pain that precedes it.

Both this apparent displacement of death and this same confidence in the court's ability to read and represent pain is seen in *Fierro*. Judge Patel noted, early in her *Fierro* opinion, that while lethal gas had been the execution technology of choice in California since 1937, in the mid-1980s Warden Vasquez of San Quentin revised the state's execution protocol. This statement takes on significance later in her decision when it is linked to the kind of technological imperative hinted at in Reinhardt's opinion in *Campbell*. As Patel put it, neither the warden nor his staff 'consulted scientific experts or medical personnel in formulating the execution protocol nor did they examine records from previous California executions'.[84] The result is charac-

terised as an 'unscientific, slapdash' execution protocol.[85] When sovereignty exercises its power over life and death, it is not free to kill in a gruesome way in order to instil awe and fear in the citizenry. The availability of lethal injection, which Patel characterised as 'more humane than lethal gas as a method of execution', renders the latter 'antiquated' and incompatible with the Constitution.[86] Rather than being the master of technology, law requires that sovereignty be its servant.

Taking *Campbell* as governing authority in the *Fierro* case, Patel characterised it as making 'clear' that the 'key question to be answered in a challenge to the method of execution is how much pain the inmate suffers'.[87] *Campbell*, she argued, 'dictates that a court look first to objective evidence of pain'.[88] After providing an elaborate description of the gas chamber and the procedures used during an execution by lethal gas, Patel reviewed contradictory expert testimony concerning the effects of lethal gas and the precise ways it brings about death.

As she summarised it, the basic disagreement between plaintiff and defence experts is 'whether unconsciousness occurs within at most thirty seconds of inhalation, as defendants maintain, or whether, as plaintiffs contend, unconsciousness occurs much later, after the inmate has endured the painful effects of cyanide gas for several minutes'.[89] To resolve this conflict, she reviewed extant scientific literature but determined that, while 'plaintiffs' theory of death through cellular suffocation has traditionally been the accepted viewpoint',[90] the scientific community was neither uniform nor clear in its conclusions.

Next, Patel reviewed two types of eye-witness accounts of execution. The first, the contemporaneous observations and records of physicians who attended every execution by lethal gas, read like an obsessive archive of death. They provide space for the physician to record when, during the course of an execution, each of the following events occur: '"Sodium Cyanide Enters"; "Gas Strikes Prisoner's Face"; "Prisoner Apparently Unconscious"; and "Prisoner Certainly Unconscious" and "Last Bodily Movement"'.[91] The other type of eye-witness evidence was observations by lay witnesses.

Patel prefaced her discussion of all of this evidence by noting that 'neither consciousness nor pain is easy to gauge. Actions that appear volitional or appear to be a reaction to pain may in fact be unconscious and non-volitional.'[92] Yet these cautions did not inhibit her reading of the observational testimony. Pain, while difficult to measure, could in her view, be read on the surface of the body, by untrained people as well as by medical personnel. Their observations provide the measure for constitutional judgment.

Beginning with California's two most recent executions, Patel noted that the physicians' records revealed that 'certain unconsciousness' did not occur until three minutes after the gas hit the face of the condemned. Records of California's earlier executions contain similar results. Taken together, the expert testimony, the scientific literature, the physicians' records and eye-witness statements 'compel' and 'unmistakably'[93] point, according to the judge, to the conclusion that during a period of consciousness following the dispensing of lethal gas that 'inmates suffer intense, visceral pain, primarily as a result of lack of oxygen to the cells'.[94] This pain, Patel asserted, moving from calm balancing of evidence to vivid analogy, is 'akin to the experience of a major heart attack, or to being held under water'.[95] In this resort to analogy, Patel sought to conjure imagined horrors somewhat closer to home for the average citizen than the particular horrors associated with death in the gas chamber.

Like both Judges Beezer and Reinhardt in *Campbell*, Patel foregrounds the question of what the journey from life to death might be under one particular execution technique. She too focused on the body and its pains, carefully constructing a narrative from different strands of evidence. She insisted that the state kill as softly, as gently, as painlessly as the minds of men and women would allow.

Her opinion, like the opinions in *Campbell*, embodies the condemned and seeks to textualise their pain. In so doing, it confronts the limits of language and representation when it speaks about physical violence and physical pain. Pain, as Elaine Scarry argues,

> ... has no voice ... When one hears about another's physical pain, the events happening within the interior of that person's body may seem to have the remote character of some deep subterranean fact, belonging to an invisible geography that, however portentous, has no reality because it has not yet manifested itself on the visible surface of the earth.[96]

According to Scarry, pain is

> ... [v]aguely alarming yet unreal, laden with consequence yet evaporating before the mind because not available to sensory confirmation, unseeable classes of objects such as subterranean plates, Seyfert galaxies, and the pains occurring in other people's bodies flicker before the mind, then disappear ... [Pain] achieves ... its aversiveness in part by bringing about, even within the radius of several feet, this absolute split between one's sense of one's own reality and the reality of other persons ... Whatever pain achieves, it achieves in part through its unsharability, and it ensures this unsharability through its resistance to language.[97]

'A great deal is at stake', Scarry herself suggests, 'in the attempt to invent linguistic structures that will reach and accommodate this area of experience normally so inaccessible to language.'[98] The cases on methods of execution surely confirm this view. Yet Scarry reminds us that the capacity of courts to understand and to convey the pain of the person being executed to their readers is quite limited, even as this capacity is foregrounded in these cases. Scarry notes that while the courtroom and the discourse of law provide one particularly important site to observe the way violence and pain 'enter language', in that discourse the problem of putting pain into language is compounded by the fact that

> ... built into the very structure of the case is a dispute about the correspondence between language and material reality: the accuracy of the descriptions of suffering given by the plaintiff's lawyer may be contested by the plaintiff's lawyer ... For the moment it is enough to notice that, whatever else is true ... [a trial] provides a situation that once again requires that the impediments to expressing pain be overcome. Under the pressure of this requirement, the lawyer [or judge] too, becomes an inventor of language, one who speaks on behalf of another person ... and attempts to communicate the reality of that person's physical pain to people who are not themselves in pain.[99]

Scarry invites us to consider legal cases like *Francis*, *Campbell* and *Fierro*, as occasions for lawyers and judges to 'invent' languages of violence and pain. However, she suggests that in law, as elsewhere, the languages which can be invented are quite limited: 'As physical pain is monolithically consistent in its assault on language, so the verbal strategies for overcoming the assault are very small in number and reappear consistently as one looks at the words of the patient, physician, Amnesty worker, lawyer, artist.'[100] Those verbal strategies 'revolve [first] around the verbal sign of the weapon'.[101] We know pain, in the first instance, through its instrumentalities, for example, hanging or lethal gas. Second, we know it through its effects. Here violence and pain are represented in the 'wound', that is, 'the bodily damage that is pictured as accompanying pain'.[102] But, as Scarry suggests, these representations can provide no certain or reliable grounding for a jurisprudence that seeks to govern the technologies through which the state puts people to death. Yet it is precisely those representations that play a central role in death penalty jurisprudence.

If Scarry is right, then the courts in the United States have created for themselves an epistemological and interpretive as well as a legal problem. By deferring the question of death and foregrounding the question of pain, they are required to take seriously the empirical

world of the body and its suffering even as they necessarily run up against the limits of their capacity to know that world and to render it in language.[103] Yet again, we are driven back to the question of why the question of pain and the search for painless execution would play so large a part in the law's confrontation with the killing state.

CONCLUSION

At the end of the twentieth century in the United States, law seems reconciled to state-imposed death, but is set on a quest to force the state to kill softly, gently, to impose no pain at all, or no more pain than is necessary.[104] That the law requires the state to kill in this manner seems, in one way, counter-intuitive; it may precipitate one kind of crisis of legitimacy by raising questions like those raised by the mother of a murder victim quoted in one of the epigraphs of this chapter : *Do they feel anything? Do they hurt? Is there any pain? Very humane compared to what they've done to our children. The torture they've put our kids through. I think sometimes it's too easy. They ought to feel something. If it's fire burning all the way through their body or whatever. There ought to be some little sense of pain to it ...*

However, perhaps it is less counter-intuitive than it might otherwise seem. Alan Hyde, for example, argues that law's requirement that the state kill gently 'follows a common pattern in which the humanistic, sentimentalized body in pain emerges as a site of empathy and identification' in the nineteenth and twentieth centuries.[105] Sentimentalising the body of the condemned establishes, Hyde notes, a bridge between the criminal and the public. The criminal, no matter how horrific his deeds, is like us in his body's 'amenability to feeling'.[106] The concern that punishment not inflict physical pain and the empathy which it enables and expresses, Hyde observes, 'lies behind the curious search in American legal history for painless methods of execution'.[107] In an endlessly repeating ritual, he says, 'electrocution, gas chambers, lethal injections are each introduced with tremendous fanfare as a painless form of death, until each is revealed to promote its own kind of suffering on the way to death'.[108] Yet, as Hyde himself recognises, execution marks the limits of empathy, reminding citizens of the ultimate disconnection between themselves and the condemned, a disconnection that seeks to operate at the moral level.[109]

Thus the search for painless death might be better understood as an act of grace, or better yet, as a response to one kind of crisis in legitimacy through another legitimation strategy.[110] Law imposes on sovereignty the requirement that no matter how heinous the crime, or how reprehensible the criminal, that we not do death as death has

been done by those we punish. We give them a kinder, gentler death than they deserve to mark a boundary between the 'civilised' and the 'savage',[111] rather than to establish a connection between citizens and murderers. We kill gently not out of concern for the condemned but rather to establish vividly a hierarchy between the law-abiding and the lawless.

The boundary-marking, hierarchy-establishing function of law's search for a technique of imposing death painlessly was put vividly on display recently in Justice Scalia's response to Justice Blackmun's dissent from a Supreme Court denial of *certiorari* in a death penalty case. In that dissent, Blackmun announced that he no longer would 'tinker with the machinery of death',[112] and would, as a result, vote against the death penalty in all subsequent cases. Scalia responded by noting that while Blackmun had described 'with poignancy the death of a convicted murderer by lethal injection',[113] compared with what the condemned had done –'the murder of a man ripped by a bullet suddenly and unexpectedly ... left to bleed to death on the floor of a tavern' [114] – death by lethal injection was 'pretty desirable'.[115] How enviable, Scalia continued, 'a quiet death by lethal injection compared with that!'[116]

We may not be able to know death, or comprehend its possibilities or its horrors,[117] but where law requires the killing state to kill softly it restrains the state from giving in to calls for vengeance;[118] in so doing, law seeks legitimacy in a not very veiled image of the hand of punishment humanely applied. It may be death we are doing, but it is a death whose savagery law insists it can, and will, control.

For the judges in *Campbell* and *Fierro*, close examination of the technologies of death deployed by the state takes the form of an effort to prevent the erosion of the boundaries between the state's violence and its extra-legal counterpart. That the state takes life, and that it is everywhere a response to an imagined violence, generates an anxious questioning within, and about, the ways state violence differs from the violence to which it is, at least in theory, opposed. The effort to kill softly, gently, painlessly, humanely is one response to that questioning, one way of trying to show that the state, though it comes into the world born of physical violence, or the violent disruptions of the existing order of things,[119] can transcend the violence of its origins.

As a response to this anxious questioning, the courts insist on policing the technologies of death to ensure that sovereign power responds to scientific progress, that ferocity gives way to bureaucracy, that it proceed judiciously, using no more force than is absolutely necessary. State killing, guided by the restraining hand of law, in this view should be rational, purposive, and proportional; the violence to which it responds is, in contrast, imagined to be irrational, anomic, excessive. As Terry Aladjem puts it, 'What is liberalism after all, if not

the creed of isolated individuals carefully bound together, their rage directed in cautious legalism? ... [Law] wants to express and deny, to reveal and conceal its own threatening fury, and it contrives its punishments accordingly with a measure of euphemistic formality ... .'[120] Liberalism depends on law both to deploy and to mask power, to enable and hide the violence on which the liberal state ultimately depends. In the face of scientific 'progress' in the technologies of death, the forms of legal procedure cannot condone archaic displays of sovereignty like the botched execution of Pedro Medina. On this account the survival of state violence as an exercise of sovereign power depends on its being subject, even if against its will, to an unending search for technologies which in their ability to kill softly, gently, painlessly allow those who kill to both end life and, at the same time, believe themselves to be the guardians of a moral order which, in part, bases its claims to superiority in its condemnation of killing.

NOTES

1. See, for example, 'Flames Erupt During Florida Execution: Gruesome Scene Renews Debate on Electrocutions', *USA Today* (26 March 1997), p. 3A.
2. 'Flames Erupt in Electric Chair's Death Jolt; Execution: Fire Shoots From Florida Man's Head, Renewing Capital Punishment Debate', *Los Angeles Times* (26 March 1997), p. 1.
3. 'Retire "Chair" Use Lethal Injection', *Sun-Sentinel (Ft. Lauderdale, Fl.)* (26 March 1997), p. 22A.
4. 'Inmate Catches Fire in Florida Electric Chair: "You could Smell the Acrid Smoke"' *The Houston Chronicle* (26 March 1997), p. 6A.
5. Ibid.
6. Austin Sarat, 'Speaking of Death: Narratives of Violence in Capital Trials', 27 *Law & Society Review* (1993), p. 19.
7. 'Retire "Chair" Use Lethal Injection', p. 22A.
8. See 'Botched, Gruesome Electrocutions Mandate Switch to Lethal Injections', *Sun-Sentinel* (30 June 1997), p. 8A. 'The voices are getting louder,' the newspaper noted, 'more persistent, more knowledgeable and more unified in voicing their urgent message: Florida lawmakers should abandon the electric chair for capital punishment and switch to lethal injection.'
9. Ibid.
10. See Robert Johnson, *Death Work: A Study of the Modern Execution Process* (Pacific Grove, CA: Brooks/Cole Publishing, 1990). Also Austin Sarat and Aaron Schuster, 'To See or Not to See: Television, Capital Punishment and Law's Violence', 7 *Yale Journal of Law & the Humanities* (1995), p. 397.
11. For a fuller treatment of the connection between methods of execution and deterrence, see Jonathan Abernathy, 'The

Methodology of Death: Reexamining the Deterrence Rationale', *27 Columbia Human Rights Law Review* (1996), p. 379.
12. See Sarat and Schuster, 'To See or Not to See'.
13. For a discussion of this issue see Austin Sarat, 'Capital Punishment As a Fact of Political, Legal and Cultural Life: An Introduction', in Austin Sarat (ed.), *The Killing State: Capital Punishment in Law, Politics, and Culture* (New York: Oxford University Press, forthcoming).
14. There are, of course, some exceptions. One recent exception is the very public discussion about the impending execution of Karla Faye Tucker. This discussion focuses on the question of why so few women are executed in the United States.
15. Or, sometimes about who the state kills.
16. Abernathy argues that 'contrary to what logic seems to dictate, the attempt over time has been to make the penalty of death gentle, hidden, and antiseptic', see 'The Methodology of Death', p. 422.
17. 'The Executioner's Weapons: After A Man Is Burned Alive in Florida's Electric Chair, The "New" Death Penalty Debate Focuses on the Manner in Which the Condemned Are Put To Death', *The Buffalo News* (9 November 1997), p. 1H, quoting columnist Leonard Pitts.
18. See Allen Huang, 'Hanging, Cyanide Gas, and the Evolving standards of Decency: The Ninth Circuit's Misapplication of the Cruel and Unusual Clause of the Eighth Amendment', *74 Oregon Law Review* (1995), p. 995.
19. For one example of this phenomenon see Thomas Metzger, *Blood and Volts: Edison, Tesla, and the Electric Chair* (Brooklyn, NY: Autonomedia, 1996).
20. Michel Foucault, *Discipline and Punish* (New York: Vintage Press, 1977), p. 50.
21. See Petrus Spierenburg, *The Spectacle of Suffering* (Cambridge: Cambridge University Press, 1984).
22. See V.A.C. Gatrell, *The Hanging Tree: Execution and the English People 1770–1868* (New York: Oxford University Press, 1994), chapter 2.
23. Foucault, *Discipline and Punish*, pp. 48–9.
24. John Locke, *Second Treatise of Government*, Thomas Peardon (ed.) (Indianapolis: Bobbs-Merrill, 1952), p. 4.
25. Gatrell, *The Hanging Tree*.
26. Ibid., p. 58.
27. Ibid.
28. Yet the public execution was also an occasion for the exercise of popular power, if not popular sovereignty. In Foucault's words, 'In the ceremonies of the public execution, the main character was the people', *Discipline and Punish*, p. 57. It was an occasion on which people could, and did, mass themselves against the punishment which was to be carried out before their eyes and in their presence. Their presence insured that the act of execution

itself, not just the judgment of death, always could be contested. As Gatrell argues, 'These crowds behaved and spoke in terms which polite observers grew less able to understand. Many crowds acquiesced in what was done by the law and affirmed its righteousness. The hanging of murderers was usually approved. But when humbler people hanged for humble crimes, they could act like a Greek chorus, mocking justice's pretensions' (*The Hanging Tree*, p. 59). Their presence insured that execution could not be reduced to a bland routine. '[I]t was on this point,' Foucault suggests, 'that the people, drawn to the spectacle intended to terrorize it, could express its rejection of the punitive power and sometimes revolt. Preventing an execution that was regarded as unjust, snatching a condemned man from the hands of the executioner, obtaining his pardon by force, possibly pursuing and assaulting the executioners, in any case abusing the judges and causing an uproar against the sentence-all of this formed part of the popular practices that invested, traversed and often overturned the ritual of public execution ... It was evident that the great spectacle of punishment ran the risk of being rejected by the very people to whom it was addressed' (*Discipline and Punish*, pp. 59–60, 63).

29. See Johnson, *Death Work*.
30. See Johnson, *Death Work*, p. 5. Also Susan Blaustein, 'Witness to Another Execution', *Harper's Magazine* (May 1994), p. 53, and Richard Trombley, *The Execution Protocol: Inside America's Capital Punishment Industry* (New York: Crown Publishers, 1992).
31. See Foucault, *Discipline and Punish*, chapter 1. Also Jacques Derrida, 'Force of Law: The "Mystical Foundation of Authority"', 11 *Cardozo Law Review* (1990), p. 925.
32. See Hugo Adam Bedau, *The Death Penalty in America* (New York: Oxford University Press, 1982), p. 13.
33. Blaustein, 'Witness to Another Execution'.
34. Michael Madow, 'Forbidden Spectacle: Executions, the Public and the Press in Nineteenth-Century New York', 43 *Buffalo Law Review* (1995), pp. 466, 469.
35. Huang, 'Hanging, Cyanide Gas, and the Evolving Standards of Decency' p. 997.
36. Ian Gray and Moira Stanley, *A Punishment in Search of a Crime: Americans speak out against the death penalty* (New York: Avon Books, 1989), pp. 19–20.
37. The numbers add up to more than 39 (the number of states using capital punishment) because statutes often permit more than one means of execution.
38. Quoted in *In re Kemmler*, 136 US 436, 444 (1890).
39. Abernathy, 'The Methodology of Death', p. 404.
40. Ibid.

41. William Bowers with Glenn L. Pierce and John F. McDevitt, *Legal Homicide: Death as Punishment in America, 1864–1982* (Boston, MA: Northeastern University Press, 1984), p. 12.
42. Raymond Paternoster, *Capital Punishment in America* (New York: Lexington Books, 1991), p. 23.
43. See *Hill* v *Lockhart*, 791 F. Supp. 1388, 1394 (1992). See also *Ex Parte Kenneth Granviel*, 561 S.W. 2d 503, 513 (1978). The court found that 'The Texas Legislature substituted death by lethal injection as a means of execution in lieu of electrocution for the reason it would be a more humane and less spectacular form of execution.'
44. Kristina Beard, 'Five Under the Eighth: Methodology Review and the Cruel and Unusual Punishments Clause', 51 *University of Miami Law Review* (1997), p. 445.
45. *Wilkinson* v *Utah*, 99 US 130 (1878).
46. *In re Kemmler*, 136 US 436 (1890).
47. Ibid., p. 447.
48. Ibid.
49. As Peter Fitzpatrick puts it, 'Law maintains its appeal to an-other by always being more than determined, by being ever able to be otherwise than what it determinedly is. One day to come ..., law could actually be more and extend to the previously excluded. Death denies that promise ... So, in dealing death, law makes irremediable the exclusions that have gone to make it what it is': '"Always More to Do": Capital Punishment and the (De)Composition of Law', in Austin Sarat (ed.), *The Killing State: Capital Punishment in Law, Politics, and Culture* (New York: Oxford University Press, forthcoming) p. 21.
50. *Francis* v *Resweber* 329 US 459 (1947).
51. For an interesting description of the case see Arthur Miller and Jeffrey Bowman, *Death By Installments: The Ordeal of Willie Francis* (Westport, CT: Greenwood Press, 1988).
52. See *Francis*, 460, note 12.
53. Francis also alleged that a second execution would violate the due process clause of the 14th Amendment. Ibid., 462.
54. Indeed Willie Francis makes virtually no appearance in Reed's opinion. We learn little about him except that he was a 'colored citizen of Louisiana', ibid., 460. Neglect of the real-life experiences and feelings of the people whose fate is decided by law is characteristic of a wide range of legal decisions. See John Noonan, *Persons and Masks of the Law* (New York: Farrar, Straus and Giroux, 1976).
55. *Francis*, 464.
56. Ibid.
57. Ibid., 462.
58. Ibid.
59. Ibid. Indeed in the only place where Reed tries to come to terms with what the first execution did to Francis he suggests, again relying on the image of the first execution as an accident, that

Francis could only have suffered 'the identical amount of mental anguish and physical pain (as in) any other occurrence, such as ... a fire in the cell block', ibid., 464. While Reed described Francis as an 'accident victim', the issue for Francis was the future as much as the past. For him what was constitutionally significant was the connection between the violence inflicted on him during the first execution and the violence which the state, with the Supreme Court's blessing, proposed to inflict on him in a second execution.

60. It is clear (or clear enough) where Reed wanted to come out: unforeseeable accidents cannot be regarded as 'inherent' in any method of punishment (including electrocution); on the other hand, every method (including electrocution) is susceptible to such accidents. But this distinction, clear though it may be, sheds no light at all on why 'unforeseeable accidents' that cause extraneous pain do not constitute the kind of cruel and unusual punishment that the eighth amendment forbids. As Justice Burton's dissent points out, 'the intent of the executioner cannot lessen the torture or excuse the result', ibid., 477. Moreover, Reed provides no reason for thinking that the state must be found blameworthy before its punishments can be declared cruel and unusual.
61. It is perhaps noteworthy that this reference is relegated to a footnote.
62. Francis, 480, note 2.
63. Ibid., 480. The conflict to which Burton refers involves whether any electric current actually reached Francis' body during the first execution attempt and arose when those in charge of the electrical equipment testified that 'no electrical current reached ... [Francis] and that his flesh did not show electrical burns', see ibid., 481, note 2.
64. Ibid., 474.
65. Ibid., 475.
66. See Alan Hyde, *Bodies of Law* (Princeton: Princeton University Press, 1997), chapter 11.
67. *Campbell* v *Wood* 18 F3d 662 (1994).
68. *Fierro* v *Gomez* 865 F. Supp. 1387 (1994).
69. *Campbell*, 682.
70. Ibid.
71. Ibid., 683.
72. Ibid.
73. Ibid., 684.
74. Ibid.
75. Ibid., 687.
76. Ibid.
77. See Huang, 'Hanging, Cyanide Gas, and the Evolving Standards of Decency'.
78. *Campbell*, 693.
79. Ibid., 701.
80. Ibid., 708.

81. Ibid., 702.
82. Ibid.
83. Ibid., 712.
84. *Fierro*, 1391.
85. Ibid., 1413.
86. Ibid., 1407.
87. Ibid., 1410–1411.
88. Ibid., 1412.
89. Ibid., 1396.
90. Ibid., 1398.
91. Ibid., 1401.
92. Ibid., 1400.
93 Ibid., 1403.
94. Ibid., 1404.
95. Ibid.
96. Elaine Scarry, *The Body in Pain: The Making and Unmaking of the World* (New York: Oxford University Press, 1985), p. 3.
97. Ibid., p. 4.
98. Ibid., p. 6.
99. Ibid., p. 10.
100. Ibid., p. 13.
101. Ibid., p. 15.
102. Ibid.
103. The movement from representing death to representing pain as the touchstone in judicial considerations of methods of executions may be less clear than I have so far made it out to be. Pain, as Scarry reminds us, is frequently used as a 'symbolic substitute for death'. Scarry, *The Body in Pain*, p. 31. She argues that the world-destroying experience of physical pain is an imaginative substitute for 'what is unfeelable in death', ibid., p. 31. Pain and death are, she suggests, 'the most intense forms of negation, the purest expression of the anti-human, of annihilation, of total aversiveness, though one is an absence and the other a felt presence', ibid., p. 31. In her view, then, when the courts speak about pain they are neither eliding nor displacing the subject of death. They are speaking to, and about it, in one of the most powerful ways available to human language.
104. Abernathy, 'The Methodology of Death'.
105. Hyde, *Bodies of Law*, p. 192.
106. Ibid., p. 193.
107. Ibid., p. 194.
108. Ibid.
109. Ibid.
110. As Abernathy puts it, '[T]he shifts from public to private executions and toward more humane means of killing have been designed to comfort the punisher, not the condemned', 'The Methodology of Death', p. 423.

111. Peter Fitzpatrick, *The Mythology of Modern Law* (London: Routledge, 1992).
112. *Callins* v *Collins*, 62 LW 3546, 3547 (1994).
113. Ibid., 3546.
114. Ibid.
115. Ibid.
116. Ibid.
117. Catherine Russell, *Narrative Mortality: Death, Closure, and New Wave Cinemas* (Minneapolis: University of Minnesota Press, 1995).
118. Austin Sarat, 'Vengeance, Victims, and the Identities of Law', 6 *Social and Legal Studies: An International Journal* (1997), p. 163.
119. Walter Benjamin, 'Critique of Violence', in *Reflections: Essays, Aphorisms and Autobiographical Writing*, trans. Edmund Jephcott (New York: Schocken Books, 1986).
120. Terry Aladjem, 'Vengeance and Democratic Justice', unpublished manuscript, pp. 7–8.

4
The Sanctity of Death: Poetry and the Law and Ethics of Euthanasia

Melanie Williams

INTRODUCTION

Law's relationship with the notion of physical death is characteristically hyperborean; for the most part wishing to identify, distantly yet accurately, a moment of decease. The busy 'life' of law – the civil concerns of property and probate, or the domain of criminal returns – can then hurry on. Thus when asked to examine the minutiae of mortal human suffering and confer justice according to a calibration of that decline, the law is poorly equipped to meet the challenge. In particular, voluntary euthanasia and physician-assisted suicide are unpalatable topics, yet the compassion and the courage to give legislative support to those who have good reason to seek assistance in ending their lives may be the mark of true civilisation. Arguably, recognition of the sanctity of human life would respect first, individual integrity and autonomy as demonstrated by the will to exercise control over the process of death and second, that the sanctity of a unique life may be best celebrated by refusing to sustain it under intolerable conditions.

However disguised, virtually all conceptions of human existence in the world and models for its regulation, moral or practical, involve acts of narration. This centrality of narrative is one instance of the epistemological significance of the aesthetic. In this chapter, narrative is of more specific relevance in two ways. In reviewing the issue of voluntary euthanasia, it is argued that the narrative fabric underlying each life should be acknowledged as a factor of profound importance to individual identity, ultimately offering a means by which the apparently disparate concepts of autonomy and sanctity may be reconciled. Thus narrative practice gains significance as a tool of ethical theory. Secondly, as will be seen, narrative is used as a source material and applied to the issue in question; this experience of the aesthetic provides a cogent practical demonstration of the interplay of processes which shape our conception of ethical criteria as a dynamic, rather than static, phenomenon.

The central section of this chapter uses poetry, and a literary essay, as core texts in the exploration of the ethico-legal dilemma of voluntary euthanasia, especially with regard to the desire for a controlled 'good death' – a physician-assisted suicide – in the face of terminal illness. Poetry, both as an experience and as a source of ethical critique, can provide a rich and rigorous stimulus to current ethical models. Having journeyed through the moment in human history when intellectual progress was constrained by rigid disciplinary divisions with law worshipping largely at a self-referential altar, we may have arrived at a more liberated place, where other forms of human discourse can be consulted to enrich our understanding. Many of the rational objections which might be raised against art by traditional jurisprudence – that it is subjective and emotive, that art is not knowledge, but merely perception – can be levelled, more or less, at sciences, humanities and law, with or without the benediction of Derrida. But greater than this debunking of claims to purer lineage is the fact that art can supply law with essential human insights lost to formal thought.

Historically, Church and State ideologies have militated against indulgence of certain aspects of autonomous control over our physical selves. Law as the inheritor and instrument of these ideologies has been slow to acquire the language of rights where there is conflict with institutional interests in the preservation of each human unit. So law perpetuates the plea that assisted suicide, euthanasia and until recently, suicide itself, offend against a notion of sanctity which embraces both a view of life as the property of a deity and as the property of the community.[1] Self-destruction sets an unfathomable and dangerously anarchic precedent.

Despite the rapid development of rights discourse, the ethical and legal debate surrounding voluntary euthanasia is enmeshed by this heavy inheritance, locked into endless shadow-boxing between the corners of sanctity and autonomy. Attempts to respond to the new culture of individual responsibility and right through legislative authorisation of assisted suicide are vulnerable to attacks from these polar combatants. In addition, conducting the debate within the confines of such abstract regions feeds the continuous displacement of core issues, such as whether legislators, lawyers and ethicists have confronted fully the face of death and terminal illness; whether society and medicine can develop, with no loss of integrity, revised conceptions of a good death.

The terminally ill may be subjected to an unwittingly ruthless medical culture, committed to the prolongation of life. Yet we have become alienated from the process of death and dying in terms of social and psychological practices: both are sanitised from view, banished from the hearth of our nuclear family. It is as much in

ignorance and in fear that we recoil: the unknown is more instantly a spectre than a friend.

The relevance of poetry to the present discussion is predominantly as a *source* of moral and ethical discourse, and as a method of imposing upon the reader an authentic relationship with that discourse, of having a relationship with the *idea* of death and dying and consequently with its full ethical implications. A similarly authentic relationship with the full implications of ethico-legal decisions should be nurtured in judges and legislators. Law's forensic relationship with the moral or ethical problem – the tendency to promote a (somewhat illusory) image of detached, 'scientific' doctrinal analysis – fosters a 'static' view of a problem in law. It is dissected, anatomised and consigned to its doctrinal or legislative fate. Yet in the life of the legal subject, the problem (and this does not apply only to the 'problem' of voluntary euthanasia) is *experienced*; the subjective encounter is kinetic, interactive, progressive.

Since the words 'aesthetics' and 'ethics' can be appropriated in the service of diverse hypotheses and bestowed with variable meanings, philosophy alone may be the most stable source of definitions for present purposes.[2] Human dilemmas such as abortion and euthanasia are usually approached via the conceptions of *applied* ethics:[3] the 'rights and wrongs' of a 'practical' dilemma are explored through 'analytic activity in which the concepts, assumptions, beliefs, attitudes, emotions, reasons and arguments underlying ... decision making are examined critically'.[4] Yet historically and conceptually, *pure* ethics – the evaluation of what is meant by ideas underpinning moral debate, that is, good, evil, beauty, virtue – is intimately linked to aesthetics, to the *appreciation* of such concepts. In Scruton's words:

> The aesthetic interest ... always sees more in an object than its mere appearance ... For example, when I look at a painting, I do not see only colours lines and shapes. I see the world that is represented by them, the drama which animates that world, the emotion that is expressed through it. In short I see a meaning.[5]

Similarly, for the legal subject death, or a 'good death', is not a static concept, an 'object' with a 'mere appearance'. It is a process redolent with meaning, an intimate materiality *and* spirituality. The judge, the legislator engaged in evaluating the dilemma has a moral duty to *appreciate* its meaning. Appreciation denotes immersion, experience of a process.

This chapter attempts to provide such immersion through experience of the aesthetic. 'Reader experience'[6] of the aesthetic text – of the medium as well as the message – is a crucial step in critiquing the ethical viewpoint which it purveys. All too easily, judges, lawyers, legislators

make decisions which may have a crucial, perhaps devastating impact upon the life of the individual. Having the power to make decisions, it is moral cowardice to shy away from their full implications. Reader experience of the text confronts the reader, in microcosm, with the impact of the moral crisis. Murdoch points out that

> ... the idea of 'objective reality' undergoes important modifications when it is to be understood, not in relation to 'the world described by science' but in relation to the progressing life of a person ... We have to learn the meaning [of moral words]; and since we are human historical individuals the movement of understanding is onward ... and not back towards a genesis in the rulings of an impersonal public language.[7]

Through a poem the reader, the putative ethicist, witnesses the contingent and kinetic force of the subject's experience, just as war photography may capture the essence of a conflict more meaningfully than political conjecture. Such an approach could of course be accused of being an emotive tactic, of propagandism. Yet the excision of the emotive and contingent from debate is itself a rhetorical tactic.

It may be said that Western civilisation has reached a crossroads. The ever-increasing recognition of individual rights, emphasis upon an educated and *informed* autonomy for which the law is a crucial instrument, jostles with the more archaic influence of paternalism. The repeal of the Australian Northern Territory legislation[8] on voluntary euthanasia allegedly resulted from lobbying by minority pressure groups: a flagrant abrogation of the democratic process. Allowing abstract and largely unrepresentative ideologies to hold sway over the hard-fought claims of the individual legal subject engaged in a mortal conflict in which the outcome is the mode of death of the subject, indicates a serious breach of morality, of justice.

This chapter does *not* seek to be a survey of current ethico-legal theory; however, an introductory comment may be helpful. The tendency of ethicists to explore life and death issues through use of the key concepts of 'sanctity of life' [9] versus 'autonomy' holds the *potential* to convey the extremity and scope of the dilemma. Yet this potential is rarely realised. Just as the procedural and doctrinal abstractions of law may be blind to the subtleties of human life, so too, the use of these words may skirt or diminish the profound questions of human existence which they consider.

Practical ethics (the usual tool used in relation to medical ethics issues) is valuable in identifying and anatomising the factors within a particular practical dilemma and the relationship of those factors to moral codes. So, for example, practical ethics will remind us that the major issues in conflict when considering abortion and euthanasia are

those of sanctity of life versus autonomy; the moral value ascribed to each depending upon their context – so sanctity may 'trump' autonomy in the context of a predominantly 'religious' evaluation. The analysis has been further addressed by reference to a theoretical frame – to deontology, or consequentialism.[10] Practical ethics will usually entail notating an index of the ethical criteria which should be included in order to survey properly the issues informing a particular dilemma. For example, when considering voluntary euthanasia – a source of intense debate in the United Kingdom, United States and Australia recently – a practical ethics summary of the issues is typified by Thiroux, essentially a list of cooperative and competing moral considerations.[11] Whilst such a survey may be an invaluable resource in identifying central issues, it may also create a reductive closed circuit of reason, where the content of the survey is ultimately exhausted by its terms.

Dworkin[12] reinvigorates the debate by conducting a critique which is both linguistically and conceptually liberated from such closed circuits. Such analysis departs from the tendency of ethical debate to express the issues in terms of irreconcilable polarities. Most profoundly, he recognises 'that death is special, a peculiarly significant event in the narrative of our lives'; that for most people the *manner* of their deaths is of 'special, symbolic importance'.[13] Yet even this refreshing use of the language of aesthetics – 'narrative' and 'symbolism' – as opposed to that of ethics – 'sanctity' and 'autonomy' – is detached from an active engagement with the world of aesthetics. A return to art, to ethics and aesthetics, may achieve such a goal.

ETHICS AND AESTHETICS: A POEM, AND AN ESSAY ON POETRY

The primary medium selected for the following discussion of the ethics of euthanasia may seem initially a strange choice. 'The Almond Tree' by Jon Stallworthy, is a poem concerning the birth of a child suffering from Down's Syndrome.[14] The link with euthanasia is not directly suggested by the poem, but springs from the insights the poet provides into the experience of tragedy. The poem links to the issue of mortality in a larger sense, not just because it deals with the death of an idea, but because it is a poem of immense physicality and spirituality, of the material body, of journeys and of endings.

The poem opens with the narrator describing his journey to hospital as a typically excited expectant father. Experience is heightened by expectation: the narrator feels omnipotent – the 'lucky prince', 'summoning summer with my whistle' and wishes fervently for a son. For him this is a profound moment in personal and human history:

I was aware that blood was running
down through the delta of my wrist
and under arches
of bright bone. Centuries,
continents it had crossed;
from an undisclosed beginning
spiralling to an unmapped end.

The unborn child heralds an apotheosis, a synthesis and perfection:

New
minted my bright farthing!
Coined by our love, stamped with
our images, how you
enrich us! Both
you make one. Welcome
to your white sheet,
my best poem!

Yet the birth heralds not joy but tragedy. The narrator-father is told that his son is 'a mongol', engendering not synthesis, but a form of death – of hopes, expectations, ambitions; death of his 'old' self. Ultimately however, this death heralds a rebirth. Indeed the 'old' self, his obsession with worldly achievements, omnipotent control of his surroundings, the blessing of the College bells, the desire for *a son* as the crowning glory to his masculine, collegiate persona, now, in the light of tragedy appears shallow and impoverished. The love engendered by the imperfect child cannot be calibrated by worldly, material criteria, nor is it conditional upon conventional expectations, but allows the narrator to be released from the myopia of a thirty-year gestation:

wrenched from the caul of my thirty
years growing, fathered by my son
unkindly in a kind season
by love shattered and set free.

Throughout, the narrator's experience is represented and charted with reference to the symbolic power of a tree, the almond tree of the title. The flowering tree provides a commentary and context to the events of the poem, most profoundly, whilst

my son sailed from me; never to come
ashore into my kingdom
speaking my language,

the almond tree

> *was beautiful in labor. Blood*
> *dark, quickening, bud after bud*
> *split, flower after flower shook free.*

These two utterly divergent images, the poignant, isolated son, adrift in an alien existence and the vibrant, fertile life-giving tree, budding and blossoming, are brought together dramatically in a verse which purposely merges the two:

> *on the darkening wind a pale*
> *face floated. Out of reach. Only when*
> *the buds, all the buds, were broken*
> *would the tree be in full sail.*

This merger is achieved not simply by the containment of the two issues within one verse, but also by the form – short breathless phrases, running together – and the convergence of images in the final line, where the tree *is* a ship.

This extraordinary convergence donates a powerfully expressed refinement to the frequently condensed 'sanctity of life' argument. The fecund tree, like humanity, is budding its offspring in a process which is both beautiful and violent, blood-dark and splitting. Though the pale face of imperfection floats out of reach, it is only when the buds, *all* the buds are broken, that the tree would be in full sail. So, perhaps, a society can only embark upon its voyage, balanced and complete – in full sail – when it accepts its full complement of humanity, not just some buds, but *all* the buds – the perfect and the imperfect, the halt and the lame.

It is significant that this poem, concerned as it is with cycles of life, death, wisdom and rebirth, is focused upon the image of the tree – itself a powerful icon in the symbolic and mythological representations of life, birth, wisdom and rebirth.[15] It is perhaps this power of the tree as icon which enhances the universality of an essay based upon the memory of a tree. The essay is a critique by Seamus Heaney of the poetry of Kavanagh; not only the image of the tree, but shared concerns provide a notional link to 'The Almond Tree'.[16]

Heaney's essay, 'The Placeless Heaven, Another Look at Kavanagh',[17] begins anecdotally, with Heaney recounting how his aunt planted a chestnut tree in the garden, the year of his birth. As the tree grew, Heaney grew, and he came to identify himself with the tree. After some years, the family moved away, the tree was cut down and thoughts of the place and the tree diminished. In maturity, Heaney's thoughts returned to the tree, or rather to the space where the tree had

been, and he came to identify himself with the space, just as before he had identified with the tree except, says Heaney, 'this time it was not so much a matter of attaching oneself to a living symbol of being rooted in the native ground; it was more a matter of preparing to be unrooted ... [to] a placeless heaven, rather than a heavenly place'.[18]

The spiritual significance of this transition from tree to space is exemplified by Heaney's critique of the poetry of Kavanagh. The early Kavanagh poem 'starts up like my childhood tree in its home ground; it is supplied with a strong physical presence and is full of the recognitions which existed between the poet and his place ... an imagination which is not yet weaned from its origin'.[19] In contrast, Kavanagh's later poetry includes place 'within the horizon of Kavanagh's mind rather than the other way around. The country he visits is inside himself ... at the edge of consciousness in a late poem ... we encounter the white light of meditation; in the early poems, the familiar world stretches reliably away.'[20]

This analysis resonates with the initial comments on 'The Almond Tree' – the 'early' self of the poem, like the early Kavanagh, or the early Heaney, identifies with the incidents and artefacts of his surroundings: he is 'not yet weaned' from the furniture of an immature identity – the enchanted wood, Magdalen Bridge, the college bells, the wish, not for a healthy child, but for *a son, a son*. At the end of the poem, the self has been transformed, 'wrenched from the caul' – the trappings which maintained the former, foetal self.[21]

The analysis is relevant to a discussion of ethics because it resurrects a profound aspect of the euthanasia debate touched upon by Dworkin. Dworkin dares to recognise that the prospect of death, like the experience of tragedy, can have a narrative and spiritual significance for the individual and that institutional, or legislative thwarting of the decision to die in an appointed way and place may thwart or fracture that narrative and spiritual vision; inflicting greater suffering upon the individual. Heaney's essay on Kavanagh suggests a further gloss to this issue in two ways. First, it narrates and legitimates the fact of spiritual growth – that the individual subject is not the static infant of a paternalistic state, but is engaged upon a kinetic spiritual and ethical journey. Second, it reminds us, with a forceful aesthetic vision, that the narrator, the subject, the 'I' who has traversed the precipice, from egocentric foetus to heath-blasted soul, has been forced to stare unblinkingly into the void, the treeless space, yet maintains a vision of the self – of the placeless heaven rather than the heavenly place.[22] The terminally ill patient who chooses to control death is not an infant in need of protection from self, but a remarkable individual who deserves support in this stage of an inevitable journey. A society which denies that support, whether under the guise of paternalism, sanctity, the 'slippery slope',[23] or whatever, is itself still in the foetal position.[24]

We have seen that one reading of 'The Almond Tree' lends support to the notion of sanctity of life, with the fused images of all the buds breaking and the tree in full sail. A case can be made for a different interpretation however, one which is prompted both by the Heaney analysis of Kavanagh and by the realisation that the poem, for all its compassion is surely not intended purely as a 'pro-life' manifesto. Whilst the narrator-father has learned love through adversity and cherishes his son, the transformative locus of the poem *is* the narrator-father. No longer the blind and naive egocentric of the beginning, he now surveys the landscape of personal tragedy with an enlightened wisdom. Like Heaney and Kavanagh, the imagination has been 'weaned from its origin' and can contemplate the empty space with equanimity. The fusion of ideas – the pale face floating out of reach, the tree in full sail once all the buds are broken, may speak of the acceptance residing in true autonomy rather than the acceptance demanded by the classical notion of sanctity. Accepting that his son will never come '*ashore into my kingdom/speaking my language*', the narrator-father bears witness to his own growth through pain. Whilst a pale face floats out of reach, the father approaches completion and balance – full sail – only after the buds, *all* the buds, of his pain are broken. Though this poem compassionates the son, it also compassionates the self: it is not about '*fathering* my son' but the humble realisation of being '*fathered* by my son'. And although the almond tree maintains its presence throughout and is not cut down, the narrator-father confronts the death, the darkness, the space:

> *In labor the tree was becoming*
> *itself. I, too, rooted in earth*
> *and ringed by darkness, from the death*
> *of myself saw myself blossoming.*

Dworkin's acknowledgement of narrative, of the symbolic importance of life and death, asserts the central importance of individual autonomy, an autonomy in wisdom. This linkage, between narrative, symbolism and autonomy, is enriched by the vision of 'The Almond Tree', by the space contemplated by Heaney and Kavanagh. In addition, the aesthetic vision demonstrates that sanctity and autonomy need not be the polar opposites of ethical theory, but co-equal actors in the formation of personal narrative. The exercise of autonomy, the art we make of our lives, is itself an assertion of a right to sanctity, not in a religious context of holiness, but in the sense of pure inviolability. Furthermore, the addition of the words 'narrative' and 'symbolism' to the vocabulary of ethics can perhaps encompass some other words, such as 'authenticity'[25] and 'compassion'. Individual decisions in the face of adversity should be respected as

integral to identity, to the narrative and symbolic view of the self. To deny this autonomy is also to deny the authenticity of the experience and the decision; it is a failure of compassion on the part of society. As Heaney says of Kavanagh: 'when he had consumed the roughage of his early Monaghan experience, he had cleared a space ... the rewards of it were a number of poems so full of pure self-possession in the face of death and waste that they prompt the deepest of responses'.[26]

The utilisation of 'The Almond Tree' and Heaney's essay on Kavanagh as a locus for exploring the major poles of argumentation in the euthanasia debate may be subject to the following major objection. According to the first reading of the poem, the experience of suffering provides a gateway to spiritual enlightenment and growth. This being the case, the alternate proposition is already well on the way to being undermined: if suffering brings spiritual growth, how can we assert the moral rectitude of support for deliberately ending life and suffering; how identify a moment when torment outweighs growth? At one level the question is unanswerable, except perhaps by a deity (and reliance upon that source of enlightenment predicates belief or faith). Yet surely we must accept as *integral* to the autonomy of the individual the right to assess and assert the arrival of such a moment even if, in practical or metaphysical terms, continued spiritual growth is still possible. We are ready to intervene and arrest suffering at other levels, but shrink from the finality of death. Our analysis is beset with difficulties – the imprecision of language, the seductive spectre, whether religious or not, of winter flowering.

The use of the term 'narrative' to consolidate the 'spiritual growth culminating in autonomous control' model of the dilemma which is human suffering may invoke an additional criticism.[27] Both the model and the term presuppose a level of conscious intervention, of planning and control in the apparent 'pattern' of our lives which corresponds to the notion of 'authorship'. Yet arguably this simply indulges the *desire* for control, promoting an over-idealised vision both of individual subjecthood *vis-à-vis* the community and of the brutally random facts and chances steering our biological existence. Thus it may be said that a more accurate analogy is that of 'readership' – a process by which we attempt to interpret – and impose coherence upon events essentially beyond our control. Nevertheless, even in the act of reading, we are dis/empowered by the inevitably personal significance that the text holds for us. Occasionally we must return to a standard text – that of mortality. To shrink from its imperious gaze, to gloss the challenge via a retreat into entirely dehumanised abstractions may, with no little irony, concede to a nihilistic passivity.

Yet another broadside may be levelled at the approach adopted in this chapter. Clearly, Heaney's essay on Kavanagh provides a

framework for exploring the entire dialectic, from the ethics of passive acceptance, to those of active integration and synthesis through the notion of narrative growth and narrative control. Why then play the arguably 'redundant'[28] card that is 'The Almond Tree'? The sceptic may maintain that it is an emotive indulgence, designed to satisfy emotional appetites whilst masquerading as a plea to the cerebral. This presupposes that the cerebral and emotional exist not only in separation, but that one is inferior to the other. Use of the Heaney-Kavanagh framework alone might permit the discussion to take place within a purely abstract context. Despite the reservations of my notional sceptic, I would assert that reading extracts from the poem, stage by stage, is not merely an aid to interpretation, but is itself an exercise in ethics, forcing the reader to submit to the charge between the emotive and the purely cerebral, whilst experiencing the profound disequilibrium of tragedy lived in the moment. This is significant because legislators and theorists commonly omit this vital stage of instantiation, thus feeding the more tolerable retreat into the abstract and impersonal. Simmonds[29] explores this detachment of moral precepts from the particular, recognising the resultant dangers:

> A ... sublimation of law occurs whenever juridical metaphors are employed to clarify the fundamental features and sources of our moral life. The complex, and potentially tragic, character of morality requires us to cope with a disorderly and conflictual array of values and commitments. This cannot be reduced to the thin gruel of rights and principles.[30]

The legal subject, the single unit of the community, can all too easily be sacrificed – not simply to the interests of the community, which may or may not be justified on utilitarian grounds – but to a blindly mechanistic legal system, in which the legitimate claims of the legal subject can be marginalised or ignored. Pashukanis, quoted in Simmonds, argued that

> within the developed legal systems of bourgeois society, the legal person becomes an abstract bearer of rights, with no more substance than a geometrical point employed in the construction of a drawing ... Precisely in so far as it reflects the fluid and atomistic nature of a market society, law ceases to embody the hierarchical structures of social life, but takes on a fetishistic quality, becoming an illusory heaven of equal principles and abstract subjects.[31]

Reduction to a 'geometrical point' is a disturbing context for individual experience of rights adjudication, particularly when the individual is

claiming the right to choose the time and manner of death in a society sufficiently informed and advanced for such rights to be debated.

CONCLUSION

The philosophies of law, and of medicine, are intimately bound to the mechanics of living, to preserving and enhancing our stake in the world. The issue of death remains peripheral to these processes. The approach taken in this paper provides a fresh basis for exploring the ethical positions raised by the subject of death. Two points in particular may be asserted.

First, that the medium of art *can* provide a rigorous framework for the examination of moral questions – great artists such as Seamus Heaney have not been afraid to respond to the philosophical, political or moral questions raised by their work. Regarding themselves as preserving a 'hard' theoretical domain, many disciplines, including the law, have distanced themselves from artistic endeavour as a field lacking theoretical rigour.[32] Latterly, literary theory has produced some staunch and vigorous argumentation which is capable of ready application elsewhere.[33] Yet ironically, literary texts themselves are frequently irretrievably metabolised – often at the altar of theory – or skirted with caution. It is hoped that this chapter demonstrates that aesthetics – literary texts – are a serious site and source of ethics discourse.

Secondly, the full impact of that ethics discourse can only be conveyed through contemporaneous experience of the text, or parts of the text, by the reader. In other words, telling the reader what a theory, a case, a painting, a text, is 'about' (fraught with difficulty, since all texts are vulnerable to the inevitable subjectivity of readings) is not the same as providing the reader with sufficient extracts from the text to experience its message and its power virtually 'first hand'. The simultaneous *use* of the narrative form and of the message conveyed *within* creates a coalition of form and content which is mutally enriching: the form permits the exercise in applied ethics to be developed in full, the content informs that development – the whole exemplifying *why* narrative is so central to the moral identity of the individual (and to our construction of ethical theory) and of *how* it comes to be so. Some will be quick to argue that the 'power' of a literary text derives from its emotive content and is thus unreliable. One response is that many legal authorities derive at least some of *their* power from 'emotive' rhetoric. The main point, however, is that the power of many texts of quality, aesthetic, scientific or legal, is composed of rational, deductive and rhetorical and emotive elements.

Heaney's essay appears in an anthology of essays entitled *The Government of the Tongue*. It is a masterfully provocative title, juxtaposing two disparate ideas, the notion of Government, the constitutional body, and the tongue, surely at once an entirely powerful and entirely vulnerable bodily constituent. Thus we are reminded of the violation that unwieldy government, unwieldy law, can impose upon our inner being, and perhaps of the ultimate ungovernability of a cry for justice, that is, the ungovernable tongue. And the least governable tongue would seem to be the voice of art, with its discomfiting, disorienting and invigorating subversive power. The poignant experience of the suffering subject, the enlightening messages of art, can teach society much. Yet fear or scepticism may nourish the relegation of both to a deserted ante-room, drowned out by the voice of the bigot or the whirr of the legal machine. If we are to ensure the dignity of citizens who, like Kavanagh, display 'pure self-possession in the face of death and waste', we must ensure that *all* tongues are properly governed.

NOTES

1. 'Sanctity' and 'autonomy' are identified as the core concepts in ethical debates on both abortion *and* euthanasia. Suicide was formerly criminalised not just because of the theological objections to self-destruction, but also because it was an offence against the state, as the wanton removal of a unit belonging *to* the state, with all the potential for subversion of state interests that such self-determination implied. 'English law might be said to recognise a right to self-determination, inasmuch as suicide is no longer a crime', Andrew Ashworth, *Principles of Criminal Law,* 2nd edn (Oxford: Clarendon Press, 1995) p. 285.
2. A most clear and accessible text is Roger Scruton, *Modern Philosophy* (London: Sinclair-Stevenson, 1994).
3. Scruton, *Modern Philosophy*, pp. 12–13, clarifies the conceptual foundations of philosophy. Of applied philosophy, he comments 'There are as many branches of this as there are occasions for human folly'; the principal components, however, being: the philosophies of religion, of science, of language, political philosophy and applied ethics. In *pure* philosophy there are four central divisions: Logic – the study of reasoning, Epistemology – the theory of knowledge, Metaphysics – the theory of being, Ethics and aesthetics – the theory of value.
4. Raanon Gillon, *Philosophical Medical Ethics* (Chichester, UK: John Wiley & Sons, 1994) p. 2.
5. Scruton, *Modern Philosophy*, p. 445.

6. On the role of the reader, see references in Stanley Fish, *Doing What Comes Naturally* (Oxford: Clarendon Press, 1989). Postmodern theory has contributed an exercise in 'consciousness raising' regarding the interactive and subjective nature of the process of reading: see Linda Hutcheon, *A Poetics of Postmodernism* (New York and London: Routledge, 1988). For a readily accessible survey see Terry Eagleton, *Literary Theory* (Oxford: Blackwell, 1988) especially at pp. 54–90 – 'Phenomenology, Hermeneutics, Reception Theory'.
7. Iris Murdoch, *The Sovereignty of Good* (London: Routledge & Kegan Paul, 1970) p. 26.
8. Despite evidence from an opinion poll that 75 per cent of Australian citizens supported the legislation, the Northern Territories Rights of the Terminally Ill Act was repealed in March 1997 following lobbying by religious and 'right to life' groups. This legislation imposed stringent safeguards to prevent abuse of its terms.
9. Arguably the notion of sanctity is not the exclusive property of theologians. For a comprehensive collection of essays on the subject of euthanasia, see John Keown (ed.) *Euthanasia Examined* (Cambridge: Cambridge University Press, 1995). This includes the theological view in Anthony Fisher's essay, 'Theological aspects of euthanasia': 'Rationally we must recognise that were we to say yes to medical killing we would have to abandon the sanctity of life principle' (p. 318).
10. There are many textbook sources. An excellent discussion of the application of theory to medical ethics is that of Gillon, *Philosophical Medical Ethics*.
11. Jacques P. Thiroux, *Ethics, Theory and Practice,* 2nd edn (London: Collier–Macmillan, 1980).
12. Ronald Dworkin, *Life's Dominion* (London: HarperCollins, 1995).
13. Dworkin, *Life's Dominion*, p. 211.
14. Jon Stallworthy, 'The Almond Tree', *Rounding the Horn: Collected Poems* (Manchester: Carcanet Press, 1998).
15. For example, Ivor H. Evans (ed.), *Brewer's Dictionary of Phrase and Fable* (London: Cassell, 1981) p. 1133 notes The Tree of Buddha or Wisdom, The Tree of Knowledge, the Tree of Life, the Tree of Liberty, to name but a few. According to J. Hastings (ed.) *The Dictionary of the Bible* (Edinburgh: T & T Clark, 1921), the almond has a symbolic, biblical connotation of 'to waken or watch'.
16. The essay is contained in Seamus Heaney's collection of literary essays, *The Government of the Tongue* (London: Faber and Faber, 1989), which provide lively intellectual critiques of the texts explored; moral and political issues are central to Heaney's understanding of the *purpose* of art: 'The "poet as witness" ... represents poetry's solidarity with the doomed, the deprived, the victimised, the under-privileged. The witness is any figure in whom the truth-telling urge and the compulsion to identify with the oppressed becomes necessarily integral with the act of writing itself' (p. xvi).
17. Heaney, *Government of the Tongue*, pp. 3–14.

18. Ibid., p. 4.
19. Ibid.
20. Ibid., p. 5.
21. This accords with existential viewpoints: 'it does not follow that the Existentialist is reduced to silence, unable to offer anything describable as an ethic. For there is, one might say, a "super-directive" which he can consistently promulgate: to live *authentically*' (emphasis added): David E. Cooper, *Existentialism* (Oxford: Blackwell, 1990) p. 171. In psychoanalytic terms, the infantile integration of self with incidental externalities is realised through the '*fort-da*' scenario: 'Everything begins when several signifiers can present themselves to the subject at the same time ... It is at this level that *Fort* is the correlative of *Da*': Jacques-Alain Miller, *The Ethics of Psychoanalysis 1959–1960, The Seminars of Jacques Lacan*, Book VII (London: Routledge, 1992) p. 65.
22. The notion of a placeless heaven disrupts orthodoxies surrounding both the notion of 'heaven' and of 'place'.
23. Discussion of the ethics of euthanasia, and the Australian repeal of the legislation, is haunted by fear of 'the slippery slope' – that legalising assisted suicide will lead slowly to a *policy* of *involuntary* euthanasia. The Northern Territory legislation seemed well tailored to resist such corruption. Further, the claim that legalising assisted suicide undermines social morality, sending the message that life is not sacred, must be misleading. It is clear that the sacred value placed upon life can be upheld by supporting individual assertions of autonomy, which rarely may be reflected in the right of the terminally ill to end life.
24. Neither psychoanalytic theory, nor anthropology are particularly helpful in theorising the individual assertion of autonomy in death. Anthropology tends to observe and record death rituals and beliefs as the realisation of collective, social goals – see, for example Nigel Barley, *Dancing on the Grave* (London: Abacus, 1995) – whilst psychoanalytic theory has been very much dominated by Freud's 'death instinct'. Modern medical anthropology has come close to addressing the issue in exploring the narratives of illness. For a superb discussion, see Byron J. Good, *Medicine, Rationality and Experience, an anthropological perspective* (Cambridge: Cambridge University Press, 1994). Yet even here, death is significantly absent.
25. Of course, authenticity is a key concept both to existential theory and to art itself. Heaney summarises Kavanagh's poetry in maturity as 'an example of self-conquest, a style discovered to express this poet's unique response to his universal ordinariness, a way of re-establishing the authenticity of personal experience and surviving as a credible being' – Heaney, *Government of the Tongue*, p. 14.
26. Heaney, *Government of the Tongue*, p. 14.
27. My thanks to Dr Nigel Simmonds of Corpus Christi, Cambridge for clarifying this point.

28. By this I mean that the purely analytical framework of this paper could arguably be conveyed simply by reliance upon Heaney's essay, which provides a basis for exploring the key issues; this view would render the use of 'The Almond Tree' 'redundant' if, but only if, the experiential lesson that the poem provides is disregarded.
29. Nigel Simmonds, 'Judgment and Mercy', 4 *Oxford Journal of Legal Studies* (1993) p. 52.
30. Ibid., p. 68.
31. Ibid., p. 67.
32. An excellent note on this 'alienation' of art is given in Douzinas, C., R. Warrington and S. McVeigh, *Postmodern Jurisprudence* (London: Routledge, 1991) p. 162.
33. Of the many texts which could be mentioned, Fish, *Doing What Comes Naturally,* is seminal to the field of literary and legal studies.

Part Two
Post Mortem

5
'But a Lump of Earth'?:[1] The Legal Status of the Corpse

Ngaire Naffine

> *How to treat dead bodies may seem to be a trivial moral question ... But, from a theoretical point of view, few [questions] are as illuminating of our self-conception and self-understanding.*
> Leon Kass, 'Thinking About the Body'

On 29 October 1988, Zoila Gonzalez gave birth to a baby girl. About a week later, the baby died, but it was not until 9 January that Mrs Gonzalez and her husband were told by the funeral home, engaged to bury the child, that she was still in the refrigerator at the hospital morgue. The Gonzalezes claimed damages against the Metro Dade City Health Trust 'for interference with a dead body and the negligent infliction of emotional distress'.[2] On appeal to the Supreme Court of Florida, the decision of the trial and appeal courts were affirmed. Because there had been no wilful misconduct on the part of the Trust, and because the plaintiffs had not been physically injured, relief was denied.

In a British commentary on this decision, which considers how this action might have fared in an English court, intriguing questions are raised about the legal character of the corpse. First, a comparison is made with the English decision of *Attia* v *British Gas*[3] where the English Court of Appeal 'permitted a claim for psychiatric injury to a plaintiff who witnessed her home burn down as a result of the defendant's negligence'.[4] However, the commentator observes that 'the analogy breaks down if, as is the settled (if controversial) position in English law, a corpse is not the property of anyone.'[5] That is, a remedy for negligent interference with a proprietary interest could not be invoked when the interference was to a corpse, for a corpse was not an item of property. As a consequence, damages arising from psychiatric injury occasioned by observing the negligent destruction of one's house could be claimed; but not so when the distress was caused by the wrongful immolation of a dead friend or relative.

Our commentator then considers whether the relatives of the deceased might 'bring themselves within the *McLoughlin/Alcock* rules

as "secondary victims"?'[6] Here the law requires the plaintiff to witness injury of an intimate and to suffer psychiatric injury as a consequence. But again there is an impediment to action here: 'There is no primary victim who is injured or killed.'[7] In other words, the corpse is not a person who can be accidentally injured or killed.

From this brief analysis of *Gonzalez*, and its British implications, it would seem that the corpse is not susceptible to easy legal classification; that it may well inhabit a sort of legal limbo, neither person not property. My chapter has two purposes. One is to trace the (mainly English) legal history of the status of the corpse which leads us to the plight of Mrs Gonzalez, in an endeavour to throw some light on its modern legal character – to see whether it has a conceptual home. The second is to reflect on the reasons why lawyers have come to see the corpse as they do.

A LEGAL HISTORY OF THE CORPSE

In 1752 the Murder Act[8] made murder a crime for which the corpse of the criminal, after execution, was punished further still:

> Whereas the horrid crime of murder has of late been more frequently perpetrated than formerly ... it is thereby become necessary, that some further terror and peculiar mark of infamy be added to the punishment of death ... The body of any such murderer shall ... be immediately conveyed ... to the hall of the Surgeons' Company ... and the body so delivered ... shall be dissected and anatomised by the said surgeons ... in no case whatsoever the body of any murderer shall be suffered to be buried, unless after such body shall have been dissected and anatomised as aforesaid.[9]

To modern sensibilities, there is something odd about this law. It seems to carry the implication that even after death, there is still a person remaining to be punished. In other words, the very idea of punishing a corpse tends to personify the corpse. To the modern, Western, secular, cast of legal mind[10] this is foolish superstition and indeed even when the Murder Act was enacted, in the middle of the eighteenth century, it sat uneasily with another legal opinion that after death there was no one there at all.

The idea that the corpse was not a person, was no one, was expressed most clearly in one of the earliest English cases, well preceding the Murder Act, on the status of corpses. In *Haynes's Case*, decided in 1614, one William Haynes was found to have dug up several graves, to take the winding sheets in which the bodies were wrapped and to

rebury the bodies. It was held 'that the property of the sheets remain in the owners, that is, in him who had property therein, when the dead body was wrapped therewith; for the dead body is not capable of it ... a dead body being *but a lump of earth hath no capacity:* also, it is no gift to the person, but bestowed on the body for the reverence towards it, to express the hope of resurrection'.[11] Thus it was early asserted that the dead body could not own property as the corpse was not a person: it was 'but a lump of earth'.

It is in *Haynes's Case*, however, that we can also identify the beginnings of the conceptual uncertainly about the positive legal status of the corpse. For although the corpse was called 'earth', it was not to be subject to the laws of property in the same manner as real earth. In his discussion of this case, some thirty years on, Sir Edward Coke reflected on his role in the decision, confirming that at the time

> ... we all resolved that the property of the sheets was in the Executors, Administrators or other owner of them, for the dead body is not capable of any property, and the property of the sheets must be in some body: and according to this resolution, he was indicted of felony at the next Assises, but the Jury found it but petty larceny, for which he was whipped, as he well deserved.[12]

In short, the corpse lacked one of the main indicia of legal personhood, the capacity to own property.

But Coke observed also that the corpse 'itself' was not to be regarded as property, and so enunciated explicitly the no-property-in-a-corpse rule. 'The burial of the Cadaver (that is, *caro data vermibus*)' he said, 'is *nullius in bonis*, and belongs to Ecclesiastical cognisance.'[13] To Coke, the corpse was neither person nor property. But having stripped the corpse of both of its two potential legal characters, Coke failed to indicate how it was positively to be viewed in law. He failed to give it a positive presence.

In 1736, Sir Matthew Hale confirmed that the corpse was incapable of owning its winding-sheet, observing that 'if *A*. put a winding-sheet upon the dead body of *B*. and after his burial a thief digs up the carcase and steals the sheet, he may be indicted for felony *de bonis and catallis A*. because it transferd no property to a dead man'.[14] The corpse was not enough of a person to own property. Then, in 1783, William Blackstone reiterated that the corpse itself was not to be regarded as property – it was neither owner nor owned:

> But though the heir has a property in the monuments and escutcheons of his ancestors, yet he has none in their bodies or ashes; nor can he bring any civil action against such as indecently least, if not impiously, violate or disturb their remains, when dead

> and buried. The parson indeed, who has the freehold of the soil, may bring an action in trespass against such as dig and disturb it: and, if any one in taking up a dead body steals the shroud or other apparel, it will be felony; for the property thereof remains in the executor, or whoever was at the charge of the funeral.[15]

Elsewhere Blackstone maintained that

> ... stealing the corpse itself, which has no owner, (though a matter of great indecency) is no felony, unless some of the gravecloths be stolen with it. Very different from the law of the Franks, which seems to have respected both [stealing of shroud and corpse] as equal offences; when it directed that a person, who had dug a corpse out of the ground in order to strip it, should be banished from society, and no one suffered to relieve his wants, till the relations of the deceased consented to his readmission.[16]

As Blackstone remarked, the Franks dealt firmly with the 'thief' of the corpse, banishing him from society; the English, however, left him unpunished.

Enter the Body Snatchers

The legal status of the corpse was to become a more pressing concern, as corpses assumed commercial value and so became vulnerable to the body snatchers. The reason for the commercialisation of corpses was the rising demand of anatomists for cadavers for educational dissection. Over the course of the eighteenth century, there was a dramatic increase in the number of medical students in Britain. There also emerged the first private medical schools.[17] As Clare Gittings observes, 'By the eighteenth century it had become generally accepted that a training in medicine should include a detailed study of anatomy.'[18] However, the provision of corpses for medical schools was woefully inadequate. There was no convention of leaving one's body to medicine and in fact the Christian preference for a decent burial countenanced against it. In Scotland, the anatomists had access to 'the body of one executed criminal each year for anatomical dissection'.[19] In England, the doctors were granted around ten corpses of executed criminals per annum.[20]

Moreover, the no-property rule meant that it was impossible to buy a corpse with the law's sanction. The same rule, however, also meant that the corpse could not be stolen and so those who disinterred the dead, and 'sold' them to the doctors could not be charged with the felony of larceny. By the end of the eighteenth century, body snatching was considered a serious social problem: 'no corpse was safe from disturbance, no matter how eminent the deceased'.[21] The

legal dilemma posed by the activities of the resurrection men was highlighted by the 1788 case of *R* v *Lynn*[22] in which a corpse had been removed from the grave for the purpose of dissection. The court affirmed that:

> The crime imputed to the defendant [was] not made penal by any statute: the only Act of Parliament which has any relation to this subject, is that ... which makes it felony to steal dead bodies for the purposes of witchcraft ... And the silence of Hale, Hawkins, and Stamford, upon this subject is a very strong argument to shew that there is not any such offence cognizable in Criminal Courts.[23]

There was an action at common law for defacing the monument but not for taking the corpse: 'And all the writers on this subject have considered the injury which is done to the executors of the deceased by taking the shroud, and the trespass in digging the soil; taking it for granted that the act of carrying away a dead body is not criminal.'[24] The court's solution in *Lynn* was to treat the taking of the body as an offence of indecency. It declared the action to be 'highly indecent, and *contra bonos mores*; at the bare idea alone of which nature revolted'.[25] The fact that the removal of the body was for the purposes of dissection made the offence no less serious.

This was insufficient as a deterrent to the body snatchers and so, in response to public criticism, the British Parliament appointed a Select Committee in 1828 'to report on the degree of social need to obtain bodies for anatomic examination'.[26] Evidence was given by resurrectionists which revealed the scale of the problem. One reported that 'he and his gang had dug up and sold 1,211 adults and 179 smalls [children] in London in the five years 1809 to 1813'.[27] Although the Committee presented its report to Parliament in June 1828, Parliament failed to act until the spur provided by the trial of Bishop, Williams and May, who had murdered a woman and two boys for the purposes of selling their bodies to teachers of anatomy.[28]

The resulting statute provided a specific statutory solution for the doctors' problem of obtaining cadavers and the public nuisance of body snatching. The Anatomy Act 1832

> ... introduced the principle of licensing ... Strict rules were imposed upon anatomy schools, including the licensing of both instructors and students of anatomy ... A simple procedure was created whereby any person or his relatives could direct that his dead body be handed over for anatomic examination. Unclaimed bodies could also be handed over for the same purpose by those in lawful possession of them.[29]

It also abolished the Murder Act which had provided the doctors with their meagre allowance of corpses. The Anatomy Act has been described as 'a simple and completely effective piece of legislation that at one stroke destroyed the trade of the body snatchers'.[30] What it failed to do, however, was to clarify the legal character of the corpse. It left the no-property rule undisturbed, but did not invest the corpse with a positive legal status.

The 'Right' of Burial: Possession and Disposal of the Corpse

Notwithstanding the interventions of Parliament through the Anatomy Act, confusion about the legal status of the corpse persisted. As cases continued to arise concerning who could and who should bury the dead, judges continued to be confounded by the legal character of the corpse. In 1840, in *R* v *Stewart*,[31] a dispute arose when a woman died in hospital and her husband was too poor to pay for the burial. The hospital sought a writ to have the overseers of the poor of the parish pay for the burial. The court held that: 'Every person dying in this country ... has *a right to Christian burial*; and that implies the right to be carried from the place where his body lies to the parish cemetery' and, quoting another case, 'That bodies should be carried in a state of naked exposure to the grave, would be a real offence to the living, as well as an apparent indignity to the dead.'[32] The court had no doubt 'that the common law casts on some one the duty of carrying to the grave, decently covered, the dead body of any person dying in such a state of indigence as to leave no funds for that purpose. The feelings and the interests of the living require this, and create the duty.'[33] Who bears this duty? In a case such as this, where the next of kin was too poor to bury the body, 'the individual under whose roof a poor person dies is bound to carry the body decently covered to the place of burial'.[34]

In *Stewart*, the court spoke of 'a right of burial', and so appeared to personify the corpse (for only persons can have rights.) However, this case appears exceptional, the more common view being that the corpse did not have 'rights'. As Potter J observed in the 1872 American decision of *Pierce* v *Proprietors of Swan Point Cemetery*, 'strictly speaking, according to the strict rules of the old common law, a dead man cannot be said to have rights. Yet it is common to so speak, and the very fact of the common use of such language, and of its being used in such cases ... justifies us in speaking of it as a right in a certain qualified sense, and a right which ought to be protected.'[35] A few years later, the English case of *R* v *Price* also questioned the accuracy of referring to 'the "rights" of a dead body' in *R* v *Stewart*, saying this was 'obviously a popular form of expression – a corpse not being capable of rights'.[36]

Over the course of the nineteenth century, the courts continued to negotiate the practical difficulties of, in the first instance, finding someone to bury the dead and, then, ensuring that the dead were not disturbed once burial had been achieved. The legal problem they had to overcome was that the corpse was *nullius in bonis* (and so was not protected by the law of property) and yet possessed no rights of its own to burial or to remain undisturbed in the grave.[37] In 1857, in *R* v *Sharpe*,[38] the court resorted to the tort of trespass (to a burial ground) when confronted with a man who had disinterred his mother so that she could be buried in a churchyard with his father. The court insisted that the 'wrongful removal of a corpse' was not excused by the son's filial devotion: 'Neither does our law recognize the right of any one child to the corpse of its parent, as claimed by the defendant. Our law recognizes no property in a corpse ... and there is no authority for saying that [filial] relationship will justify the taking of a corpse away from the grave where it had been buried.'[39]

The American judiciary was less insistent on the no-property rule. In the 1872 decision of *Pierce* v *Proprietors of Swan Point Cemetery*,[40] dealing with similar facts to *Sharpe*, Potter J acknowledged a '*quasi* property' interest in the dead body. The person having charge of the buried corpse had a right to act to protect it, and held it on a sort of trust for all of those who had an interest in it.

The English courts, however, held firm to the no-property rule. In 1882, in *Williams* v *Williams*,[41] the deceased had stated in his will that he wished his friend Eliza Williams to cremate his body and place his ashes in a Wedgwood vase he supplied for the purpose. The executors ignored this and had the body buried. Ms Williams organised for the disinterment and cremation of the corpse, and then sued the executors for the expenses. The court followed *Sharpe*, saying, 'It is quite clearly the law of this country that there can be no property in the dead body of a human being.'[42] This notwithstanding, the court also declared that, 'prima facie the executors are entitled to the possession [of the corpse] and are responsible for the burial of a dead body'.[43] This supposedly non-proprietorial right of the executors to possession of the corpse, and the incidental duty to dispose of it, has continued to be affirmed until the present day.[44]

The flawed logic of the rule that an executor may possess but never own the corpse, and yet has a duty to dispose of it, is not difficult to discern. According to one commentary:

> Quite how to reconcile these propositions, has remained something of a mystery. In part it has been fudged in that the relatives appear to be only one of a number of groups of persons on whom the duty to dispose is placed ... In asserting, however, that they may claim the body, English law to that extent recognises a right to the body, if

> only to carry out the duty to dispose ... But this cannot be a property right, there being no property in a corpse. At this point English law appears to give up and hope for the best.[45]

More Property than Person?

Despite the reiteration of the no-property rule since the time of Coke, the legal language used to describe the corpse has been drawn consistently from the vocabulary of property law. In particular the right 'to possess' the unburied corpse, a right which is normally regarded as an incident of property, has been one repeatedly recognised, and American courts have also been willing to concede a quasi-property right in buried corpses.[46] Despite some early references to 'the right' of burial, there is little sense in the case law of the person remaining a person after death. Not only does death mark the moment at which a human being formally ceases to be a person for most legal purposes, but death also marks the moment at which the human form becomes explicitly objectified in law – when the human non-being becomes something to be possessed and disposed of: 'but a lump of earth'.

The most explicit recognition of the 'propertied' view of the corpse is to be found in the leading Australian High Court Case *Doodeward* v *Spence*,[47] decided in 1908. Here the Court was given an unusually free hand to theorise the status of the corpse because of the special nature of the body in question: the corpse was a two-headed baby, and so never quite a person in the eyes of some of the judges. The facts were unusual. The doctor of a woman who had given birth to a still-born two-headed baby (40 years earlier) 'took the body away with him, preserved it with spirits in a bottle, and kept it in his surgery as a curiosity'[48] and it was sold at his death. The father of the plaintiff bought the 'bottle and the contents' and the plaintiff displayed it for profit. It was confiscated by the police and the plaintiff sued successfully for conversion and detinue of his 'property'.

One of the two majority judgments was given by Griffith CJ who declared that although the 'unburied corpse awaiting burial is *nullius in rebus*', that does not stop it 'becoming the subject of ownership'.[49] Indeed, '[a]fter burial a corpse forms part of the land in which it is buried, and the right of possession goes with the land'.[50] Here we see a virtual paraphrasing of the early view expressed in *Haynes* that the corpse is 'but a lump of earth'. The very fact that a corpse can be in 'lawful possession', said Griffith CJ, 'connotes a right to invoke the law for its protection'.[51] He maintained also that 'a human body ... is capable by law of becoming the subject of property ... when a person has by the lawful exercise of work or skill so dealt with a human body or part of a human body in his lawful possession that it has acquired some attributes differentiating it from a mere corpse awaiting burial'.[52] He was, however, unwilling to express any opinion 'on the question

whether a still-born child falls within the authorities relating to human corpses'.[53]

The other majority judge, Barton J, did not regard this 'aberration of nature'[54] as a human corpse and so was able to find for the plaintiff while casting not 'the slightest doubt upon the general rule that an unburied corpse is not the subject of property, or upon the legal authorities which require the proper and decent disposal of the dead'.[55]

Over the past several decades, the no-property rule has been rejuvenated by the new medical technologies, the development of transplant surgery and the consequent injection of value in the corpse and its parts. Again the activities of the doctors can be seen to be driving the demand for bodies and their parts, investing the corpse with potential commercial value and so stimulating concerns about the legal nature of both the living and the dead body. This has generated an extensive and rapidly expanding literature on whether the body and its parts should be regarded as property.[56] Although space does not allow for a close consideration of this scholarship, it is pertinent to note that these contemporary debates again disclose a mixed attitude to the body as proprietary interest. On the one hand, the dominant view seems to be that it would be inappropriate to regard the body as property and, to this end, many legislatures around the world have banned the sale of body parts.[57] On the other hand, the legal language employed to describe the body and its reusable parts has borrowed heavily from the vocabulary of property. As Mykitiuk has observed, 'A review of the scholarly legal literature on this subject will find that the vast majority of articles are concerned with issues of ownership, possessory interests, who shares in the profits, supply and demand, exchange transactions and markets.'[58]

Whereas the early legal commentaries and cases had little to say about the reasons for the no-property rule, often simply asserting it to be the case (and usually citing Coke as authority for the rule), there is now a more open ethical debate about the reasons for such a rule. They include the legacy of slavery and a concern that formal property rights in the body would sanction the commodification of human beings. It is also suggested that if parts of the body were to be regarded as proprietary interests, those who are least advantaged would be subjected to almost irresistible economic pressures to sell their parts and perhaps even sacrifice their life and so experience the most gross form of human exploitation.[59]

What is lacking from the modern debate about the legal status of both the corpse and the living body is any sense of 'its' personhood – the sense of a live body with rights or any sense of the rights of the dead. Nor is there a sense of an integrated embodied person whose materiality is part of their essential personhood, and whose body is therefore not objectified but is simply self.

THEORISING THE CORPSE

In the second part of this chapter, my purpose is to consider why the corpse has been so poorly theorised in law. Why have the courts 'fudged' the status of the corpse and why do we lack a coherent legal view of the dead? A related question is: why have the judges and the commentators been drawn to the view of the corpse as property, usually against their better judgment? And, having rejected the propertied view of the corpse, why has there been such a singular failure to say what the corpse is? Is there something about the corpse which makes it difficult to characterise in law? Because these are profound metaphysical questions, directed at law's view of being human, discussion will necessarily be speculative and lightly sketched.

To recapitulate, now with explicit philosophical intent, this brief legal history of the corpse has revealed a clear duality in legal thought about the dead which has persisted to the present. It seems that courts have felt obliged to choose from only two legal concepts: property or person. The governing legal logic has been that if an entity is a person, it has rights which must be respected. If something is property, it is the object of the rights of a person. The dominant view has been that the corpse does not have rights and cannot be said to be a person. Thus the 'right' of burial has been treated by the courts as an historical curiosity, not a genuine reflection of the legal status of the corpse. The judiciary has been similarly reluctant to treat the corpse as property, although rights and duties of possession and disposal on the part of the executors have been recognised. Because the concepts of 'property' and 'person' are the two great legal categories for imposing order on the animate and inanimate world,[60] it seems that we are left with little to think or say about the corpse. If it is neither person nor property, it would seem to lack a positive legal conceptual presence.

The problem therefore seems to be one of classification and of the ordering of legal meaning. As Wittgenstein explained in *Philosophical Investigations*,[61] we are obliged always to make sense of the world with the concepts already embedded in the language with which we wish to understand and order the world. That is, the existing concepts which organise our world always precede us and impose themselves on us, in that we must use them in order to make sense of them. In view of the dichotomised choice of ordering concepts, we are offered in law with which to make sense of the corpse, concepts which have already shaped our legal thought; perhaps it is little wonder that we lawyers are left floundering. According to this reasoning, our thinking about the legal world has already been arranged into a dualism which

does not work for the corpse and so we are left with an unconceptualised, even unthinkable, entity. Thus when forced to give corpses a name, the courts have resorted to describing them as 'objects *sui generis*'[62] for we lack a legal vocabulary of the dead.[63]

The suggestion that our problem lies in the unsuitability of the concepts to hand, however, may be too facile a response to the conceptual dilemmas of the corpse. For while it is true that our current range of legal categories is limited, we have yet to establish that they are incapable of giving meaning to the corpse. It may well be that they can do more work than they have been allowed to date. We have already canvassed, albeit briefly, some of the reasons why 'property' may provide a poor conceptual home for the corpse (though it has by no means been entirely ruled out and to many appears an attractive option).[64] However, the personhood of the corpse has received little judicial or scholarly attention. Before we jettison both of our potential organising concepts, it is therefore appropriate to consider why corpses have not been understood as persons and whether this unpersoning of the dead is justified.

One explanation of the failure of lawyers to personify the corpse may be the failure of the will. By this I mean that in our Western legal tradition, personhood has been regarded as a status based on abstract reason: on the rational disembodied will.[65] Our legal personhood derives from our ability for rational reflection and deliberated action, that is, our ability to think, to direct our will. This will has in turn been characterised as non-material.[66] Moreover, our material form has been regarded as immaterial to our ability to think and reason and so thought to be inessential to our personhood. Consequently, the person as living will has received considerable attention by legal theorists,[67] while the material person has been undertheorised.[68] This legal bias towards the will and away from the body, and the mind/body dualism which it presupposes, has been so profound that, with little reflection on the matter, the body has been declared not to be a person – whether alive or dead. It has been treated as mere housing, not essential to self.[69]

With personhood conceived of as will, it is difficult to find positive legal meaning in the human body. Even the criminal offences against the person, which seem to be most directed at our embodiment and our bodily relations with one another, are conceived of as offences against our will. (Thus consent is usually an answer to a charge of assault.) Because of the disinclination to 'propertise' the body, our only other option, we are left with an incoherent view of the corpse: once the will has gone – upon death – it seems that there is nothing left to conceptualise.[70] But is this necessarily the end of the matter? Is it possible to personify the corpse and, if so, is there value in so doing?

POSTSCRIPT: A COHERENT VIEW OF THE COMPLETE PERSON?

Strictly speaking, there is no legal bar to personifying the dead. Our law has always taken an imaginative and creative approach to personification, and has deemed both ships and corporations to be legal persons.[71] There does appear, however, to be a cultural impediment to personification of the corpse. The reason is that personification of the body, alive or dead, would seem to demand the embodiment of the person, but this is not the Western way of thinking of persons who are conceived of, instead, as abstract will. We might even say that the Western legal person is a brain (really a mind) on a stalk. Thus when the will is extinguished with death, so is the person. However, there are other cultural models of the person which recognise and indeed personify our materiality, though it is impossible to canvass these views within the scope of this brief chapter. For present purposes we may note simply that within Chinese, Japanese, orthodox Jewish, Maori and Aboriginal cultures it is possible to find views of the person which give more regard to our materiality.[72] These views, not surprisingly, generate more respectful, even reverential attitudes to the dead which we Western lawyers may want to embrace.[73] Thus it may be that the impoverishment of current Western legal thought on the corpse is a function of cultural insularity. Different, perhaps richer, views of the person are to be found elsewhere. It remains to see whether these are directions we would wish to take. But that would be the work of another chapter.

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NOTES

1. *Haynes's Case* (1614) 77 ER 1389, 1389.
2. Andrew Grubb, 'Psychiatric Injury and Mishandling of a Corpse: Gonzalez v Metro Dade City Health Trust', 4 *Medical Law Review* (1996) p. 216.
3. [1987] 3 All ER 455.
4. Grubb, 'Psychiatric Injury', p. 219.
5. Ibid.
6. Ibid.
7. Ibid.
8. 25 Geo II c. 37.

9. Quoted in Clare Gittings, *Death, Burial and the Individual in Early Modern England* (London: Croom Helm, 1984) p. 74.
10. As opposed to the Japanese, Maori or Native American. See Stephen Lammers and Allen Verhey (eds), *On Moral Medicine: Theological Perspectives in Medical Ethics* (Grand Rapids, MI: W.B. Eerdmans Publishing Co., 1987).
11. (1614) 77 ER 1389, 1389 (emphasis added).
12. Edward Coke, *Institutes of the Laws of England Part III* (London: Thames Baset, 1680) p. 110.
13. Ibid., p. 203.
14. Matthew Hale, *History of the Pleas of the Crown Vol. I* (London: Professional Books, 1971, reprint of 1736 edn) p. 515.
15. William Blackstone, *Commentaries on the Laws of England Vol. II* (New York: Garland, 1978, reprint of 9th edn, 1783) p. 429.
16. Ibid., *Vol. IV*, p. 235.
17. Russell Scott, *The Body as Property* (London: Allen Lane, 1981) p. 5.
18. Gittings, *Death, Burial and the Individual*, p. 74.
19. Scott, *The Body as Property,* p. 5.
20. Gittings, *Death, Burial and the Individual*, p. 74.
21. Scott, *The Body as Property,* p. 6.
22. (1788) 100 ER 394.
23. Ibid., 394.
24. Ibid., 395.
25. Ibid.
26. Scott, *The Body as Property*, p. 8.
27. Ibid.
28. Ibid., p. 11.
29. Ibid.
30. Ibid., p. 12.
31. (1840) 113 ER 1007 (emphasis added).
32. Ibid., 1009.
33. Ibid.
34. Ibid.
35. 14 Am Rep 667, 678 (1872).
36. *R* v *Price* (1884) 12 QBD 247, 253.
37. As the court observed in *Williams* v *Williams*, 'although there is no property in a dead body ... [the] executors have a right to the custody and possession of his body (although they have no property in it) until it is properly buried. It follows that a man cannot by will dispose of his dead body. If there be no property in a dead body it is impossible that by will or any other instrument the body can be disposed of': (1882) 20 Ch D 659, 665.
38. (1857) 26 LJMC 47.
39. Ibid., 48.
40. 14 Am Rep 667 (1872).
41. (1882) 20 Ch D 659.
42. Ibid., 663.
43. Ibid., 664.

44. Thus in the 1992 Australian decision of *Calma* v *Sesar* (1992) 106 FLR 446, in which a mother and father were in dispute over where their son should be buried, the Supreme Court of the Northern Territory declared that the parents had an equal right and duty to dispose of the body. However, the court stated that: 'It is clear that there is no property in a human corpse held for the purposes of burial. What the law recognises as incident to the duty to dispose of the body is the right to the possession of the body until it is disposed of' (at 450). Similarly, in the 1996 English decision of *Dobson* v *North Tyneside Health Authority* [1996] 4 All ER 474, which involved a dispute over the destruction of a brain, the court held that: 'Although there was no property in a corpse, unless it had undergone a process or other application of human skill, such as stuffing or embalming, the executors ... charged by law with the duty of interring the body had a right to its custody and possession until it was buried' (at 474).
45. Ian Kennedy, 'Negligence: Interference with Right to Possession of a Body: *Mackey* v *U.S.*', 3 *Medical Law Review* (1995) p. 233. Note that Australian courts have recently affirmed the American view. Thus, in the 1997 New South Wales Supreme Court decision of *Smith* v *Tamworth City Council* (unreported, NSW Supreme Court, 14 May 1997), the Court approved of the statement in the US case of *Polhemus* v *Daly* 296 SW 442, 444 (1927) that 'while there is no right of private property in a dead body in the ordinary sense of the word, it is regarded as property so far as to entitle the next of kin to legal protection from unnecessary disturbance and violation or invasion of its place of burial'. The court held that this states the law of New South Wales.
46. For American cases on buried corpses, see Paul Matthews, 'Whose Body? People as Property', *Current Legal Problems* (1993) pp. 201–2.
47. (1908) 6 CLR 406.
48. Ibid., 410–11.
49. Ibid., 411.
50. Ibid., 412.
51. Ibid.
52. Ibid., 414.
53. Ibid., 415.
54. Ibid., 416.
55. Ibid., 417.
56. See, for example, Lori Andrews, 'My Body My Property', 16(5) *Hastings Center Report* (1986) pp. 28–38; Roy Hardiman, 'Toward the Right of Commerciality: Recognising Property Rights in the Commercial Value of Human Tissue', 34 *UCLA Law Review* (1986) pp. 207–64; Michelle Bourianoff Bray, 'Personalizing Personalty: Toward a Property Right in Human Bodies', 69 *Texas Law Review* (1990) pp. 209–44; Courtney Campbell, 'Body, Self, and the Property Paradigm', 22(5) *Hastings Center Report* (1992) pp. 34–42; Roger Magnusson, 'The Recognition of Proprietary Rights in Human

Tissue in Common Law Jurisdictions', 18 *Melbourne University Law Review* (1992) pp. 601–29; Stephen Munzer, 'Kant and Property Rights in Body Parts', 6 *Canadian Journal of Law and Jurisprudence* (1993) pp. 319–41; Brian Hannemann, 'Body Parts and Property Rights: A New Commodity for the 1990s', 22 *Southwestern University Law Review* (1993) pp. 399–430; Paul Matthews, 'The Man of Property', 3 *Medical Law Review* (1995) pp. 251; Danielle Wagner, 'Property Rights in the Human Body: The Commercialisation of Organ Transplantation and Biotechnology', 33 *Duquesne Law Review* (1995) pp. 931–58.

57. In South Australia, there is a prohibition on trading in tissue contained within the Transplantation and Anatomy Act 1983. Section 35 says that 'a contract or arrangement under which a person agrees, for valuable consideration ... to the sale or supply of tissue from his body or from the body of another person, whether before or after his death ... is void'.
58. Roxanne Mykitiuk, 'Fragmenting the Body', 2 *Australian Feminist Law Journal* (1994) p. 77.
59. See discussion in Scott, *The Body as Property*, especially p. 183, and articles listed in note 57.
60. As Roxanne Mykitiuk has observed in another context: 'A basic problem with existing legal concepts is that they provide only two conceptual categories within which to examine human body fragments: either as persons or as property', 'Fragmenting the Body', p. 74.
61. Ludwig Wittgenstein, *Philosophical Investigations*, trans. G.E.M. Anscome, 3rd edn (Oxford: Blackwell, 1968).
62. *Moore* v *Regents of the University of California* 793 P2d 479, 489 (Cal. 1990) per Panelli J.
63. The practical effects of this apparent theoretical vacuum are remarkable. The corpse is in many important respects unregulated and unprotected. Corpses do not fall within the offences against the person or the offences against property. Nor are there many laws dedicated to their protection. For example, cannibalism and necrophilia are generally not crimes. And, as we have seen in the preceding legal history, judges have been scratching about for centuries to find a way of protecting the corpse from unwanted intervention. On cannibalism, see *R* v *Dudley and Stephens* (1884) 14 QBD 273; *R* v *Noboi Bosai* [1971] P&NGLR 271; Glanville Williams, 'A Commentary on *R* v *Dudley and Stephens*', 8 *Cambrian Law Review* (1977) pp. 94–9. On necrophilia, see Tyler Trent Ochoa and Christine Newman Jones, 'Defiling the Dead: Necrophilia and the Law', 18 *Whittier Law Review* (1997) pp. 539–78.
64. Among some legal writers on the body as property, there has been a considerable push for the idea that the body and its parts should be regarded as a property interest. See, for example, Tania Wells, 'The Implications of a Property Right in One's Body', 30 *Jurimetrics Journal* (1990) pp. 371–82.

65. Theorised most extensively by Immanuel Kant.
66. I should add that this is the ideal type of the legal person in that law still recognises the personhood of the irrational, for example, children and those with dementia. This does not detract from the fact that the paradigm legal person is still the 'man of reason'.
67. See, for example, many of the essays in Ngaire Naffine and Rosemary Owens (eds), *Sexing the Subject of Law* (North Ryde, NSW: LBC Information Services, 1997) and also Ngaire Naffine, *Law and the Sexes: Explorations in Feminist Jurisprudence* (Sydney: Allen & Unwin, 1990).
68. This bias has been slightly corrected in recent times. See for example, Roxanne Mykitiuk, 'Fragmenting the Body'; Pheng Cheah, David Fraser and Judith Grbich (eds), *Thinking Through the Body of the Law* (St Leonards, NSW: Allen & Unwin, 1990); Ngaire Naffine, 'The Body Bag' in Naffine and Owens (eds), *Sexing the Subject of Law*, pp. 79–93, and Rosemary Owens 'Working in the Sex Market' in Naffine and Owens (eds), *Sexing the Subject of Law*, pp. 119–46. In philosophy, more attention has been paid to the body by critical philosophers. See especially the work of Elizabeth Grosz and Moira Gatens.
69. Indeed one legal writer has suggested that the Western model for the body is the corpse: Drew Leder, *The Absent Body* (Chicago, IL: University of Chicago Press, 1990) p. 143.
70. So thorough has been this stripping of meaning that leading liberal legal philosophers such as Joel Feinberg maintain that once a person is dead, there is no subject, there is no one, nothing to harm at all, though one might be able to harm what he calls the ante-mortem person: Joel Feinberg, *The Moral Limits of the Criminal Law Vol. I: Harm to Others* (New York: Oxford University Press, 1984) pp. 79–95.
71. Indeed, the law can declare anything to be a legal person and so confer on it legal rights. See Alexander Nekam, *The Personality Conception of the Legal Entity* (Cambridge, MA: Harvard University Press, 1938).
72. Stephen Lammers and Allen Verhey (eds), *On Moral Medicine: Theological Perspectives in Medical Ethics* (Grand Rapids, MI: W.B. Erdmans Publishing Co., 1987).
73. Though this is not necessarily the case. The availability of organs for transplant may be best secured by our current view of the dead.

6
Bodily Remains in the Cemetery and the Burial Ground: A Comparative Anthropology of Law and Death *or* How Long Can I Stay?

Prue Vines

The question of how long bodily remains can stay undisturbed where they are buried, and how the burial site is treated, is determined in Australia by different sets of laws depending on whether people are buried in Aboriginal burial grounds or non-indigenous burial grounds.[1] An examination of the relevant laws and their construction of the meaning of 'bodily remains' indicates that there are profound cultural differences between indigenous (in particular, Aboriginal views) and non-indigenous views of bodily remains which are closely linked to views of death and spirituality, and in that context, time. The cultural conflict is clearly shown in the long history in Australia of interference with burial remains for the purposes of archaeology. In the legal context I consider three randomly chosen examples of attempts to deal with disinterment or disturbance of human remains which suggest that concern for the dead, their remains and the sites in which they have been buried is much greater among Aboriginal than non-Aboriginal people. The background to these concerns, and the legal consequences of those perceptions, will be explored in this chapter. In particular, this chapter shows how the law reflects cultural contingencies in our understandings of death. The burial ground, for Aboriginal people, is a site of incorporated memory which comes to exist in the land itself – that memory is communal rather than individual. But the recent common law has been incapable of seeing death as other than silence, or the land as more than a mere medium which fills – eventually completely – the absence of the individual.

One of the largest Aboriginal burial sites in New South Wales lies on Barkandji land at Lake Victoria.[2] Lake Victoria's water level is kept artificially high by the Murray Darling Basin Commission, covering a large number of burials and causing significant damage to the sites. The Barkandji people have campaigned to have the water level kept low.

They have three issues of concern in relation to the burial sites: the disinterring of bodies from graves, the sacred nature of the sites leading to concern about desecration and actual damage to the area itself.[3] They oppose the Murray Darling Basin Commission's application under the National Parks and Wildlife Act 1974 (NSW) for consent to destroy the graves.

In 1986 the Murray Downs Golf and Country club proposed developing a golf and country club. The site of the proposed club house was a sand dune where Aboriginal remains had been found in the past. Other burial sites existed on the land, and the evidence showed that Aborigines had lived there over some 30,000 years. The local community, the Wamba Wamba people, were extremely concerned about disturbance to the burial sites. In early 1988 during construction, human remains were found. They were collected and buried nearby. At one stage, human remains had been placed upon the surface of the fairways of the golf course and some were left on a spoil heap.

In 1989 the Minister administering the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 declined to make an emergency declaration of protection of the area under s 9 of the Act. The Wamba Wamba Local Aboriginal Land Council and the Murray River Regional Aboriginal Land Council lodged an application in the Federal Court for a declaration that the area is a significant Aboriginal area under serious and immediate threat of injury and desecration, and a further declaration that the Minister should make an order protecting it. Although Lockhart J noted that 'The undoubted historical significance and strength of Aboriginal tradition relating to land with which this case is concerned and land nearby raise questions of political sensitivity, high emotion and spiritual, as well as material, significance', he dismissed the application on the grounds that the Minister had exercised his discretion properly.[4]

In 1948, Camperdown Cemetery in Newtown, a suburb of Sydney, was converted to a park. Bodies of historical significance were moved into a smaller area which remained as a cemetery. The tombstones of other graves were moved into that area as well. The rest was left as it was, grassed over and is now a large park with a children's playground. The Newtown festival is held there each year. The relevant legislation there was the Camperdown Cemetery Act 1948 (NSW). Most of the remains stayed where they were, but there was significant disturbance and the sacred nature of the site appears to have been lost.

ARCHAEOLOGY AND ABORIGINAL REMAINS

There is a long history in Australia of interference with Aboriginal graves and the bodily remains in them on the basis that 'science'

requires it. I will here refer only to a few examples. Scientific pretensions were useful to European collectors – they were able to consider the collection of Aboriginal remains as responsible science rather than irresponsible desecration. Museums in Australia played a significant role in collecting remains of deceased indigenous people. From the late 1860s, there was particular interest in the idea of a Darwinian, survival of the fittest, ordering of races. A concerted programme of disinterring of Aboriginal remains was directed by museums such as the Australian Museum in Sydney.[5] Paul Turnbull points out that at the time, in the

> ... climate of debate stimulated by ideas of human evolution which, from the 1860's, seemed to many to imbue older concepts of racial difference with a new order of explanatory coherence and power ... by virtue of their geographical isolation and supposedly harsh material circumstances, Australian and Tasmanian Aborigines were viewed as arguably the world's most distinct and morphologically unsophisticated races of man ...[6]

The Museum Directors paid for bodies and indeed even directed collectors to take them from Aboriginal burial grounds. Thousands of Aborigines' remains were disinterred.[7]

One example is the Murray Black collection, a group of skeletons collected from burial sites along the Murray River by a person ironically named George Murray Black. He was engaged by Melbourne University and the Institute of Anatomy in Canberra to collect what became one of the largest collections of Aboriginal skeletons (or indigenous skeletons of any nation in the world).[8] This collection of over 1,600 skeletons included many of the bodies from the burial sites of the Barkandji people around Lake Victoria.[9] Most of these skeletons have now been returned and reburied.[10]

The views of the archaeologists were informed by the culture from which they came, which was not particularly concerned about the sacred nature of the long dead. In turn, the archaeological view came to have a profound influence on the development of the legislation designed to protect Aboriginal burial remains.

THE ENGLISH BACKGROUND TO THE LAW OF BODILY REMAINS

The English law, from which Australian common law derives, on the treatment of bodily remains was based on 'a prevailing belief in the existence of a strong tie between body and personality/soul for an undefined period after death'.[11] This derived from the belief in purgatory, a state or place where the dead (of uncertain goodness)

stayed until the prayers of the living assisted them into heaven. It was assumed that on the Day of Judgement the body would be resurrected whole. With the rise of Protestantism the buried body became less important. Prayers for the dead were no longer seen as protective of the dead, and, while not forbidden, gradually disappeared. At the same time, the link between Protestantism and individualism (a Protestant had a direct relationship with God) meant that society became increasingly secular.[12] The fact that England became a profoundly Protestant country, where there was an Established Church with political and legal ties to the State, was important for the way bodily remains were thought of, and in turn the way the law dealt with bodily remains. (Catholics continued to believe in purgatory and the connections with the dead but these views were less likely to be reflected in the law because Catholicism was peripheral to it.)

At common law, for a private individual (rather than a government body) to disinter or exhume a body was a misdemeanour.[13] In *Haynes's Case*, as far back as 1614,[14] the digging up of bodies was described as an 'inhuman and barbarous felony', but this view was very much focused on the newly dead. Churchyards were very crowded, and bodies were frequently disturbed accidentally while another was being buried. One English churchyard of less than 0.2 of a hectare had some 5,000 bodies buried in it between 1100 and 1900.[15] In such circumstances disturbance and disinterring of remains was an inevitable event for nearly everybody. The dead body, especially that of the long dead, seemed to lose its religious significance, although bodies of the newly dead retained their emotional significance to their relatives and friends.

Thus the fact that bodies were frequently disturbed or disinterred from cemeteries in England was accepted or ignored except where the bodies concerned were of the newly dead. There was great revulsion against the 'Resurrectionists' or body snatchers who specialised in stealing newly dead bodies for the purposes of dissection by the medical profession. The Anatomy Act of 1832 ended the trade in dead bodies, but it did this by making it easy for anatomists to obtain and use bodies of the poor.[16] At the same time, legal control of cemeteries moved from religious to secular authorities. The old cemeteries were church property. Modern cemeteries (from the eighteenth century) tended to be owned by secular bodies.[17]

By then it was clear that the law was not intrinsically concerned with the sacred nature of bodily remains, taking a highly secular view derived from the dominance of the living over the dead. This view accords with MacPherson's argument that the hallmark of Western political theory since the seventeenth century has been possessive individualism – with 'its conception of the individual as essentially the

proprietor of his own person or capacities ... the individual was seen neither as a moral whole, nor as part of a larger social whole, but as an owner of himself'.[18] For example, Locke's view of property held that land was only to be appropriated to the extent that labour had been mixed with it, and only so much as the owner could use it.[19] The usable nature of land was paramount – land was seen as a commodity, and the ownership of land was commodifiable.

AUSTRALIAN ATTITUDES

'Australia's earliest cemeteries were remarkable for three things: they were public; they were Anglican; and they were so quickly forgotten.'[20] The present Sydney Town Hall is set on top of a former cemetery. Another major cemetery, used between 1819 and 1868, is now the site of Central Railway Station in Sydney.

Australia is like other Western countries in its resistance to the concept of death and its desire to nullify it and pretend it doesn't happen.[21] Australians are relatively irreligious, and religion has a strong influence on ideas about death. If Australians *are* religious they are more likely to be Protestant Christians, than Catholic.[22] This religious viewpoint is less likely to result in concern about bodily remains than the Catholic one, although the Catholic Church has withdrawn its resistance to cremation. Modern cemeteries in Australia are run by secular organisations, and the modern cemetery looks as much like an ordinary lawn as possible. One reason for this is that '[o]ne of the very real problems associated with cemetery management is that after a few years the people most intimately concerned with a particular grave often cease to be interested in its preservation'.[23] In these cemeteries, the living have picnics whether remembering their dead or not – using the land for recreation rather than as a sacred place. Cremations have become the most common method of disposal of the body in Australia.[24] Thus concern for the bodily remains of people long dead is not a recognisable pattern in non-indigenous Australia.

CHARACTERISING THE RIGHT TO REMAIN ONCE BURIED

The burial of bodies is restricted in non-indigenous Australia by health regulations and cemeteries legislation.[25] Cemeteries in most Australian jurisdictions are governed by Local Government legislation[26] such as the Local Government (Control of Cemeteries) Act 1966 (NSW) which establishes local councils as controllers of public cemeteries, but each cemetery may also have legislation of its own.[27]

When people are buried they often have a contract giving them an 'exclusive right to burial' which is said to be a right 'in perpetuity'. The 'exclusive right' refers to the fact that the cemetery authority cannot bury anyone else in that same plot. If this is a right in perpetuity does this mean the body can never be disturbed? In *Gilbert* v *Buzzard*, an issue was whether the decomposition of the body ends the perpetual nature of the licence. Sir William Scott said:

> The process of nature will resolve [bodies] into an intimate mixture with their kindred earth, and will furnish a place of repose for other occupants of the grave in succession ... [T]he legal doctrine certainly, is, and remains, unaffected that the common cemetery is not *res unius aetatis*, the exclusive property of one generation now departed; but is likewise the common property of the living, and of generations yet unborn, and *subject only to temporary appropriation.* [emphasis added][28]

He was recognising the short-term nature of the law's consideration of the deceased. This doctrine of temporary appropriation has been rejected in the United States,[29] and the legislation of some Australian cemeteries expressly rejects it.[30] However, even where it exists, the doctrine of temporary appropriation is not a doctrine allowing disinterment of bodies, but is an expression of the ability of the cemetery authorities to bury another body in the same grave at a later date. Some cemeteries expressly reserve this period to 25 years or longer, while others (fewer as time passes) guarantee never to disturb the body.[31] The doctrine suggests a view of the burial ground which is highly commodified, and dependent on its usefulness.

Ordinarily, bodies can only be exhumed on the authority of a Coroner for the purposes of *post mortem* examination. It is an offence to disinter a body without such permission and an injunction may be granted to prevent it.[32] The various Cemeteries Acts reiterate this position.[33] However, although it is an offence for private individuals to interfere with dead bodies, there is clear recognition that public authorities can do so. For example, in New South Wales the Conversion of Cemeteries Act 1974,[34] as well as the specific legislation for each cemetery, controls changes to cemeteries and disinterment of bodies from cemeteries. Section 6 of the Act provides that Councils may resolve to convert a cemetery to a park. The Council is required to give notices in newspapers and to consider any objections. The Act then provides for the Council to apply to the Minister to have the cemetery declared a public park in the nature of a rest park (s 9). The Council is not to 'use the conversion land or permit it to be used for any other purpose' unless the Act allows it. The council should erect a memorial indicating 'the sacred nature of the area' (s 13(3)).

Monuments may be removed but remains are not to be disturbed, and require 'reverent reinterment' if they are. However, the 'sacred nature of the area' is clearly limited in scope, since the Act contemplates the use of the park by the general community. There is a strongly Lockean view of the land here – it is commodified and that commodification is for the benefit of the living users of the land.

Special legislation is almost always passed where disinterment is required.[35] In the case of the Camperdown Cemetery, the Camperdown Cemetery Act 1948 (NSW) was intended to, *inter alia*, 'authorise the removal of human remains, headstones, grave enclosures, and other surface structures from parts of the land; to provide for the reinterment of such remains ... to provide for the redesign and reconstruction of a cemetery area within part of the land'.

A register of the names of persons buried in the cemetery was to be kept available for inspection. A new cemetery area was to be created and in that section the remains and headstones of any person in a 'historic grave', or for whom a perpetual endowment had been paid, would be reinterred and the tombstone re-erected. All other headstones and structures were to be removed and disposed of. Some of these were placed around the wall of the new cemetery where they remain.

Section 4(7) of the Act provided that representatives of any of the deceased who had been buried less than twenty years before, or where the grave had received regular care during the previous five years, or substantial repairs during the previous ten years, could apply in writing within six months of the commencement of the Act to have the remains collected and moved for reburial within the cemetery. Representatives of the deceased could at their own expense remove the headstone and the remains for reinterment. The focus of the Act was on the relatively newly dead and their emotional significance to their relatives – once again a highly secular view based on the convenience of the living rather than the sacred nature of the dead. It was clearly envisaged that the remainder of the human remains would stay in the ground and the park's activities would go on above them. (By contrast, the Wamba Wamba were extremely disturbed at the prospect of the siting of the club house and the activities associated with it on top of their burial ground.)

A relatively low emphasis, then, is given by the common law and non-indigenous Australian society generally (as constructed by the law)[36] to the rights of the dead to stay where they have been buried without disturbance. In particular, the rights of the living are seen as predominant. It is also fairly clear that there is a relatively short period during which the law expects relatives of the deceased will see themselves as custodians of the dead, if at all. Thus, the greatest ire has been reserved for cases involving the newly dead. Within two or three

generations at the most, links seem to be lost. Many non-indigenous Australians would simply not know where relatives further generations removed are buried. The common law thus contemplates interference with dead bodies with relative equanimity. The reiterated refrain 'There is no property in a dead body'[37] suggested the sacred, and that the commodification of the body was repugnant, but in *Doodeward* v *Spence*, the majority of the court was prepared to hold that there was property in a dead body where work and skill had been expended on it,[38] a highly Lockean view. The common law is focused on the use of the land for a particular purpose – the interment of the newly dead. This is very much a view of the land as a commodity. The body disappears both legally and literally, and the land becomes usable again as a commodity. In another way the body is seen as a commodity as well: when it is no longer useful to the living personality it is simply to be discarded; there is little sense of a lingering link between body and soul which must be respected by the living. Death is the end. The individual becomes *absent.* Where the living may need the land for roads or accommodation this view is even stronger. Any notion of the land as enduring or immortal is based on its ability to be used and reused.

ABORIGINAL VIEWS

For non-indigenous people, some awareness of Aboriginal views can be garnered from looking at the cases where they have fought to protect burial sites, and how they have argued their case. For example, in the *Wamba Wamba* case, Lockhart J said:

> Aboriginal tradition requires that burial places remain peaceful and tranquil and must not be walked on or otherwise intruded upon by human beings. They are the places which Aboriginals believe are the place of the spirits waiting to be called back, and, if the spirits are disturbed, the Aboriginal people believe that they will suffer because of the failure to care for them. There is no doubt that the Aboriginal community are disturbed and distressed by the actions of the second respondent and will continue to be disturbed if the club house and bowling greens are constructed on their proposed sites even if the northern bowling green is moved to a different site or not constructed at all on any part of the land of the second respondent.[39]

There is thus no sense, as this view is characterised, that the dead must make way for the living, but rather, a strong sense of custodianship in the nature of a sacred trust. This does not seem to be related to the emotional significance of the newly dead, but goes well beyond

that to a strong sense of the deeply significant nature of the site and a need for it to remain undisturbed as a whole. History is read into the land as a communal story. The land itself has memory. It is not a commodity. Moving the bodies, as was done with Camperdown Cemetery, would be seen as desecration because it disturbs the bodies and the land, which have become fused.

Similarly in *Onus* v *Alcoa of Australia Ltd*, where the issue of the standing of the Aboriginal people to sue in relation to disturbance of their land was raised, Gibbs CJ said, 'The appellants claim not only that their relics have a cultural and spiritual significance, but that they are custodians of them according to the laws and customs of their people.'[40]

The relationship of Aboriginal people to the land is profoundly important, and is strongly linked to their view of human remains in burial sites, but eliciting this for legal purposes can be difficult. One difficulty with asking Aboriginal people to tell others how they see burial grounds (for example, in court), is that this information may be secret, and therefore it is inappropriate to talk about it to non-Aboriginal people: 'Aborigines, working under long inherited laws of protection through secrecy, prefer not to mention the existence of a sacred site, let alone its significance, until it is almost on the point of being destroyed ... [and] unless ... the release of that knowledge is perceived, ultimately, to be the only way to protect an area.'[41]

The question has to be asked, however, how much do we really need to know? We need to know that it is significant to the people concerned as a group; we of non-indigenous Australia do not need to know more than that in order to respect their concerns. There may be an evidentiary threshold of some kind, but this does not necessarily translate into a need to have all the details of the sacred nature of a site.

RESOLVING CONFLICTS WITH ARCHAEOLOGY

Recently, archaeologists and other scientists who study Aboriginal people have begun to accept that Aboriginal people themselves should decide where human remains are held.[42] They have moved towards a much greater level of consultation with Aboriginal people in relation to any archaeological work,[43] because of recognition of a continuous living tradition. There is a real debate about using the term 'prehistoric' in relation to Aboriginal matters, particularly as one definition of prehistoric means that any Aboriginal remains over 200 years old are regarded as prehistoric. Some archaeologists argue that no living people should have jurisdiction over fossil remains, although they are willing to accept their jurisdiction over recent remains.[44] This reflects the perception already noted that Westerners make a real distinction

between the newly dead and the long dead, which may not be reflected in the thinking of Aboriginal people. This conflict is highly significant because of the strong influence archaeology has had on the legislation governing Aboriginal burial sites.

LEGAL CONTROL OF ABORIGINAL BURIAL SITES

Most of the Australian jurisdictions now have some legislation concerning Aboriginal remains, which is generally defined as remains not buried in cemeteries where non-Aboriginals are buried. They define 'archaeological object' to include human remains.[45] The legislation generally provides for the protection of 'relics' or 'sites' at the discretion of the appropriate Minister. Protection of burial sites in most jurisdictions is therefore under the control of the Minister.[46] Property such as human remains and artefacts is defined as Crown property, and while some relics and human remains are being returned it is largely as a matter of grace and favour.[47] Indeed, in relation to the Western Australian Act, it has been held that the Act was passed not for the benefit of the Aboriginal community concerned, but for the whole (including the non-indigenous) community.[48]

The New South Wales legislation is illustrative. While the National Parks and Wildlife Act 1974 does seek to protect the remains or the site, it is clear that the determination of whether the site is significant is not to be made by Aboriginal people. The Minister has enormous discretion as to whether or not to declare a site significant. There is no direct mention of burial grounds, and bodily remains are defined quite separately from 'significant sites'. Aboriginal groups have made it clear that this legislation is not satisfactory.[49]

Where state legislation is not helpful, the Commonwealth legislation is intended to take over.[50] A major difference between the State and Territory legislation and that of the Commonwealth Aboriginal and Torres Strait Islander Heritage Protection Act 1984 is the specific bodily remains legislation in the latter, which requires persons who discover remains which they think are remains of an Aboriginal person to notify the Minister, giving particulars and their location. By section 20(2) the Minister, having received such a report, and being 'satisfied that the report relates to Aboriginal remains, ... shall take reasonable steps to consult with any Aboriginals that he considers may have an interest in the remains, with a view to determining the proper action to be taken in relation to the remains'. He or she may return them to Aboriginal people who are traditional custodians, deal with them 'in accordance with any reasonable directions of such traditional custodians, or, if there is no such Aboriginal person, the remains may be transferred to a prescribed authority for safekeeping'.[51]

Burial sites are protected separately as 'significant Aboriginal areas' which are defined in s 3 as areas 'of particular significance to Aboriginals in accordance with Aboriginal tradition', but it is the Minister who must be satisfied of this and that the area is 'under threat of injury or desecration' before he or she can issue a s 9 declaration for emergency protection , or a s 10 declaration which may be made after investigation.

The Act has recently been reviewed.[52] There have been 99 areas for which applications for protection were made, in 75 applications. Four declarations have been made under s 10, of which two were later overturned by the Federal Court. Only one site remains protected by a s 10 injunction, the other declaration having been revoked.[53] The profile of the typical case was noted as including the fact that 'the Minister declined to grant the application on the basis that the State or Territory government had handled the matter properly'.[54]

Criticisms of the Act are similar to those made of the state legislation. It does not take account of the secret nature of Aboriginal cultural knowledge. It does not take sufficient account of Aboriginal and Torres Strait Islander perceptions of significant sites, but still shows the marks of an archaeological focus, nor does it ensure that Aboriginal and Torres Strait Islander people will be consulted. On top of these problems the role of the Act as a last resort has led to complicated relationships between the State and Territory legislation and the Commonwealth legislation, which has not worked in favour of declaring protected sites.

The fundamental problem seems to be an inability to see the issue of significance as one which should be determined by Aboriginal people themselves. Evatt recommended that the issue of significance should be determined by an accredited agency of Aboriginal people. She noted the comment in the *Tasmanian Dams* case:

> The phrase 'particular significance' ... cannot be precisely defined. All that can be said is that the site must be of a significance which is neither minimal or ephemeral, and that the significance of the site may be found by the Aboriginal people in their history, in their religion or spiritual beliefs, or in their culture. A group of whatever size who, having a common Aboriginal biological history, find a site to be of that significance are the relevant people of the Aboriginal race for whom the law is made ...[55]

The question of whether the site has been injured or desecrated is similarly one which can only be answered by reference to Aboriginal people's views.

LAW, PERCEPTIONS OF MORTALITY AND THE FUTURE

When discussing the disinterment and disturbance of non-indigenous remains in cemeteries, there is some sense that the views of the people concerned and the relevant lawmakers are fairly consonant with each other. This is patently untrue with respect to the treatment of Aboriginal burial grounds. The weakness of the law lies in its cultural insensitivity in relation to a phenomenon which is necessarily profoundly cultural. This is a situation where the dominant culture has developed legislation ostensibly to protect the oppressed, but which still shows the imprint of the first people able to get government protection for such sites, the archaeologists.[56] This imprint implicitly denies Aboriginals any control over the process on the incorrect assumption that the culture relating to the burial grounds is dead.

Is a burial site forever? How is the relationship between the body and the land seen in Aboriginal and non-indigenous culture? The conflict between the Western views of land and Aboriginal views of land was at issue in *Milirrpum* v *Nabalco*,[57] and not until *Mabo No 2*[58] was a resolution found which could allow the common law to recognise a different way of conceiving of property in land. This different conception of land is at the heart of the issue about the meaning of burial grounds in Australia.

In *Gilbert* v *Buzzard*,[59] the land was viewed as a 'holding medium': once the body has decomposed it has *disappeared*, and the land is no longer a burial ground – it has lost that character. This is confirmed by the doctrine referred to by Griffiths CJ in *Doodeward* v *Spence*[60] when he said 'after burial a corpse forms part of the land in which it is buried and the right of possession goes with the land'. It can then be used again.[61] The individual is gone, in some fundamental way. The legal system can only conceive of death as personal silence or absence. The Aboriginal view of bodily remains and connections with them, in so far as it can be understood from these cases, has a very broad scope. The size of the family and the time frame are clearly much greater than in the Western tradition. The number of generations elapsed does not seem to alter the sacred nature of the site, which also seems not to depend on whether there are bones to be seen. The land itself appears to take on a sacred character, so that the body when decomposed would seem not to have 'disappeared' or 'evaporated' but to have 'merged' into the land, the land continuing to be the place of the dead who remain powerfully connected with it long past the time non-indigenous people would have forgotten. Thus, far from commodifying the land, and characterising it as useful or not useful, the land has memory and sacred character. These two approaches to the burial site are significant indicators of the approaches to mortality of

the two cultures. Indeed, they reveal a cultural contingency in our understandings of death.

The legal construction of non-indigenous bodily remains in Australia can be characterised as 'confined'. It is confined in terms of the size of the family (which kin are expected to be interested in bodily remains), and in terms of time-frame (for how many generations they will be interested). The body is defined as separate from the soil in which it is buried, and after decomposition seems to have legally and culturally 'disappeared'. The site of burial is then available to be used again. The legal construction is closely connected to the sociology of people's ideas about bodily remains generally. The dominant legal culture has also constructed a view of indigenous bodily remains, which is also confined because of the dominant legal culture's inability to recognise the different outlook of Aboriginal people. The dominant legal culture has exhibited a paralysis in relation to Aboriginal burial remains because of its inability to conceive of any other understandings of death besides that of silence or absence. The legal regime for Aboriginal burial sites does not bear the same connection to the Aboriginal views of bodily remains as it does to dominant non-indigenous views. It is therefore indefensible. It is time for a change.

NOTES

1. For convenience, I will refer to Aboriginal burial grounds as 'burial grounds' and non-indigenous burial grounds as 'cemeteries'. Burial grounds are regulated by the Cultural Heritage legislation referred to in notes 46–48; cemeteries are regulated by common law and the legislation referred to in notes 26–27.
2. C. Pardoe 'The cemetery as symbol: the distribution of prehistoric Aboriginal burial grounds in southeastern Australia', 23(1) *Archaeology in Oceania* (1988) p. 1. It is estimated that the number of burials there may be as many as 18,000 or more.
3. A. Chalk, 'Protecting burial sites', 72 *Aboriginal Law Bulletin* (1995) p. 34.
4. *Wamba Wamba Local Aboriginal Land Council and Murray River Regional Aboriginal Land Council* v *Minister Administering the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 and Murray Downs Golf and Country Club Ltd.* (1989) 23 FCR 239.
5. Turnbull, '"Ramsay's Regime": The Australian Museum and the Procurement of Aboriginal Bodies, c 1874–1900', 15(2) *Aboriginal History* (1991) p. 108.
6. Ibid., p. 110.
7. D. Monaghan, 'The Body Snatchers', *The Bulletin* (12 November 1991).

8. G. Wettenhall, 'The Murray Black collection goes home', *Australian Society* (December–January 1988/89) p. 19.
9. C. Pardoe in 'The cemetery as symbol', says about 570 skeletons from Lake Victoria were held in museums, p. 5.
10. G. Wettenhall 'The Murray Black collection goes home', *Australian Society* (December 1988–January 1989) p. 19. There were difficulties with this because the Murray Black collection was stored not in complete skeletons, but as collections of skulls, scapulae, tibia, etc.: Lori Richardson, 'The acquisition, storage and handling of Aboriginal skeletal remains in museums: an indigenous perspective' in R. Layton (ed.), *Conflict in the Archaeology of Living Traditions* (London: Routledge, 1989).
11. R. Richardson, *Death, Dissection and the Destitute* (London: Penguin, 1988) p. 7.
12. See R. Tawney, *Religion and the Rise of Capitalism* (Harmondsworth: Penguin, 1938); S. Ozment, *Protestants: the birth of a revolution* (London: HarperCollins, 1993).
13. *R* v *Lynn* (1788) TR 733; 100 ER 394; see also *R* v *Sharpe* 7 Cox CC 214; [1857] Deas & B 160; 169 ER 959; *Foster* v *Dodd* (1867) LR 3 QB 67; *Williams* v *Williams* [1882] (1882) 20 Ch D 659; *The Queen* v *Price* 12 QBD 247; *Beard* v *Baulkham Hills Shire Council* (1986) 7 NSWLR 273. For example, in *R* v *Lynn* the body was disinterred for the purposes of dissection.
14. (1614) 12 Co Rep 113; 77 ER 1389.
15. C. Gittings, *Death, Burial and the Individual in Early Modern England* (London: Croom Helm, 1984) p. 140.
16. Richardson, *Death, Dissection and the Destitute*, p. 271.
17. See S. French, 'The cemetery as a cultural institution' in D. Stannard (ed.), *Death in America* (Philadelphia: University of Pennsylvania Press, 1975).
18. C. B. MacPherson, *The Political Theory of Possessive Individualism; Hobbes to Locke* (Oxford: Oxford University Press, 1962), p. 3.
19. N. Laslett (ed.), *Locke's Two Treatises of Government,* 2nd edn (Cambridge: Cambridge University Press, 1962), *Second Treatise,* ss 32–5.
20. G. Griffin and D. Tobin, *In the midst of life ... the Australian Response to Death* (Melbourne: Melbourne University Press, 1982) p. 32.
21. P. Ariès points out in 'The reversal of death' in Stannard (ed.), *Death in America,* that children before the twentieth century knew very little about sex but a great deal about death, and today it is the other way around: 'It is not the children who are born in cabbages, but the dead who disappear among the flowers.'
22. For example, in the 1981 Australian Census 26 per cent of people recorded themselves as Catholic; 43 per cent recorded themselves as some form of Protestant denomination; 10.8 per cent said they had no religion and 10 per cent did not answer: Hans Mol, *The Faith of Australians* (Sydney: Allen & Unwin 1985) p. 6.
23. Griffin and Tobin, *In the midst of life*, p. 71.

24. The rate of cremations is much higher than the rate of burial, being, in the Sydney area, some 65 per cent of disposals of bodies: Rookwood Necropolis Joint Community of Necropolis Trustees Office, by telephone on 26 March 1997. The predominance of cremation may arise from various factors, one of which is the relative expense of cremation and burial. Burial in 1997 at Rookwood varied from $990 to $1350 while cremation cost $550. It should be noted that the disposal costs are only a small part of funeral costs.
25. In New South Wales, for example, the Public Health Regulations provide in s 34 that bodies may only be buried in public cemeteries or in a private cemetery or place approved by the local authority or on private land with an area greater than five hectares and the local authority has approved the location. Bodies may not be buried on land if that would 'make likely' the contamination of drinking water or domestic water supply. It is thus relatively rare for people to be buried outside public cemeteries.
26. ACT Cemeteries Act 1933; NT Cemeteries Act 1980; Qld Cemetery Act 1865; Vic Cemeteries Act 1958; SA Local Government Act 1934 Part XXX; Tas Local government Act 1962 ss 486A–527; WA Cemeteries Act 1986; Local Government Act 1960, s 269.
27. For example, in NSW the Necropolis Act 1901 (Rookwood), and in SA Enfield Cemetery Act 1944 and Klemzig Pioneer Cemetery (Vesting) Act 1983.
28. (1821) 3 Phill Ecc 335 at 357.
29. *Wilson* v *Read* 68 Atl 37, for example.
30. For example, NSW Necropolis Act 1901 s 24(3).
31. For example, the ACT Canberra Public Cemeteries Regulations r. 15A provide that the duration of exclusive rights in the Gungahlin cemetery is only 25 years. SA Enfield General Cemetery Act 1944 makes the period 99 years (each has a possibility of renewal for the same period).
32. ACT Coroners Act 1956; NT Coroners Act 1974; NSW Coroners Act 1980; Vic Coroners Act 1985; Qld Coroners Act 1958; TAS Local Government Act 1962 s 526; WA Coroners Act 1920; An injunction was granted in *Donaghy* v *Carroll* (1910) 11 SR (NSW) 9; see also *Beard* v *Baulkham Hills Shire Council* (1986) 7 NSWLR 273.
33. ACT Canberra Cemeteries Act 1933 s 16; SA Local Government (Cemetery) Regulations 1995 20; NSW Public Health Regulations 1991 r 36.
34. In the other jurisdictions the various Cemeteries legislations apply. See note 26.
35. For example, NSW St George Church of England Cemetery Act 1961; Botany Methodist Church Cemetery Act 1924 and many others. Another example is that in Queensland, when the Paddington Cemeteries Act of 1911 provided for 'The Resumption of Certain Disused cemeteries at Paddington, near Brisbane, and for the Conversion of the same to other Public Uses'.

36. Australia's multiculturalism means that there will be many non-indigenous people for whom this characterisation of their views of the dead is wrong. However, the law shows a particular construction of the dominant views of society and I assume this view to be the dominant social view.
37. For example, *Doodeward* v *Spence* (1908) 6 CLR 406 per Higgins J at 418–419, but there is some doubt as to the origin of this rule and it has been convincingly argued by P. Mathews in 'Whose body? People as Property' (1983) CLP 193 that the suggested sources of the rule were all *obiter dicta*. See also R. Magnusson, 'The Recognition of Proprietary Rights in Human Tissue in Common Law Jurisdictions', 18 *Monash University Law Review (MULR)* (1992) p. 601; D. Mortimer, 'Proprietary Rights in Body Parts', 19(2) *MULR* (1993) p. 217.
38. *Doodeward* v *Spence* (1908) 6 CLR 406 per Griffith CJ at 414, Higgins J at 422 – but note, this was not the majority for the decision in the case.
39. (1989) 23 FCR 239.
40. (1981) 149 CLR 27.
41. H. Wootten, *Significant Aboriginal Sites in Area of proposed Junction Waterhole Dam, Alice Springs* (Report to Minister for Aboriginal Affairs under s 10(4) of the Aboriginal And Torres Strait Islander Heritage Protection Act 1984), May 1992, p. 31, quoted in R. Goldflam, 'Between a Rock and a Hard Place: the failure of Commonwealth Sacred Sites Protection Legislation', 74(3) *Aboriginal Law Bulletin* (1995) p. 13.
42. C. Pardoe, 'Sharing the past: Aboriginal influence on archaeological practice: a case study from NSW', 14(1–2) *Aboriginal History* (1990) p. 208, footnote at p. 222.
43. See, for example, P. Veth, 'Archaeological ethics in WA: the formalisation of Aboriginal consultation', (1) *Australian Aboriginal Studies* (1991) p. 63; and see generally, Layton (ed.) *Conflict in the Archaeology of Living Traditions*.
44. See Layton (ed.), *Conflict in the Archaeology of Living Traditions*.
45. NSW St George Church of England Cemetery Act 1961; Botany Methodist Church Cemetery Act 1924 and many others. Another example is that in Queensland, Paddington Cemeteries Act of 1911 s 4.
46. See Cth Aboriginal and Torres Strait Islander Heritage Protection Act 1984, s 21E; NT Heritage Conservation Act 1991 s 4 (archaeological place, ss 33, 39 (protection); NSW National Parks and Wildlife Act 1974 s 84 (Minister may declare site to be an Aboriginal place), s 90 (protection), ss 62–4 (mining), ss 65–6 (protected archaeological areas); Qld Cultural Record (Landscapes Queensland and Queensland Estate) Act 1987, s 33; SA Aboriginal Heritage Act 1988 Dev 2 (Protection of Aboriginal sites, objects and remains); Tas Aboriginal Relics Act 1975, s 7; WA Aboriginal Heritage Act 1972, s 15; Vic Mineral Resources Development Act 1990 (Aboriginal

place as defined in Cth Act above, restrictions on miners in relation to Aboriginal places ss, 45(xii), 46, 58); Vic Archaeological and Aboriginal Relics Preservation Act 1972, ss 15–19.

47. Tasmania's Museums (Aboriginal Remains) Act 1984 provides that Aboriginal remains become the property of the Crown, but that the Minister is to notify elders of the Aboriginal community, and the property shall vest in them. See also K. Auty, 'Aboriginal Cultural Heritage: Tasmania and La Trobe University', 76(3) *Aboriginal Law Bulletin* (1995) p. 20.
48. *WA* v *Bropho* (1991) 5 WAR 75 .
49. See E. Evatt, *Review of the Aboriginal and Torres Strait Islander Heritage Act 1984,* 21 June 1996, chapter 5, and H. Fourmile, 'The Queensland Heritage Act 1992 and the Cultural Record (Landscapes Qld and Qld Estate) Act 1987 (Qld): Legislative Discrimination in the Protection of Indigenous Cultural Heritage', 1 *Australian Indigenous Law Reporter* (1996) p. 507.
50. *Tickner* v *Bropho* (1993) 114 ALR 409 per French J at 446.
51. Cth Aboriginal and Torres Strait Islander Heritage Protection Act 1984, s 21.
52. Evatt, *Review.*
53. Ibid., 2.
54. Ibid., 2.19.
55. *Commonwealth* v *Tasmania* (1983) 57 ALJR 450 per Brennan J (as he then was), at 539, quoted in Evatt, *Review* at 8.6.
56. As discussed in the US context by James Riding In, 'Without ethics and morality: a historical overview of Imperial Archaeology and American Indians', 24(1) *Arizona State Law Journal* (1992) p. 11 at 14.
57. (1971) 17 FLR 141 where Blackburn J felt constrained to hold that Aboriginal people's relationships with land could not be regarded as proprietary and rejected their claim against Nabalco.
58. (1992) 175 CLR 1.
59. (1821) 3 Phill Ecc 352.
60. (1908) 6 CLR 406 at 412.
61. This is a way to characterise our use of wills as well – they allow the continuing circulation or use of property rather than the enshrinement of it as a memorial *per se*.

7
Did He Fall or Was He Pushed?: Inquiring into Pitjantjatjara Deaths

Jon Willis

On the morning after New Year's Day 1995 I was woken at around nine o'clock by two police officers from the township 30 kilometres away, who had come to inform me officially, as Liaison Officer for the remote Northern Territory Aboriginal village in which I lived and worked, that one of the young men from the village had been killed in a road accident the evening before.[1] It seemed that Jackson Craig had somehow fallen from a moving car, sustaining head injuries which killed him instantly. I pulled on some clothes and drove with them around to the house where Jackson had lived with his wife, Lisa, and his two children and parents-in-law. It was immediately clear that his family were already aware of his death, and had already begun the conventional display of grief that precedes the long series of funeral rites that accompanies any Pitjantjatjara death.

I shook hands sombrely with Jackson's father-in-law and mother-in-law, Willy and Rene, and gave his widow, Lisa, a long hug while we both cried quietly, a response to our shared feelings both appropriate and conventional. As I went to leave, Lisa's demeanor shifted from the conventional display of grief, and she grabbed me urgently by the arm. 'He didn't jump out of that car. They pushed him out. They killed him. Tell those policemen.' She began sobbing in earnest, and her mother took her broken-hearted daughter back inside. Willy, who had heard this outburst, said to me quietly that I should ignore her, that she didn't know what she was saying, and in any case, it was men's business, not something for the police: '*Pulitjaman tjuṯa, tjana tjitji. Watiku nyangatja.*' – Police men are all (ritual) children. This is for (initiated) men.

Over the course of the next few days, two competing explanations of Jackson's death began to coalesce in the village. One version, the result of inquiries by the police acting as agents for the Northern Territory Coroner, was pieced together from the testimony of eye-witnesses to the death and the events that immediately preceded it. The police inquiry was mediated by the investigating officers' difficulties with Pitjantjatjara language and translation, but more

importantly by what they were able to view as evidence, by who they were able to interview as witnesses, and ultimately by a procedure and logic of inquiry driven almost entirely by the need to establish, in a narrow chronological sense, a sequence of events. In the resulting narrative, straightforward and lacking in any sense of tragedy, Jackson's death was a stupid accident brought on by excessive drinking and his own reckless leap from a moving vehicle. In its stark way, it subtly confirmed and was legitimated by a certain hard-edged Territorian view of Aborigines as irresponsible drunkards, and a certain institutional indifference to the contribution made by Jackson's death to the horrifying mortality statistics of young Aboriginal men in Australia.

The second version, publicly promoted by his distraught wife with increasing clarity and vigour as the week progressed, was that Jackson had been set up, deliberately lured into a state of drunkenness in which he could be easily murdered with an iron bar, then thrown from the moving vehicle. It was a revenge killing. This version, a form of ritual inquest, was based on a much more meticulous marshalling of evidence, although the nature of what constituted evidence, and its interpretation, were subject to a clearly different procedural logic. There was no comparably chronological version of the events immediately surrounding Jackson's death, however, and in important ways it rejected those proximate circumstances as virtually irrelevant in a rich and extensive matrix of events, relationships, cultural practices and geography.

In this chapter, I expose the culturally divergent institutions and procedural logics at work in the parallel inquiries into Jackson Craig's death. In particular, I examine how the structure of both coronial and ritual inquest, although quite different, are organised around points of functional similarity which can be used as the basis of a comparison. Both inquiries, for example, are interested in answering the 'interrogative pronouns' – the who, what, how, where and when of the death. At the same time, numerous factors – the personnel who organise the inquiries, the way that death is understood, the manner in which the inquiries are conducted, what can or must be viewed as evidence – ensure that what each inquiry can view as truth and evidence, and the interpretation made of these facts, are widely divergent. In examining the way that each inquiry marshals its evidence, interrogates its witnesses, and works to create its interpretation of what really happened, I shed light on how our culture's perceptions of death's effect on the relationship between our individual bodies and the social body, is reflected in and determines the manner in which our legal structures deal with death.

DEATH AND THE POLICE

The limitations of the police version of events derive directly from pivotal aspects of police methods for establishing truth, including the questions that police are empowered to ask in relation to an unexpected death, and their reliance on eye-witness accounts. In cases involving evidence from Aboriginal people, conventional modes of interaction between Aborigines and police also come into play such that parts of Aboriginal testimony may either be withheld from police, or alternatively may be dismissed as irrelevant or tangential to the narrative that police are constructing in their investigation.

In framing inquiries into unexpected deaths in the Northern Territory (as in other parts of Australia), the police act as agents for the Coroner, theoretically subject to his/her direction and supervision. To a large extent, therefore, the nature of their investigation is framed by the way in which the coronial function has historically evolved. The coronial role is a relatively ancient one in legal systems which stem from the British legal tradition. Although there is some historical evidence that the English king granted the office of Coroner to a nobleman as long ago as 925, the establishment of a permanent role of 'coronator' or coroner occurred in 1194, when Hubert Walter, the Archbishop of Canterbury and Chief Justiciar, directed that the freeholders in each county elect three knights and a clerk to be 'keepers of the pleas of the Crown ... *custodes placitorum coronae'*, assisted by a jury of 'knowledgeable men of the neighbourhood'.[2] From the beginning, the main purpose of the Coroner's Court has been the initial examination of the circumstances of particularly serious criminal matters, and hence the Coroner has typically acted as an investigating judge assisted by a jury. The coroner and jury are first required to investigate the identity of the deceased and the place of death. The Coroner then puts questions to the jury aimed at discovering the circumstances and details of the death, aimed particularly at determining whether the death had been caused feloniously (that is, by homicide or suicide), by misadventure, or naturally.[3]

As time progressed, the constitution of the Coroner's Court has evolved. The Coroner shifted from being an elected official to being an appointed officer of the Court. The evidence previously provided by a jury of 'knowledgeable men from the neighbourhood' has been largely superseded by a police investigation, and the Coroner now has the discretion to hold an inquest with or without a jury. Hence the Coroner is 'no longer the ring-keeper but him or herself the tribunal of fact, *as well as* the orchestrator of investigation and assembler of information'.[4] In Australia, the Coroner has also generally been able to exercise considerable discretion over whether to hold a public inquest at all, or to complete the inquiry without a public hearing.[5]

In practice, this has meant that a Coroner could make a finding on the basis of the police and medical reports alone, a practice which has its advantages in more remote jurisdictions. Recent years have seen a consolidation of coronial jurisdictions, which in Australia has meant a move from City or District Coroners towards the establishment of permanent State Coroners, who act as 'investigator, an invigilator of public safety, a vocal contributor to debates on public policy, and a figure of importance in times of trauma and disaster'.[6] Again this move has placed a considerable degree of importance on local police as key informants, whose report could form the basis for a decision on whether or not to hold an inquest.

At the same time, the role of the Coroner's Court has gradually come to focus on the investigation of deaths, to the exclusion of other kinds of crime. This focus stems from the first substantive regulation of coronial practice in 1887, when the British Parliament passed the first Coroner's Act. This legislation required that when there was reasonable cause to suspect that a person had died under apparently violent or unnatural circumstances, had died suddenly, or died in prison, then the coroner in whose jurisdiction the dead body was found was to be informed, and an inquest held into the death. The task of informing the Coroner was regulated under the Births and Deaths Registration Act 1836 and later legislation, so that

> ... by 1874 registered medical practitioners who had attended a patient in the last illness were required to deliver a statement to the Registrar of Deaths setting out the cause of death unless it was known that an inquest was to be held. In 1885 Registrars were required to refer to the coroner any deaths which arose from violence or were suspicious, or which were 'sudden', or where the cause was described as 'unknown.'[7]

Despite the changes over time, the Coroner remains charged with the task of establishing the identity of the deceased person, the time and place of their death, and the manner and cause of their death – answering the interrogative pronouns (who, when, where, how and why).[8] However, as Waller has noted,[9] there has been a change in the focus of coronial inquiries, particularly with the increasing consolidation of the Coroner's jurisdiction, and the increasing number of cases being directed to centralised Coroners' attention – in 1981, 2,697 deaths were reported to the Sydney City Coroner alone.[10] Coroners are increasingly being charged with the task of mainly exercising their powers for the benefit of a public whose safety or health may be endangered by the circumstances leading to specific deaths under investigation, or where the public imagination has been exercised by

the death, either because of the identity of the deceased, or the media attention drawn to the circumstances of death.

In real terms, this means that where the 'interrogative pronouns' can be answered in a conclusive way by the police and medical reports, and where no particular public interest is served by a public inquiry, there is little compulsion to hold an inquest. Bray suggests that in NSW, eighty per cent of Coronial cases are concluded by 'reviewing the papers and dispensing with an Inquest'.[11] It can be concluded then that there is some administrative benefit to be derived from uncontroversial findings from the police and medical reports.

The streamlining of the Coroner's role is assisted by the standardisation through precedent of the verdicts as to cause of death available to him or her, particularly since the British publication of the Coroner's Rules, which subtend the Coroner's Act. In the most recent version of these Rules, possible findings include: natural causes, industrial disease, dependence on drugs/non-dependent abuse of drugs, want of attention at birth, suicide (whilst the balance of mind disturbed), attempted/self-induced abortion, accident/misadventure, execution of sentence of death, killed lawfully, open verdict, killed unlawfully (murder, manslaughter, infanticide), and still birth. In the case of the first four of these verdicts, but in no other, the Coroner may also find, where appropriate that the cause of death was aggravated by lack of care or by self-neglect. It should be noted that 'where the Coroner's Act speaks of the cause of death it means the real cause of death; namely, the disease, injury or complication, not the mode of dying'.[12] In relation to the verdict of lack of care, it is usually only considered appropriate in cases where the physical condition of the deceased caused the death, and is not used to indicate a breach of duty by some other person. It usually indicated that some other person had a real opportunity of rendering care (in the narrow sense of that word) which would have effectively prevented the death.

There can be little doubt that police investigations on behalf of the Coroner are guided by the kinds of verdict that are available to the Coroner, such that a police report on the circumstances of death which allows the Coroner to reach a conclusive verdict is likely to be the most administratively efficient. Police investigation is guided by Occam's Razor, and seeks to establish the simplest interpretation of the death consistent with the 'facts' which is explicitly conducive to one of the available Coronial verdicts. In each case, the possible verdicts which are applicable to the 'facts' form a hierarchy from the least complicated to the most complicated. In general terms, the degree of complication will be a factor of the number of outside circumstances or persons other than the deceased whose actions have some material bearing on the manner and cause of death. In establishing the events surrounding the death as 'facts', the police are guided by two

principles: to find a simple correspondence between the statements of eye-witnesses and the material evidence; and to demonstrate that the 'facts' so constituted are consistent with the least complicated possible verdict, with the least desirable outcome always being an open verdict. Their task is assisted or hindered by two factors: the degree of consistency between statements by witnesses; and the degree of consistency between the statements of witnesses and the physical evidence constituted by the condition of the deceased body, and the location where the deceased has been found. The police role, to a degree, is to reduce contradictions and complications, not to search for them. The extent to which the statements of eye-witnesses are consistent with each other and with the physical evidence provides a logical limit to the extent of police inquiries, particularly in cases which are, in the public sense described above, uncontroversial.

It is unsurprising to find that the police acting on behalf of the Coroner seek to specifically limit the role of family members of the deceased, in light of their capacity to bring to the investigating officers' attention all manner of potentially complicating contextual detail of no particular relevance to their investigation. Bray offers six possible roles for family members in a Coronial investigation: the finder of the body, reporter to the police, last to see the dead person alive, identifier, next of kin, and the person making funeral arrangements.[13] There is little necessity for the views of others to be sought as a routine part of the investigation. Under the coronial system, family members are deliberately marginalised, except to the extent that they are material witnesses, or members of an interested public. The exception is when, due to inconsistencies arising between the statements of eye-witnesses or with the material evidence, the police are forced to consider interpretations leading to more complex verdicts, and need to construct a version of events which takes into account a broader social and chronological context than the proximate events.

In the police version, Jackson had been drinking with Ron Mason, Patrick Gardener, Jason Bates and Willy Balza at Mulga Bore, a roadhouse approximately 90 kilometres from the village, on New Year's Day. There they remained until closing time, approximately 5.30 p.m. They came back towards the village in Patrick Gardener's car, stopping at some point to drink some takeaway alcohol that they had brought from Mulga Bore when they left. They arrived back in the village at about 7 p.m., stopping outside the house of a village employee, who confirmed in a statement that Jackson was part of a noisy drunken group sitting down on the ground outside his yard, a group which also included the other four men who had just returned from their New Year's Day trip to Mulga Bore. Jackson got back into the car with Ron and Patrick, who was intent on driving to another village about 250 kilometres west. They left Jason and Willy behind.

Jackson had died soon after the car left the village. According to Ron's testimony, given in a statement the next morning, Jackson had decided that he didn't want to go and asked to be taken back to the village. When Patrick refused to turn around, Jackson had opened the door of the car, threatening to jump out. Patrick had not taken him seriously, and continued to drive. Jackson was fairly drunk and fell out the door of the moving vehicle, less than two kilometres by road from the village. Ron told Patrick that Jackson had fallen out and asked him to stop, but Patrick refused to stop, for reasons that remain unclear. Ron continued to plead with Patrick to go back until they reached a roadside rest area some eleven kilometres from the village, where he finally convinced Patrick to let him out of the car. Patrick continued driving to Painter Creek, and was later charged *in absentia* with leaving the scene of an accident. He missed a scheduled court appearance some months later, and, consistent with the exigencies of remote area policing, still has a warrant out for his arrest. A tourist found Jackson's body lying on the road, and contacted the police. The police responded quickly, and by 8 p.m. had confirmed that Jackson was dead.

The police investigation proceeded in a relatively uncomplicated fashion. They were quickly able to establish, with assistance from village residents gathered at Jackson's house, that he had been drinking without incident all afternoon, and had gone off with Patrick and Ron of his own free will, albeit very drunk. On their return to the police station after attending the scene of the 'accident', they discovered Ron at the side of the road, drunk and agitated, and took him into protective custody. With the assistance of another village employee as interpreter, they took a statement from him as eye-witness to the 'accident'. They established in a routine and informal way from their own records and from village employees that there had been no prior incidents indicating animosity between Jackson, Ron or Patrick, and their own prior experience with Jackson confirmed their belief that he was entirely capable of acting irrationally while drunk. The post mortem examination confirmed that Jackson had died from traumatic injuries to the head consistent with falling from a moving vehicle. They were unable to contact Patrick to confirm Ron's version of events in the car, but there was sufficient consistency between his statement, statements from other witnesses, their prior knowledge of the deceased, and the apparent circumstances of death for them to conclude that Jackson had indeed died by accident. Although during the week following his death, his wife attended the police station to present her view that he had been murdered in retaliation for the 'accidental' death of Ron's nephew some months earlier, there was no apparent connection between Jackson and the earlier death that could be legitimately viewed as a motive. Her insistence that the post mortem

should look for evidence that he was knocked unconscious or beaten to death before being pushed from the car was heard with some sympathy for a grieving widow who had come a little unhinged, but little sincere conviction. She was not a material witness, and her testimony would introduce complications where none were warranted. The police declined to take a statement from her.

DEATH AND THE PITJANTJATJARA

Lisa's conviction that Jackson had been murdered was founded on the fact that Pitjantjatjara people do not believe in accidental death, or at least in the type of accident where somebody can cause their own death solely through negligence or stupidity. Pitjantjatjara people, who call themselves *A<u>n</u>angu*, indeed do not believe that any early or unexpected death, whether caused by a medical condition, by human agency, or by fate, could be classified as anything but unnatural, which implies in every such case that human agency is involved. For *A<u>n</u>angu* then, the verdicts available in the case of an unexpected death amount to two basic possibilities: unintentional homicide (that is, manslaughter) and intentional homicide (that is, murder). This view is predicated on a notion of life and death as transformations of a single existence, where the moment of death is part of a smooth and long process of transition from one state (*uti* – meaning clear or apparent) to another (*wiyaringu* – meaning finished, or simply, not).

As with other relationships and processes throughout life, the model for a proper death comes from the way that ancestral beings (*tjukuritja*) finished their visible existence in the material world during the creation period (*Tjukurpa*). *A<u>n</u>angu* believe that each of them shares spiritual and physical identity with these ancestral beings through the medium of land/earth, as a manifestation of the ancestral being responsible for the creation of their birthplace. When people come into being, their substance and spirit grow out of the *ku<u>r</u>anitja* (essence, life force) of ancestral beings left behind at sites throughout the landscape. *Ku<u>r</u>anitja* provides the substance for human growth, and humans become consubstantial with the ancestral beings whose essence is embodied in conception, birth and living.[14]

At the end of their creation period journeys, ancestors typically changed from a mobile being into a permanent feature of the country through a transformation with the specific name *purkaringanyi*, a word meaning both to cool down, and in the case of ancestral beings, to exhaust themselves and pass out of subjective existence.[15] For human as for ancestral subjects, death is meant to be an exhausted passing out of existence, and represents only the end of subjectivity rather than the end of existence. It is the reverse process to conception/birth: the

transformation of subjectified human into objectified essence.[16] Normal death for human subjects comes at the end of a visible and tangible period of slowing down, either through ageing or long-term illness, where the relationship between a person and the material world is being renegotiated. A sudden death denies this transition period, and a person is forced to move from one state to the other without the physical preparation required. Such a person's state may be spoken of in much harsher language than for a normal death – they are *iluntaṉu*, meaning 'rendered dead', or perhaps, 'murdered'.

Once dead, human subjects return to the ancestral essence from which they were composed since conception, with the transformation of human substance into ancestral *kuṟanitja* managed through a two-stage burial process, the responsibility for which is taken by close relatives or the same moiety including siblings, affine kin of the same generation, and fictive relations from the same moiety, especially *marutju* (brothers-in-law). The death is frequently accompanied by a conventionalised grief display, which includes a number of elements: ululating wails from women and ostentatious sobbing from men, close-cropping of hair by immediate relatives, ritualised (often with savage abandonment) beating of those deemed immediately responsible for the death, and frequently self-injury by close relatives who might wound themselves on the upper arms with knives (termed 'sorry cuts'), or beat their own heads with rocks until blood flows. While much of this display seems quite stylised (though extreme) to the detached observer, the grief at any death is none the less keenly felt, particularly when the death is unexpected. The deceased is usually buried as soon as possible after death at the culmination of a series of mortuary rituals conducted by a large group of gathered relations, known in many parts of Central Australia as a 'sorry camp'.

On burial, a deceased person becomes *kuṟanitja*, embedded in the land at the burial site. This transformation is an uneasy one, as the *kuṟanitja* appears to retain a rapidly attenuating, but depersonalised attachment to the human life it formerly composed, again particularly when the death is unexpected. As a consequence, relatives act to ensure that reminders of that human life are removed: the deceased's clothes and bedding are burnt; the house in which he/she lived is abandoned for a number of years or swapped with another family; the deceased's name, and words that resemble it, pass out of public circulation for a period of time, and photographic images of the deceased are destroyed or hidden. In the case of an unexpected death, part of the responsibility of kin is to resolve any questions arising out of the circumstances surrounding the death, for the unresolved questions can provide a link to subjectivity that prevents a deceased

person from returning to the land. In such cases, an equivalent procedure to that of the coroner comes into play.

Ritual Inquest: The Aboriginal Coronial Method

The report of the Royal Commission into Aboriginal Deaths in Custody identified that in most Aboriginal groups in Australia some process of inquiry into unexpected death is instituted to explain and apportion blame for the death.[17] Even where death may be attributed to the immediate effect of malevolent spirits, sorcerers or magic, the object of the inquiry is always to identify a person who is responsible for launching the magical attack. The mourning period, including the 'sorry camp' and the funeral, are the time when deliberations are made as to responsibility for the death, including making decisions 'as to who is considered to have breached their duties and contributed to the death'. The anthropologist Gertrude Stotz, who carried out consultations for the Royal Commission among the Warlpiri neighbours of the Pitjantjatjara, explained the process in the following way:

> The ritual inquest into the circumstances of death is part of a 'sorry camp's' ritual structure to establish the social cause of death which will in time lead to the self incrimination of a person. While the ritual denies the physio-mechanical causality of death from sickness, injury or homicide, even suicide, it does not necessarily exclude them either, for behind each of these causes are social causes.[18]

Such social causes may include breaches in duty of care, calculated according to local understandings of kinship responsibilities – for example, failing to intervene effectively to limit a brother's or spouse's dangerous drinking may be viewed as contributing to his death from alcoholism or alcohol-related violence. As one of Stotz's informants from Marla Marla outstation stated, the inquest 'goes back from when it started trouble'. Hence questions might include: '"How many was with him? If I die and someone been drinking with me they go back to when first time I started making (and getting) trouble ... they pick on him." His deceased oldest brother's latest wife was beaten up badly by his mother for "not looking after him properly." However "eventually somebody will talk and then we know" who killed him.'[19]

According to Stotz's informants, the role of eye-witnesses in Aboriginal inquests is to provide an account of the circumstances surrounding the time of death, not for the purpose of establishing cause of death necessarily, but rather to inform an investigation by relevant kin into the personal circumstances of the deceased in order to identify a broader social cause of death. Proximate and social causes may conflict, leading to competing hypotheses that must be resolved in order to attribute blame (and punishment) for the death.

Reid and Mununggurr describe one such conflict in relation to a death in Maningrida:

> [People] were unable to decide between two competing hypotheses about the cause of death. One, advanced by many people, was that the deceased had been a victim of sorcery worked by strangers from other Aboriginal settlements who also drank at the 'pub'. The other, offered predominantly by medical and mission staff, was that he died as a result of excessive drinking over a period of years ... [Any] medical information provided by doctors or nurses would be relevant to the inquiries of relatives into the cause of death. Such knowledge is important both to those responsible for avenging a death caused by sorcery (that is, a murder) and to those who are responsible for keeping the peace by controlling the responses of those obliged to act when blame is apportioned.[20]

It is clear from this account that many different people could serve as witnesses in a ritual inquest, including those whose testimony relates only very peripherally to the proximate circumstances of death. Basil Sansom has examined in some detail the processes used by Aboriginal town campers in Darwin to establish the 'facts' of a death.[21] In Sansom's view, 'the "facts" of the death ... were not mere evidence. They were presented so that, of themselves, they pointed directly to conclusions. The reasons and causes were put into the facts themselves.'[22] Giving these 'facts' the shape of self-evidence required days of private work for close relatives of the deceased, who served as the main witnesses of the truth of the death. This truth was composed not merely of an orderly account of the circumstances of the death, as in the coronial inquiry, but also an examination of reasons, causes and culpabilities. In Sansom's example, a lot of people were blamed – 'candidature for blame is open because people are blamed in fine detail. There is a listing of "wrong things" and one exhausts the catalogue of the camp's membership to establish culpability or immunities.'[23]

In the case of Jackson's death, the primary responsibility for witnessing to the truth of the death fell to his widow. As in the examples cited above, there were competing versions of the 'facts' to be adjudicated, alternative hypotheses about proximate causality to be resolved (accident versus murder), and an elaborate web of reasons, causes and culpabilities to be explored publically. In a sense, the ritual inquest was as concerned with the 'interrogative pronouns' as the police inquiry, but the scope of the questions, as well as what constituted a valid answer, were quite different. The 'who' question was unconcerned with naming the deceased – indeed, in accordance with Pitjantjatjara practice, the deceased was no longer named. This

part of the ritual inquest was rather concerned with establishing the social identity of the deceased: as a member of a moiety for the purposes of determining responsibility for the management of mortuary ritual; as a member of a patrilineage whose other members shared an interest in avenging the death, and in relation to the men who shared his final hours. The 'who' and the 'why' questions were viewed as intimately linked. Why were those men drinking with him? What interest did they have in seeing him dead? What responsibility or 'duty of care' did they have, in kinship terms, for ensuring his safety?

This part of the inquiry centred on two main social facts. First, Jackson's patrilineage had been implicated in the death of Albert Moses, another young man from the village some months earlier. In this case, Albert had died in a car accident, but with suspiciously few external signs of physical damage. His relatives were of the view that there had been some magical intervention in the accident, aimed at another occupant of the car whose family had in turn been blamed for the earlier death of another member of Jackson's family. Jackson's death, it was argued, was a revenge killing, part of an ongoing vendetta that had apparently continued for many years. This interpretation was supported by the second fact: two of the men who had been drinking with Jackson were members of Albert's immediate family. Ron was his paternal uncle, and Willy his maternal uncle. A further compromising detail was the fact that Jackson had not habitually drunk with either of these men, and the speculation was that they had used the celebration of the New Year to catch Jackson off his guard.

The 'what' and 'how' questions were concerned with resolving the conflict between the eye-witness account of the death, and an alternative version of events which fitted better with the allegation that Jackson had been murdered. As the testimony of the main eye-witness was compromised by the nature of his relationship to the deceased, and as the medical evidence did not rule out injuries sustained through interpersonal violence, there was considerable room for speculation as to how Jackson's death had been orchestrated. Relevant to answering this question was the 'fact' that getting someone drunk to the point of incapacity is locally viewed as a typical part of modern *warmala* (that is, 'revenge killing') practice, and as a consequence the violent death of any drunken person is automatically viewed as highly suspicious by the Pitjantjatjara. Local rumour contained numerous accounts of violent murders disguised as car accidents such that falling from a moving vehicle or being run over were cynically viewed as euphemisms for being beaten to death. In Jackson's case, it was easily determined that he had probably been beaten unconscious with a tyre iron, then thrown unconscious or already dead from the vehicle as a means of disguising what had actually happened.

The 'where' and 'when' questions were much less concerned with the particular circumstances of the death than with where Jackson came from (and hence his patrilineal links to men blamed for Albert's death), and with the 'fact' that he was the only member of that patrilineage who lived in close proximity to Albert's uncles. So although Jackson was not personally implicated in Albert's death, his residence in our village made him an easy target for revenge. That Jackson died at a time when he was physically vulnerable because of drunkenness, and isolated from men who could be viewed as allies and protectors, was also viewed as significant. The relocation of key participants immediately after the death – both Patrick and Ron moved within two days to villages hundreds of kilometres away – was viewed as tantamount to an admission of guilt.

The Process of Ritual Inquest

Drawing these conclusions about the circumstances of her husband's death, and then gaining public acceptance of her interpretation of events, required substantial work from Jackson's widow. In part, this work was her responsibility as chief representative of his generational moiety, but there was a degree of self-interest in her characterisation of his death as a murder, and her deflection of responsibility for the death onto the men with whom he had been drinking. Jackson's brothers would certainly otherwise have viewed her and her family as having abrogated their responsibility to ensure his safety, especially when he was drunk. Given the reputation of his family as revenge murderers of particular viciousness, it was very important for Lisa to establish a plausible explanation of the death that shifted substantial responsibility for the death off her shoulders.

The nature of the work of the ritual inquest is closely tied to conventional practices for establishing a publicly-held truth in Aboriginal society. The discussion of Aboriginal coronial method in the report of the Royal Commission into Aboriginal Deaths in Custody is couched in terms that imply a formalised process of inquiry similar to a Coroner's Court, with hearings held, witnesses called and findings made. The Pitjantjatjara inquest, however, has no such formalised structure. The process is in fact much closer to what Sansom has described as the politics of representation and presentation in camp life, and is particularly concerned with two kinds of formal process which he has described as proclaiming and broadcasting.[24] He describes proclaiming as

> ... entering a demand for a specific verdict on a defined issue ... Its style is nagging and vociferous. Its duration is extended. Its prime message is thrusting and simple. The grounds for the demand, however, are presented as a set of detailed assertions ... A deal of

> energy is expended and words are presently used with liberality in the attempt to make and imprint a social fact that will live on as a verdict, eventually to be sparely and simply stated.[25]

Sansom states that the proclaimer is not simply making a commentary on events in the camp, but is making an issue with the view of winning acceptance for their claim. Although their claim may initially be met with indifference or even aversion, the proclaimer will persist until public resistance has been broken down, and their claim accepted. Once this has happened, the proclaimer is free to 'broadcast' publicly their claim as a true interpretation. Like proclamation, broadcasting is 'an act of public in-camp communication, and is distinguished from proclamation by the fact that, from the outset, those who assay the act command audience attention. Telling round follows on successful proclamation and is an index of success.'[26]

Lisa's initial statement to me, that Jackson had been murdered, was the beginning of her campaign of proclamation against the public acceptance that her husband had thrown himself from the moving vehicle. Her attempts over the following week to convince the police that they were investigating a murder rather than an accidental 'suicide' were also part of this campaign. She wasted few opportunities to proclaim to the whole population of the village during the preparation for the funeral that Jackson had been murdered, initially alone but soon with the support of her immediate family, who had no wish to share in the blame for his death. Her version of events won significant support from most village residents when Patrick and Ron moved away from the village, and certainly the facts that she had marshalled in support of her story were compelling. Most people were aware of the circumstances of Albert's death, and Lisa's linking of the two deaths was clearly seen as reasonable. Within a few days of the death, her claims had been accepted by the majority of village members.

Once she was certain of a measure of public support for her version of events, Lisa began to broadcast, or 'tell round', the story of Jackson's death, now accepted publicly as truth. By the time that Jackson's body had been returned to his home village for burial, Lisa's version of events surrounding his death was the version accepted by those members of his family responsible for avenging the death, and blame was diverted from Lisa and her family.

CONCLUSION: DID HE FALL OR WAS HE PUSHED?

It is clear that only Ron and Patrick will ever know for certain whether Jackson fell or was pushed from the car that day. It is also clear from

what happened afterwards that both the Coroner's Court and the 'court' of village opinion were equally satisfied with the divergent verdicts that were reached at the end of their respective inquiries. The thrust of this chapter has been to contextualise two different processes of inquiry to identify the points of departure that lead to such different conclusions. The most important of these points of departure relates to the positioning of sudden death: for the police acting as agents of the coroner, a sudden death is an administrative problem requiring the most simple and economical resolution consistent with the known facts; for the Pitjantjatjara, a sudden death is an offence against natural and religious law which requires the identification of a perpetrator, and the assignment of blame and punishment. These differences in positioning reveal fundamental differences in what could be described as the ownership of the death. For the coroner, death (and life for that matter) can be treated as part of the material property of the individual-as-citizen, to be marshalled by police and medical experts as two related components or interests. One component, the body-identity, is the property of the estate of the deceased, on whose behalf it must be rationally administered and resolved. The second component, the citizen-identity, is the property of the state whose laws govern the living and dying of its citizens, and whose panoptic scrutiny of the circumstances of the death serves to ensure that blame for the death is correctly apportioned, and public safety guaranteed. For the Pitjantjatjara, death and life are never viewed as the property of the individual, let alone the State, with whom their contact has been tenuous by virtue of historical as well as geographical circumstance. The physical substance of the deceased belongs to the *manta*, the earth, from which it was composed and to which it returns on burial: there is no material interest to be resolved here. The social person of the deceased belongs not to the individual but to the corporate groups of which he was a part: his generational moiety and his patrilineage. The sudden death has robbed these groups, and it is the interests of these which is served by the ritual inquest. There are no experts here, and no simple administrative generalities: the sudden death has damaged the unique matrix of personal and material relationships in a small and closely-knit society. The deceased person was an irreplaceable node in that matrix, providing for specific and particular linkages between land-holding patrilineages through marriage, both within and across moiety boundaries. The gap left by the death cannot simply be smoothed over, but must be rebuilt over time and through other alliances. The damage done, and the work that will be required to repair it, must be offset by retribution against the corporate groups represented by the individuals deemed responsible for the death.

Both coronial and ritual inquiries are therefore interested in the identity of the deceased, but in different ways. The Coroner's interest

is in the individual identity of the deceased, and particularly in the correct identification of a deceased body with the living person it had been. The police are anxious to have the body identified by a knowledgeable person, and to ensure a chain of identification – that is, to ensure that the person that died in those circumstances at that site is the body that the knowledgeable person has identified. The Pitjantjatjara are not interested in the name of the deceased, as personal names pass out of use at death, and everybody knows the identity of the deceased anyway. Their interest is in the contextual identity of the deceased, for identity is entirely relational in death as in life, with each person a node in a broad-ranging consanguineal, affinal and fictive kinship matrix, and a member of generational moiety, and local patrilineages and matrilineages. The Pitjantjatjara inquiry focuses on tracing these linkages in relation to the people present at the death, and their relationships with other people who might have borne an enmity towards the deceased, or the family of the deceased.

Both inquiries similarly have an interest in the time and place of death, although the Pitjantjatjara interest is much more concerned with contextualising the death in a sequence of events across sometimes long periods of time – that is, their determination of time and place of death is diachronic. The coroner's interest is much more synchronic: fixing the exact time of death, and describing in great detail the physical surroundings at the scene of the death. The coroner is also greatly interested in fixing the manner of death, based on the physical evidence of the body and scene of death, and the reports of eye-witnesses. These details, in the coroner's view, relate directly to the cause of death. For the Pitjantjatjara, the manner of death is entirely incidental, except where direct human agency is involved – for example, in the case of a shooting, where it is known who fired the gun. The witnessed manner of death, as in this case, may not necessarily be seen as relevant as it may mask the actual manner of death.

As a consequence of these divergences, the determination of cause of death is necessarily different. For the coroner, cause of death is directly related to the established manner of death. For the Pitjantjatjara, cause of death is determined as a result of reasoning based on calculations of identity as well as a time and place of death. Eye-witness testimony as to manner of death may be viewed as secondary to the testimony of key relatives who can provide social and cultural context to the events that the eye-witness reports. In the case described in this chapter, the testimony of the eye-witness was much less important than the identity of the eye-witness in relation to the deceased in determining the socially accepted manner of death, and consequently the social cause of death.

The responses to the divergent verdicts have been as different as the verdicts themselves. On the Coroner's side, the police conclusion that Jackson had fallen accidentally from the vehicle was accepted, and the manner of his death was never made the subject of a formal inquest. None the less, Jackson's death was part of a larger Coroner's inquest which investigated how the supply of alcohol from Mulga Bore roadhouse contributed to the deaths of six men over a two-year period, resulting in substantial changes to liquor licensing in the region. The only charge resulting from the death was brought against Patrick for leaving the scene of the accident. On the Pitjantjatjara side, and from a Pitjantjatjara point of view, there has been significant fallout for the men who were drinking with Jackson the night he died, and deemed responsible for his death. Ron Mason was reported to be living in a village 250 kilometres away from the day after the accident, and later settled in another village a further 100 kilometres away. Although he managed to escape relatively unscathed, his brother Eddie, who had also moved to another village in the wake of his son Albert's death just prior to Jackson's, died suddenly of a heart attack in 1996. This death was deemed suspicious by *A<u>n</u>angu*, and probably the result of sorcery, as it was not preceded by any ill-health or warning signs, and Eddie was a relatively young and vigorous man. Willy Balza was beaten up by Lisa's father the day of the death, and his arm broken. He disappeared later that year, amid rumours that he was murdered and buried at the back of Alice Springs rubbish dump by unspecified members of Lisa's father's family. Jason Bates's brother, Rob, died later that year in a suspicious suicide. After a night drinking at Lisa's father's homeland, he had returned to the village and camped with Jason's family. When Jason woke up the next morning, he noticed that Rob was lying in an odd position – face down, half kneeling. When he rolled him over, he discovered that he had been shot point-blank through the forehead, and was lying on the rifle. Although he was still alive, he died later in hospital in Alice Springs. Patrick Gardener was subjected to traditional punishment in the form of spear wounds to the thigh, which he survived.

There is a temptation to look at these two systems for dealing with unexpected death as mere curiosities of comparative ethnography: different strokes for different folks. To do so is to miss an unusual opportunity to compare the ways two quite different legal systems render and order the 'facts' of the same death, and to reflect on what these renderings and orderings reveal about the relationship between our legal structures and ourselves, as individual bodies and members of the social body. Inquests, whether coronial or ritual, have structure themselves, and in this chapter I have examined and compared the forms and logics of inquiry, the nature and role of witnessing, and the identity and comportment of the 'officers of the court', so that it is

possible to see a kind of functional similarity between what the coroner is doing in terms of cultural action, and what the Pitjantjatjara are doing. Of perhaps more subtle importance however, has been my discussion of the structural role that inquests play in relation to sudden deaths – the divergent meanings imposed not only on the body of the deceased, but also on the body of evidence, the body of opinion, and on the bodies of those who survive. While coronial and ritual inquests may be functionally comparable, the hermeneutic processes in which they engage, and the results or these processes, are worlds apart. The divergence between the interpretations of the Northern Territory Coroner and Pitjantjatjara villagers are based on quite different understandings of who Jackson Craig was, and the effects of his death on his individual and social identities. Clifford Geertz, in his comparative examination of fact and law, has called these divergent understandings different ways of 'imagining the real'.[27] By attempting to understand the two realities which coalesced around Jackson Craig's deceased body, and the meaning of his death within those two realities, we are able to conclude that, in a real sense, Jackson fell *and* was pushed. We can conclude, with the Northern Territory police, that Lisa's testimony was irrelevant and implausible; and conclude also, with Lisa's father, that policemen are all ritual children who perceive nothing, and the real process of understanding and acting should be left to the initiated men. In allowing ourselves to draw these contradictory conclusions in the case of Jackson Craig, we might be encouraged to examine the work of the Coroner's Court in every case with similarly critical and interpretive care. The working and determinations of the Coroner's Court are a rich source of information that furthers our insight into how our culture's conception of death is manifest in and works to structure our legal system's response to death.

NOTES

1. The name of the community and the identities of the people involved have been disguised to preserve their confidentiality.
2. I. Freckleton, 'Expert Proof in the Coroner's Jurisdiction' in H. Selby (ed.), *The Aftermath of Death* (Sydney: Federation Press, 1992) p. 38.
3. D. McCann, 'The Range of Findings Open to the Coroner' in Selby (ed.), *The Aftermath of Death*, p. 11.
4. Freckleton, 'Expert Proof', p. 40.
5. McCann, 'Range of Findings', p. 13.
6. J. Brennan, 'Accommodating Law to Culture' in Selby (ed.), *The Aftermath of Death*, p. 210.
7. McCann, 'Range of Findings', p. 11ff.

8. Freckleton, 'Expert Proof', p. 39; see also K. Waller, 'The Modern Approach to Coronial Hearings in Australia' in Selby (ed.), *The Aftermath of Death*, p. 3.
9. Waller, 'The Modern Approach'.
10. C. Bray, *Needs of Families with a Death reported to the Coroner: Possible Social Work Responses* (Sydney: NSW Department of Health, 1986) p. 11.
11. Bray, *Needs of Families*, p. 2.
12. Coroner's Rules 1984, Form 22, Inquisition cited in McCann, 'Range of Findings', p. 13.
13. Bray, *Needs of Families*, p. 14ff.
14. For more on the subject-object-subject transformations of Pitjantjara ontology, see N. Munn, *Walbiri Iconography: Graphic representations and Cultural Symbolism in a Central Australian Society* (Chicago, IL: University of Chicago Press, 1973); N. Munn, 'The Transformation of Subjects into Objects in Walbiri and Pitjantjatjara Myth' in M. Charlesworth, H. Morphy and D. Bell (eds), *Religion in Aboriginal Australia: An Anthology* (St Lucia: University of Queensland Press, 1984); J. Morton, 'Singing Subjects and Sacred Objects: More on Munn's "Transformation of Subjects into Objects" in Central Australian Myth', 58(2) *Oceania* (1987) pp. 100–18; J. Morton, 'Singing Subjects and Sacred Objects: A Psychological Interpretation of the "Transformation of Subjects into Objects" in Central Australian Myth', 59(4) *Oceania* (1989) pp. 280–98; J. Willis, 'Romance, Ritual and Risk: Pitjantjatjara Masculinity in the Era of AIDS', unpublished PhD thesis (Brisbane: Tropical Health Program, University of Queensland, 1997) p. 88ff.
15. Munn, 'Transformation', p. 80, C. Goddard, *Pitjantjatjara/Yankunytjatjara to English Dictionary* (Alice Springs: Institute for Aboriginal Development Press, 1992) p. 124.
16. Munn, 'Walbiri Iconography', p. 199; Morton, 'More on Munn'.
17. M. Langton et al., 'Too Much Sorry Business – The Report of the Aboriginal issues Unit of the Northern Territory', in E. Johnston (ed.), *Royal Commission into Aboriginal Deaths in Custody: National Report*, Vol. 5 (Adelaide: Australian Government Publishing Service, 1990), p. 363ff.
18. Ibid., p. 364.
19. Ibid.
20. J.C. Reid and D. Mununggurr, 'We are Losing our Brothers: Sorcery and Alcohol in an Aboriginal Community', 2(9) *Medical Journal of Australia*, Special Supplement on Aboriginal Health (1977), pp. 1–5.
21. B. Sansom, *The Camp at Wallaby Cross: Aboriginal Fringe Dwellers in Darwin*, (Canberra: Australian Institute of Aboriginal studies, 1980).
22. Ibid., p. 120.
23. Ibid., p. 121.
24. Ibid., pp. 89–92, 115–18.

25. Ibid., p. 89.
26. Ibid., p. 116.
27. C. Geertz, 'Local Knowledge: Fact and Law in Comparative Perspective' in *Local Knowledge: Further Essays in Interpretive Anthropology* (New York: Basic Books, 1983), pp. 167–234.

8
Pro Patria Mori: Law, Reconciliation and the Nation

Scott Veitch

> '*What is* la Patrie*?' asked Maurice Barrès, and answered: 'The Soil and the Dead.'*
> Zygmund Bauman, *Mortality, Immortality and other Life Strategies* (Oxford: Blackwell, 1992) p. 106.

> *No more arresting emblems of the modern culture of nationalism exist than cenotaphs and tombs of Unknown Soldiers … The cultural significance of such monuments becomes even clearer if one tries to imagine, say, a Tomb of the Unknown Marxist or a cenotaph for fallen Liberals. Is a sense of absurdity avoidable? The reason is that neither Marxism or Liberalism are much concerned with death and immortality. If the nationalist imagining is so concerned, this suggests a strong affinity with religious imaginings.*
> Benedict Anderson, *Imagined Communities* (London: Verso, 1991) pp. 9–10.

I read recently that one of the Unknown Soldiers of the Vietnam war, laid to rest in a United States military cemetery in Arlington, had been identified. What trauma this induced! The vacuum in which all and no particular identity was sealed was broken by a rush of detail: a name, a background, a family, a biography – a life. Such ghostly insolence, it seemed, such unfitting unsettlement of the honoured national past by the improperly deceased: please, don't bring out your dead!

The nation is questioned by such knowledge, its past has not been stilled enough, and Anderson is right about the religious imagining – our secular age is besotted with it. The singularity of a life, and its death, undoes the previous offer of redemption held out by the nation to the universal soldier-citizen, a redemption premised on a future harmony where anonymity figures as no one and as everyone, and is mingled in and as the sacred soil that is the country. Each man's death diminishes the nation, until the point that it does not; until, that is, it enriches it. Yet fulfilment of the nation's commandment – one must

not die in vain – is subject to a delay of process, since certain sins will have to be forgotten, amongst those the vanity of too much personality.

And so the dead can still speak, and often too much. Hence, in my chosen title, one returns to the meaningful words of a dead language, *(dulce et decorum est) pro patria mori* – (sweet and honourable it is) to die for one's country – recalled as 'the old Lie', in Wilfred Owen's poetic, prophetic but belated rejection of the proposed stakes of his own death in that hell of national conflict which was the First World War. But disquiet remains with us: for if one cannot die in peace, it is hard, also, to rest in peace.

The nation has re-emerged in discourses of reconciliation, in South Africa, Chile, Australia and elsewhere, as these countries attempt to come to terms with their pasts. What is the significance of this? Anderson suggests that what marks the difference between 'nationalism' and Marxism and Liberalism is the concern with death and immortality, and it is this point I want to pursue. This chapter provides a reading of nation and immortality that relates them specifically to the role of law in processes of reconciliation. My argument is that law and legal institutions cannot leave the dead alone, but court them for their own, and, ultimately, for the nation's putative *immortality*. Law's symbolic role in these great moments of upheaval is best seen in its inheritance of religious functions – law as redeemer, law as saviour, law as confessional, law as grace – as it moves inexorably in and as the service of the nation.

In this sense, law (even according to its own self-image) transcends its more typical regulatory aspects, and engages instead with modes of nation-building more familiar to us from the period of the emergence of the modern nation-state in Europe. Albeit employing mechanisms different from those of the late eighteenth and nineteenth century, this rush to the nation contains, I will suggest, similar urges, and ones which might, as some commentators would have it, be seen to be out of place at the end of the twentieth century. For despite protestations to the contrary, the 'nation' (and its links to state and economy) is playing a prominent role today, and peculiarly so, one might think, as this emerges in the often belated responses to imperial legacies which were themselves premised on the strength and wealth of nations. And it is in this irony that one may see less a process of the post-colonial, than a neo-colonisism, embodied, most literally, in a recolonising of the past in the name, though not the names, of the dead.

In seeking to come to terms with the existence of a traumatic and violent past, the demand for reconciliation can be seen, I will suggest, as a precarious form of mourning. Reconciliation is the invocation of a need and of a demand both to remember and to forget, a process of

coming to terms which can be seen variously as an acknowledgement, an overcoming and an atonement. The use of extraordinary or quasi-legal institutions in times of political transition, or of mechanisms not widespread in 'conventional' legal operations – such as an institutionalised use of amnesty which transcends conventional notions of justice in an attempt to sustain the foundations of a new social vision – is emblematic of law's symbolic role in these moments of great upheaval and change. Yet whether, given the *ways* in which law and legal mechanisms are implicated in this process, the precariousness can be sustained, remains open to question, a question as to whether, in Gillian Rose's terms, mourning becomes the law.

To pursue these concerns, and the links between law, nation and reconciliation, I will consider recent events in South Africa. The argument in this chapter develops in the following parts: an introduction to the South African notions of healing the nation, the role of collective memory and the relation between reconciliation and immortality, and, finally, a problematisation of reconciliation in the face of agonistic politics.

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Portia, fount of wisdom, noble judge, beseeched Shylock – who 'crave[d] the law' – thus: 'therefore Jew, Though justice be thy plea, consider this, That in the course of justice, none of us Should see salvation: we do pray for mercy.'

We might get what we deserve, even what we merit, and this might be just. But like mercy, reconciliation requires more than 'justice', more, in this sense, than what law's regular performativity can offer with regard to future conduct and the distribution of rights and obligations. Reconciliation demands acknowledgement and forgiveness on the route to an atonement, and in this process it is not only the victims of oppression whose lives or memory are seen in need of reparation, but also the nation itself that is in need of healing. The stakes of reconciliation are firmly tied to the health of the nation, to its recovery, to its salvation.

Given such emphasis on healing the nation, it is perhaps not surprising that much of the discourse around the working of South Africa's Truth and Reconciliation Commission (the TRC) employs the metaphor of the body. The nation is treated as scarred and wounded, in need of physical and psychological healing. There was an urgent need, expressed in the metaphorical imagery of the words of government minister and former legal academic Kader Asmal, to 'stop the pathology of the past', to get rid of 'what poisons the body politic' and thus allow for a 'catharsis in our national life'.[1] As the Minister of Justice himself put it: 'many people are in need of healing, and we need

to heal our country if we are to build a nation which will guarantee peace and stability'.[2]

Legal mechanisms are implicated in this in a variety of ways.[3] These range from issues of domestic property law, constitutional law and criminal law, to aspects of human rights and international law, often as not in some combination. But there is also a sense in which the effort required to save the nation from its past involves, as I have suggested, more than 'justice' can deliver. Law's relationship with the nation, and with the metaphors of healing, repair and salvation thus force us towards a reconsideration of the ways in which law and the nation are bound together in a teleology which the call for reconciliation exposes.

The postscript to the South African Interim Constitution of 1993 acknowledged 'the past of a deeply divided society characterized by strife, conflict, untold suffering and injustice' and sought to provide a 'historic bridge … [to] a future founded on the recognition of human rights, democracy and peaceful co-existence for all South Africans, irrespective of colour, race, class, belief or sex'. A part of that bridge was to be built by an investigation of the causes and extent of violations of human rights in conflicts since 1960 by the TRC, itself established by the 1995 Promotion of National Unity and Reconciliation Act. Its brief was to investigate and establish 'as complete a picture as possible of the nature, causes and extent of gross violations of human rights … within or outside the Republic', to grant 'amnesty to persons who make full disclosure of all the relevant facts relating to acts associated with a political objective committed in the course of the conflicts of the past' and to take 'measures aimed at the granting of reparation to, and the rehabilitation and the restoration of the human and civil dignity of, victims of violations of human rights'. It was to report 'to the Nation'.

The dominant model for the TRC was one of restorative justice. Its spirit was most succinctly captured in terms originally in the epilogue to the Interim Constitution itself: 'there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for *ubuntu*[4] but not for victimisation'.

Restoration here combines with the notion of healing, of restoring to health that which has been sick. But in so doing, restorative justice is also future-oriented in the sense that it seeks to provide a new moral basis for the nation, and in this we detect the need for law's extraordinary effort, not to right the wrongs of the past, but to seek a transition in the concept of justice appropriate to the founding of the new social order. Even the Constitutional Court, ruling on the constitutionality of the amnesty provisions within the TRC Act, could not shake the powerful teleology of this vision. As Mohammed J wrote, bearing witness to the power of metaphor, if 'conventional' legal

mechanisms, rather than those established through the TRC, had been employed, 'Both the victims and the culprits who walk on the "historic bridge" described by the epilogue will hobble more than walk to the future with heavy and dragged steps delaying and impeding a rapid and enthusiastic transition to the new society at the end of the bridge, which is the vision which informs the epilogue.'[5]

The institutionalised use of amnesty, although a vital element in the *realpolitik* of the negotiated settlement at the close of the Apartheid regime, displays an emblematic significance in the transitional process. Amnesty's roots lie in a forgetfulness, an *amnesia*; but here not one which is total. Indeed, in the way in which amnesty was to be granted in the South African model, it is amnesty's demand for memory, for remembering, that opens the space for the healing power of truth, the truth that is so vital for building the new moral order. Thus according to Anthony Holiday:

> The rationale for this arrangement was clear, if unspoken. It was that the TRC would accomplish the first part of its brief, namely the determination of a concatenation of historical facts and their causes, through fulfilling its second duty of dispensing symbols of reconciliation in the form of indemnities to those whose crimes were the substance of the historical truths it sought to expose. The indemnities were to serve as inducements to frank and full confessions.[6]

On the ground that that which cannot be remembered cannot yet be forgotten, the TRC was to induce those who knew their own role in the violent truths of the past to come forward to testify to them publicly, and to have immunity from civil and criminal liability if they met the criteria set out in the Act.[7] In such a way, the public, as addressee, would include those victims and/or relatives who had known or suspected human rights violations to have them confirmed or told and acknowledged in their full detail, often for the first time. Only as now remembered could they ever begin to be forgotten, and the process of healing made possible. As the banners of the TRC brightly proclaimed: 'Truth. The road to reconciliation'.

This linkage of public statement (achievable also through investigative powers possessed by the TRC) and private knowledge was an integral part of the TRC's brief. Significantly, one of the most common demands set for the TRC was to establish the whereabouts, if they had not been incinerated and were now untraceable, of the remains of those killed in the political violence of the struggle. Exhumations came to be an almost daily occurrence as relatives sought to know what had happened and to identify remains in order to be able to 'bury properly' those they had lost. In this dialectic of memory and

forgetting, a grant of formal amnesty allowed solely for the forgetting of the public legal aspect of the crime or wrong; the TRC could neither usurp nor second-guess the private response – it could only attempt to establish what it saw as a base-line condition for the broader aim of reconciliation. And that aim, as the title of the Act explicitly stated, was the promotion of a wholeness, an at-one-ment,[8] a *national* unity.

It is, therefore, the health of the nation that provides the ultimate *telos* of amnesties, reparations and the rest. But if the stakes of reconciliation are tied to the well-being of the nation, what, we might ask, is being covered over in this form of healing, in this process of *re*covery? To answer this I will now consider the disjuncture between testimony and nation-building, or, as I will put it here, between *collected* memories and *collective* memory and the problem of temporality with which this is associated.

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In the Christian notion of immortality, 'It is the existence with God, fellowship with Him, which creates the whole interest in a future life ... To have this fellowship [this being "at home with the Lord"] restored is immortality.'[9] In this 'divine economy of redemption', immortality constitutes a reconciliation with God in which individuals are joined 'to a higher order of being, and which has within it "the power of an endless life"'.[10]

It is precisely this 'being at home' in the nation which reconciliation in its more secular form seeks to effect,[11] in which individuals, and of necessity both the past and the future, can be progressively redeemed. But such 'fellowship', which both forms of reconciliation seek, demands a relationship which is not consensual, not contractual, nor even solidary but is rather a transcendence, a sublimation that the individual is drawn into. And in order for that fellowship to be restored, in order for it to be *restorative*, the relation intimates a continuity that might hitherto have been hidden from view, a continuity demanded by the very notion of immortality. Galloway puts it this way: 'if immortality means personal immortality, then some community of memory and interest must survive the break caused by death. In other words, death must not mean total rupture of continuity; it must somehow be bridged by memory ...'.[12]

It is no mere coincidence that the creation of a collective memory in the process of reconciliation has been seen as central to South Africa's coming to terms with the legacy of apartheid. One of the most influential conceptualisations of this mode of thought – and one widely used in writings on national reconciliation – can be found in the writing of theologian Richard Niebuhr:

> Where common memory is lacking, where men do not share in the same past, there can be no real community and where community is to be formed common memory must be created … the measure of our distance from each other and our groups can be taken by noting the divergence, the separateness and lack of sympathy in our social memories. Conversely, the measure of our unity is the extent of our common memory.[13]

According to this, common memory is the precondition of genuine community. It is this which will provide a continuity, a road from the past to the future, along which social cohesion can be reached. But what is left implicit in this formulation is the requirement of a conduit between the two – memory and community – which involves a prescriptive phase ('common memory must be created'). There is no *necessary* location or content for what that mediating prescription must consist in; but there is a presumption that it should be legitimate.

It is suggested here, however, that where legitimation in the creation of common memory is sought at the level of the nation, it is the biographies of lives and the details of deaths of the victims of the struggle that come to be overlooked, pressed into the service of another grouping, namely the *collective*. As one writer has put it in an analysis of TRC testimony heard in a gross human rights violations hearing, 'history and public memory come to be constructed as a simultaneous recounting and then wiping over bodies as a symbol of personal suffering, loss and trauma'. Despite the public nature of hearings and the concentration on personal accounts of the events of the past, victims' testimony has been 'inserted into a collective memory of sacrifice and redemption'; the deeply nuanced conflicts and personal histories are recounted and then accounted for by treating them as 'elevated to [the status of] a politically and historically unproblematised victim sacrificed in the name of the "Struggle" and inscribed into a teleology of national redemption'.[14]

Legal amnesties granted by the TRC allow us an insight into this dialectic of memory and forgetting. Yet the problems of memory within this framework of 'national redemption' can perhaps best be seen as most acute for those victims or relatives of the dead who perceive their loss as being insufficiently remembered in that effort to create a common memory. One victim of acts of political violence committed late in the transitional process, Michael January, said the following in an amnesty application made by the perpetrators:

> I am opposed to amnesty not on the grounds of truth or the disclosure of these men, but that amnesty cannot be given to us the survivors. Mr Prior [the TRC evidence leader] has attempted on various occasions to explain to me the nature of these proceedings,

> and amnesty, and he explained to me that the word amnesty as derived from the Greek word amnesia, which means to forget. Well, we cannot forget.[15]

In saying this, the victim, who had himself grown up in the townships and been on the receiving end of the Apartheid laws, indicates a failure to effect the link between personal reconciliation (he said he had 'unconditionally forgiven these men for what they have done') and the public political ability of the TRC to serve up an amnesty to the perpetrators on the way to *its* form of memory and national reconciliation. Here, in other words, we may see a conflict, borne of a resistance to the inchoate transcendence, and delineated by an articulate, if reluctant, participant in the process. And the reason for this conflict lies less in the motivation of the applicants who had devastated January's life, than in the failure of current legal and governmental strategies to back up a formal amnesty with a remembrance of the continuing loss of the victims. The move to a common memory is precisely what the speaker resists, and to this extent he rightly detects the symbols of national reconciliation as failing to ground themselves in either the reality of personal loss or the detailed and ongoing needs of the new civil society. As he acidly commented: 'This is the bitterness that drives me to thinking of the Truth and Reconciliation Commission as no more than a mechanism of the system to forgive itself and whitewash the suffering that myself, my family and the people of this country, have endured.'

In this 'whitewash', this forgetting on the road to a national reconciliation and its community of memory, we encounter a disjuncture, and one indicative of the gap between law's symbolic efforts in the service of the nation and the grasping of political and legal needs of civil society. A gap, in other words, between 'full disclosure' – truth – and the prescriptive needs of reconciling the nation's memory and identity in the process of 'healing the nation'. And this problem multiplies in different ways. In this context Michael Ignatieff has noted that: 'We tend to vest our nations with consciences, identities and memories as if they were individuals. It is problematic enough to vest an individual with a single identity ... [But] the identity of a nation is additionally fissured by region, ethnicity, class and education.'[16]

Collective memory, in other words, differs from the *collected* memories of those who experienced the past from hugely divergent perspectives; the former, whatever it may be or may be constructed as, cannot be a simple summation of the latter. Seeking to institute common memory at the level of the nation is thus always in danger of failing to recognise, or even of deliberately suppressing divergent commonalities that cannot be reduced to or which in fact cut across

the creation of the collective when posed at the level of the nation. Thus on the one hand, genuine concerns of class, race, ethnicity and urban/rural divisions are not picked up on or are ignored as one collective seeks to supersede these alternative forms (one consequence of which may be to engender a conservative form of continuity from the old regime of the very kind that the new regime seeks to overcome),[17] and on the other the achievement of fellowship is paid for with a sacrifice which is not of the victims' making.

Yet, that the linear, progressive configuration of law's service to the nation is deeply problematic with regard to what it fails to recognise does not, in itself, disrupt its real potential in fulfilling certain other goals. As Lyotard has written: 'The message of redemption is more pleasant to hear, easier to "exploit" and propagate than the memory of indignity.'[18] This was Michael January's point, and his desperation.

Collective memory draws on a particular form of legitimation that is not a democratic one; that is, one that, even aspirationally can draw on the consensus of the general will, however that may be achieved. Rather, as it is used above by the Minister of Justice, say, building the nation is itself a move in trying to *create* conditions for the new democratic polity which *is to be* universalistic in its approach. Political legitimation at the level of the latter differs from the legitimation to be offered by reference to the collective memory of the nation. Again, as Lyotard points out, 'The legitimacy of a nation owes nothing to the idea of humanity and everything to the perpetuation of narratives of origin by means of repeated narrations.'[19] These repetitions of narrative may be one way of instituting the sought-after collective memory and, where reconciliation is drawn on to set the moral and social tone for the new country, the stakes are seen to be high. But these origins, as Lyotard and many others before him are aware, are problematic.[20] As such, they may be used to detract from the nature of *ongoing* political conflict and the normalisation of key economic approaches under the guise of national commonality.

Thus the 'community of memory' that reconciliation requires is at once an installation of the collective, a prescription embracing reconciliation as a means to a unified fellowship, and a forgetting. It forgets because it is in the process of covering up the fact of the *immemorial*, covering up that which cannot be remembered except as forgotten.[21] Reconciliation in this vein forgets the 'untold suffering' of lives and deaths en route to a wholeness embodied in the new nation, just as the doctrine of immortality forgets the mortality and worldliness of humans through the redemption of God the healer. This is why the unknown soldier is, as unknown, emblematic for the *nation*'s immortality. It is also, perhaps, what it means to have truly died for one's country.

The transitional justice of the TRC then, is not merely concerned with considerations of justice in periods of transition, but signals strongly that concepts of justice are themselves in transition in these periods. This requires that law be used in a symbolic process of a type it ordinarily shuns, used to create new narratives and new origins, to *rewrite the past* for the sake of the future. It does so in order that commonality and thus healing can *now* make sense: to foster a continuum, a memory within which the idea of healing can be propounded as a progression and thus the problem of temporality dealt with on terms commensurate with its overcoming.

Unfortunately, however, this belies not only the contested truths of the conflict, but fails once again to address the particularity *and* meaningfulness of the very experience of conflict and its *ongoing* consequences. For as Michael Ignatieff has written: 'the past continues to torment because it is *not* past. These places [Yugoslavia, Rwanda, South Africa] are not living in a serial order of time but in a simultaneous one, in which the past and the present are a continuous, agglutinated mass of fantasies, distortions, myths, and lies.'[22]

Histories and memories, in other words, are what *continue* to clash in the aftermath of civil war. The ghosts of the past have not been laid to rest but continue to haunt. Yet the 'time' of reconciliation, and the law's imbrication in this, does usurp these conflicts in order to hurry a different process of mourning – the linear teleology of the nation's well-being – which will account neither for the details of loss that inspire the very project itself, nor for the confused sense of temporality that refuses to disappear. As such, law's appeal to the nation and, accordingly, to a putative collective memory is instituted on the grounds of an impossible reality, past *and* present. The appeals to the collective memory of the nation in the nation-building effort overlook the temporal and ideological disjunctures, and so necessitate a forgetting where the problem of authority in the legitimative efforts of the new nation draw on a history and a collective memory that *could never have been* and yet seemingly *must be*.

In terms of the promise of immortality held out to the patriot in their dying for the nation we thus encounter the paradox of memory and identity formulated by Renan: 'the essence of a nation is that all individuals have many things in common, and also that they have forgotten many things'.[23] But forgetting is an active process and where the end-point – that other world at 'the end of the bridge' – is ineluctably sought, the legal mechanisms employed must then mirror the effort required of more than a mere mortal. 'In the course of justice none of us should see salvation': 'regular' justice is not enough. The nation alone can redeem, and law's amnesty delivers the mercy that seeks a reconciliation only the nation, as 'soul' and 'spiritual principle'

(Renan), can offer; and through which, simultaneously, and inexorably, the nation's power is itself enhanced.

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In a phrase as beautiful as it is itself haunting, Gillian Rose has written that 'mourning becomes the law'. Mourning is not merely a private act of love, but encapsulates, in certain key moments, an act of justice which is also at once a political risk. Antigone's defiance of the law is not simply an act of love for her dead brother but one through which she *reinvigorates* the politics of the city. Such an act constitutes the agonistic gesture that makes political life meaningful, but cannot be reduced to political reason. Rather it exemplifies the 'broken middle', which, if reduced to either pole – personal love or the politics of state – would lose sight of its significance: 'To oppose the new ethics to the old city, Jerusalem to Athens, is to succumb to loss, to refuse to mourn, to cover persisting anxiety with the violence of a New Jerusalem masquerading as love.'[24] To reduce one pole to the other seeks to 'mend the diremption of law and ethics', rather than to sustain its creativity, its contradictions and its meaning for political action.

Rose has argued that, 'Political theology out of the perspective of Resurrection proclaims: all "future" thinking must do justice to, or be conducted in the darkness of the redemption of those who have died.'[25] It is precisely this notion of redemption which we can trace in the healing metaphors surrounding the TRC. Yet for all its theological groundings, we are left, I suggest, with the political concern about reconciliation as recovery, as a covering over of that 'persisting anxiety' which lies at the core of political possibility. For the question of reconciliation, or, even more acutely, the question *whither* reconciliation, is largely, perhaps primarily, a question of the nature of contemporary conflict, and, therefore, a profoundly political question.

A posited *redemption*, invoked, in the alternative, through the law of the nation, merely acts to drive under – but for how long? – conflicts that are at the heart of agonistic politics. To rise to immortality in the 'holy city' of the nation displays a desire to strip the conflicts and identities that force through the past into the present (*and* vice versa), but without recognising what precisely is at stake. This is the promise of immortality but it is also the hidden danger of reconciliation:

> This holiness corrupts because it would sling us between ecstasy and eschatology, between a promise of touching our ownmost singularity and the irenic holy city, precisely without any disturbing middle. But this 'sensual holiness' arises out of and falls back into *a triune structure* in which we suffer and act as singular, individual and universal; or, as *particular*, as represented in institutions of the

> *middle*, and as the *state* – where we are singular, individual and universal *in each position*. These institutions of the middle represent and configure the relation between particular and the state: they stage the agon between the three in one, one in three of singular, individual, universal; they represent the middle, broken between morality and legality, autonomy and heteronomy, cognition and norm, activity and passivity. [emphasis added][26]

The discourse of reconciliation I have traced here neglects to account for this diremption. Mourning does not become, does not *suit*, the law, when love, this embrace of wholeness, completion, is posed at the level of the nation.

Reconciliation in this sense loses the defiance required of political risk and indeed *does not do justice to it*.

As such, the dead will not gain immortality; *their* risk remains, but as ghosts, as the *undead*. Waiting, not resting.

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NOTES

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2. Dullah Omar, 'Introduction to the Truth and Reconciliation Commission', in H.R. Botman and R.M. Petersen (eds), *To Remember and to Heal: Theological and Psychological Reflections on Truth and Reconciliation* (Cape Town: Human & Rousseau, 1996) pp. 25–6.
3. For a broader treatment of the use of legal mechanisms in times of recent transitions, see indicatively Ruti Teitel, 'Transitional Jurisprudence: The Role of Law in Political Transformation', 106 *Yale Law Journal* (1997) p. 2009.
4. '*Ubuntu*' signifies a fellowship, a being human only through the humanity of others.
5. *Azanian Peoples Organisation (AZAPO) and Others* v *President of RSA and Others* 1996 (8) BCLR 1015 (CC) para 18.
6. Anthony Holiday, 'Forgiving and forgetting: the Truth and Reconciliation Commission', in Sarah Nuttall and Carli Coetzee (eds), *Negotiating the Past: The Making of Memory in South Africa*, (Cape Town: Oxford University Press, 1998) pp. 46–7.
7. Promotion of National Unity and Reconciliation Act 1995 s 20.

8. On 'at-one-ment' in the context of reconciliation see C. Perrin and S. Veitch, 'The Promise of Reconciliation', 4(1) *Law/Text/Culture* (1998) pp. 225–33.
9. R.G. MacIntyre, 'The Christian Idea of Immortality', in J. Marchant (ed.), *Immortality* (London: G.P. Putnam's Sons, 1924) pp. 84–5.
10. Ibid., pp. 89, 94.
11. One might usefully compare the discourse of reconciliation in Australia surrounding *Bringing them home*, the enquiry into the Stolen Generations.
12. G. Galloway, 'The Philosophy of Immortality', in Marchant (ed.), *Immortality*, pp. 104–5.
13. From H. Richard Niebuhr, *The Story of our Life*, quoted by Alex Boraine (Deputy Chairperson of the TRC) in his 'Introduction' to Boraine and Levy (eds), *The Healing of a Nation?*, pp. xvi–xvii.
14. Heidi Grunebaum-Ralph, '(Re)membering Bodies, Producing Histories: Writing over Memory in Holocaust Survivor Narrative and TRC Testimonies', unpublished manuscript, 1997.
15. Testimony of Michael January from the transcript of the 'Heidelberg Tavern Hearing', Day 5, Cape Town, 31 October 1997. The applicants, members of the Azanian Peoples Liberation Army, have subsequently (August 1998) been granted amnesty.
16. M. Ignatieff, *The Warrior's Honor: Ethnic War and the Modern Conscience*, (London: Chatto & Windus, 1998) p. 169.
17. For a powerful critique in the broader African context see indicatively, Mahmood Mamdani, *Citizen and Subject: contemporary Africa and the legacy of late colonialism* (Princeton, NJ: Princeton University Press, 1996).
18. J.-F. Lyotard, 'Europe, the Jews, and the Book' in J.-F. Lyotard, *Political Writings*, trans. B. Readings with K. P. Geiman (London: University College London Press, 1993) p. 161.
19. J.-F. Lyotard, *The Differend: Phrases in Dispute*, trans. G. Van Den Abbeele (Manchester: Manchester University Press, 1988) p. 147.
20. See E. Renan's well-known paper, 'What is a Nation?' reprinted in H. K. Bhabha (ed.), *Nation and Narration* (London: Routledge, 1990). This is not to suggest that, as for example Derrida would have it, the problem of origins should be augmented to the mystical; see J. Derrida, 'Force of Law: The Mystical Foundations of Authority' (1990) 11 *Cardozo Law Review*, p. 919, and for a critique of this point, S. Veitch, 'Doing Justice to Particulars' in E. Christodoulidis (ed.), *Communitarianism and Citizenship* (Aldershot: Ashgate, 1998).
21. See J.-F. Lyotard, *Heidegger and "the jews"*, trans. A. Michel and M. S. Roberts, (Minneapolis: University of Minnesota Press, 1990).
22. Ignatieff, *The Warrior's Honor*, p. 186.
23. Renan, 'What is a Nation?', p. 11.
24. G. Rose, *Mourning Becomes the Law: Philosophy and Representation* (Cambridge: Cambridge University Press, 1996) p. 35.
25. G. Rose, *The Broken Middle: Out of our Ancient Society* (Oxford: Blackwell, 1992) p. 289.
26. Rose, *The Broken Middle*, p. 285.

Part Three
Memento Mori

9
Law Deathbound: Antigone and the Dialectics of *Nomos* and *Thanatos*

Costas Douzinas

I

Greek tragedy is the meeting point of philosophy, literature and ethics – of reason, form and law. Classic tragedy was Nietzsche's philosophical opus *par excellence*, the testing ground of the Odyssey of Spirit for Hegel, of desire for Freud and *jouissance* for Lacan, of the primordial memory of Being for Heidegger. Amongst the great works of world literature no one 'has elicited the strengths of philosophic and poetic interest focused on Sophocles' Antigone'.[1] 'Of all the masterpieces of the classical world – and I know them and you should and you can – ', wrote Hegel, 'the *Antigone* seems to make the most magnificent and satisfying work of art of its kind', and he calls Antigone 'celestial, the most resplendent figure ever to have appeared on earth'.[2] If the whole philosophical tradition were lost, except the 'Ode to Man', the first choral song of *Antigone,* alongside its translation by Holderlin, says Heidegger, we would be able to reconstuct all the great philosophical themes of Western culture. Lacan dedicates his seminars on ethics to Antigone, using her as an example of the Freudian revolution in morality: 'Even if we are not aware of it the latent, fundamental image of Antigone forms part of [our] morality.'[3]

Oedipus the King and the myth of Oedipus have been recognised as key texts for the understanding of psychic identity. *Antigone*, the daughter of Oedipus, should be similarly acknowledged as the foundation stone of Western legality. The story of the maiden sacrifice is both a key representation of law's underlying structure and the primal myth of law's genesis. If the structure of the psyche reproduces the Oedipal scene, the legal institution is both the symptom of Antigone's desire and the cure and punishment for her transgression.

We are well aware of the jurisprudential and speculative readings of *Antigone*. The tragedy concerns the unfolding of a series of conceptual juxtapositions, embodied and represented by the two diametrically opposed protagonists. The key conflict may be that between divine and human law, or between law and justice, family and state or individual

and society; but its narrative presentation always follows the same path. The antagonists judge and are themselves judged by their opponent and by the critic. We can read the two opponents as irreconcilable principles or as steps in the dialectic. The juridical presentation will always sharpen the issues, abstract the action and present the conflicts as right against right or right against wrong or even wrong against wrong. But in all instances it is discourse against discourse, law against law and the antagonistic partialities will circle each other and will eventually be sublated as the law becomes, in Hegel's felicitous phrase, the embodiment and accommodation of reason and need.

But can we read *Antigone* as anything other than a lesson in morality, or a stage in the unfolding of Spirit's self-consciousness in law? This chapter argues that the foundational status of *Antigone* is not the result of its place in an idealised 'childhood of man' that matured later in Western adulthood. Antigone will always remain foreign, forbidding, a 'raw daughter of a raw father'; she will always defer her desire and her meaning, a step ahead or behind, an original point that is always vanishing. But our own desire of *Antigone*, our persistent attempt to arrest the play of meaning and to interpret her monstrous desire, points to Heidegger's and Lacan's genealogy: *Antigone* is the myth of the leap, both original and final, in which *dasein* founded itself by finding itself before its 'other', death. *Antigone* shows the internal and inescapable bond between *thanatos* and *nomos,* the deathbound character of legality. We will follow this link between death and law in the exemplary readings of *Antigone* by Lacan and Heidegger.

II

If *Antigone* is for Lacan the best starting point for an analytical theory of ethics, its first Ode or *stasimon* is, according to Heidegger, the place where we moderns, 'inexperienced at hearing because our ears are full of things that prevent us from hearing properly',[4] must turn to discover the design and essence of being-human. It is a question of openings; of the original unfolding of the ontological difference, of the bursting out of human essence and of the beginning of history. In the *Introduction to Metaphysics,* Heidegger has reached a point in his reading of a number of Heraclitus' fragments in which he has defined Being as *physis*, *aletheia,* appearance and unconcealment, and *logos* as the steady gathering and intrinsic togetherness of being. Being as *logos*, the collectedness and gathering of opposites, and their *polemos*, conflict, gives beings 'supreme radiance i.e. the greatest beauty'. One such example of *logos*, separate and distinct in itself but at the same time a gathered togetherness that maintains itself as such, is the *nomos* of the *polis*, the statute that constitutes the original unifying unity of what

tends to grow apart.[5] But how does human essence open out of the collectedness of Being and *logos,* of *physis* and *nomos*? Heidegger turns for the answer to the first *stasimon* of *Antigone*, the 'Ode to Man':

Chorus: Numberless wonders, terrible wonders walk the world
but none the match of man
(*polla ta deina kouden anthropou deinoteron pelei*).[6]

Man is *deinotaton*, the strangest most awesome: a word which in its ambiguity expresses both the extreme reaches and the abysmal depths of Being. *Deinon* means the terrible, 'overpowering power', terrifying and awe-inspiring; but man is also *deinon* in the sense of the violent one: violence is not just part of his action but of his Being. Man's strangeness, the basic trait of his uncanny essence is that he abandons, always violently, the familiar and the secure for the strange and overpowering. But in this endless and violent fleeing to the unknown he becomes *pantoporos aporos* and *hypsipolis apolis*. Heidegger, and after him Lacan, change identically the accepted punctuation and translation of these key lines, paradoxically linking the opposed terms. Man opens and follows a myriad paths on his flight from home, *poros*, but he is cast out of all of them. He achieves his essence in and out and for the *polis,* historically: 'He advances toward nothing that is likely to happen, he advances and is *pantoporos*, "artful", but he is *aporos*, always "screwed" ... He always manages to cause things to come crashing down on his head.'[7] And again, *polis* is the time and place where the paths meet, the site of *Dasein*. But the *poli*tical action that makes a citizen highest in the city leaves him also without site, city and place, alien and lonely as he must first create the ground and order of his creation.

The conquest of the sea, the earth, of animals and birds that opens the Ode is not a description of man's activities. All these are an outline of his overpowering Being that brings both his and all other beings into their own being. The second strophe names the elements of the overpowering powers; language, thought, passion, laws and buildings rule man and must be taken up by him as he launches in his ever-new ventures. This is a standard translation:

Chorus: And speech and thought quick as the wind
and the mood and mind for law that rules the city
all these he has taught himself (*edidaxato*)
and shelter from the arrows of the frost
when there is rough lodging under the cold clear sky
and the shafts of lashing rain –
ready resourceful man! Never without resources
never an impasse as he marches on the future –
only Death, from Death alone he will find no rescue.[8]

'But how could man have invented the power which pervades him, which alone allows him to be a man?', asks Heidegger,[9] and offers his own translation, which clearly diverges from the accepted both syntactically and semantically:

> And he has found his way
> to the resonance of the word,
> and to wind-swift all-understanding,
> and to the courage to rule over cities.
> He has considered also how to flee
> from exposure to the arrows
> of unpropitious weather and frost.
> Everywhere journeying, inexperienced and
> without issue, he comes to nothingness.
> Through no flight he can resist
> the one assault of death,
> even if he has succeeded in cleverly evading
> painful sickness.

Heidegger reads the key word *edidaxato* in line 356 against philological opinion and its dictionary value, to mean not that man has invented and taught himself language, thought and laws, but that he has found his way towards their overpowering order and there found himself. As soon as man departs into being, he finds himself in language. Language, this uncanny thing, speaks man; its overpowering power helps him speak and create the violent words and acts through which he breaks out into his myriad paths and breaks and subjects his world into its manifold beings. The beginning of language is a mystery; it arose in the violent overpowering of power, of originary, archaic poetry and philosophy in which the Greeks spoke Being. The original work of language is not a *semiurgy* but a *demiurgy*. Mastering the violence of language makes man; through speech and understanding he tames and orders the powers of the world and moves into them as the violent creator of beings and history. But all violence shatters against one thing, a limit that surrounds and delimits man's creative violence: death. Shattering against the uncanniness of death is of the essence of being. But it is not the fact of death that is shattering, not the exit itself but the exitlessness which is proper to *Dasein*, its innermost and necessary possibility. The opening is the admission to the exit, the exitless exit. For Heidegger, Being moves to death, death is the necessary possibility and telos of *Dasein*. Everything that enters life begins to die, and the certain but indeterminate imminence of death, of *Dasein*'s demise, is *Dasein*'s ownmost possibility and the signpost of its individuation. The *logos* gathers the

supreme antagonism, the struggle of life and death, which is the intrinsic togetherness and possibility of Being.

The third strophe brings together the two meanings of *deinon* and their interrelation in the *deinotaton*. *Deinon* as man's violent power is evident in knowledge and art (*techne*); these look beyond the familiar and cause beings to present themselves and stabilise in their being. *Deinon* as the overpowering power, on the other hand, is evident in the fundamental *Dike,* the proper order and governing structure of *Being* against which the violence of speech and act will break out and break up. *Techne* confronts *Dike* as man sails into the order of *Being*, violently tears it asunder using his power against its overpowering dispensation and brings forth the existence of beings. *Dike* is the overpowering order, *techne* the violence of knowledge. The reciprocal relationship and conflict between Being as a whole and man's violent Being-there leads to disaster as violence shatters against Being.

Now Heidegger proceeds to the final reading of the poem, a paradigmatic presentation of his combined ontology and hermeneutics and his own act as *deinotatos*. What lies between the lines of *Antigone* is the shattering, the writing of disaster. The possibility of catastrophe has an ontological permanence. The fall into disaster is fundamental, an inescapable condition of human existence. The essence of being human rises on the breach into which the overwhelming power of Being bursts, 'in order that this breach itself should shatter against being'.[10] Man cultivates and guards the familiar, home *polis* and hearth, only 'to break out of it and let what overpowers break in'. The violent one desires the new and unprecedented and abandons all help and sympathy to fulfil the call of Being; but to achieve his humanity he knows of no peace and reconciliation, no permanent success and status: 'To him disaster is the deepest and broadest affirmation of the overpowering.'[11] The greatness of the Greeks was to understand the suddenness and uniqueness of Being that forcefully revealed itself as *physis, logos* and *Dike* and to respond to its awesome overpowering in the only way that could bring forward beings out of Being, that is, violently. The violence that the violent one uses against the overpowering order leads to catastrophe. Heidegger insists that hierarchy and domination are implicit in the gathering of Being in *logos*. The violent creative man is not to be found in the 'bustle and activity' of everyday mundane life. The disapproval of the violent one by the Chorus that closes the Ode is not an admonition to the peaceful resignation of undisturbed comfort but a confirmation that the uncanniness of human being can only be found in those few heroic 'shepherds of Being' who respond to the unique call of *Dasein* with violence. *Dasein* comes to being through violence and shattering; it perdures through catastrophe and death's imminence. That is how

Dasein happens, that is how history opens. Violence is the midwife of the law, death its aim.

III

What do we find if we turn to Lacan's reading of *Antigone*? Hegel's dialectics of desire and death and a psychological version of Heidegger's fundamental ontology. Let us first explore the role of death in the dialectics of desire and law.

The influence of Hegel's *Phenomenology of Spirit* and of Kojeve's reading of Hegelian theory[12] on Lacan's 'return to Freud' is well-documented.[13] Lacan uses the Hegelian dialectic extensively to show how the Other and reflexivity help in the constitution of self. But while the turns and tribulations the Hegelian self goes through are central to the achievement of self-consciousness, Lacan's reformulation presents the subject as split and decentred. In Kojeve's reading, Hegel aims to reconstruct the transcendental presuppositions and the necessary historical stages which have led to the present condition of subjectivity and of historical and philosophical consciousness. While Descartes and Kant had emphasised the solitary consciousness, Hegel claims that the ego as self-consciousness is constituted through desire. Simple consciousness discovers, through sense-perception and speech, being and the external world standing outside of the subject and independent of her knowledge. But for the ego to rise, this passive contemplation of the world must be complemented with desire. Desire belongs to a subject, it is exclusively and radically subjective, it is my desire which makes me aware of myself and of my difference from the object, the not-I. Thus desire reveals and creates self-consciousness.

But desire is active, it tries to assimilate and transform its object in its being, it negates its independence and givenness. The desire for food, for example, negates the being of the foodstuff as it devours it to satiate hunger. Desire reveals a fundamental lack in the subject, an emptiness in the self that must be filled through the overcoming of the external object. But this devouring desire does not differentiate humans from animals. The fully human desire is not addressed towards an object or a being, but towards a non-object, towards another desire. When self desires a thing, it does not do so for its own sake but in order to make another self recognise his right to that thing and therefore recognise his existence and superiority. But as a multiplicity of desires desire to be so recognised, their action for recognition becomes a war of all against all.

This universal fight for recognition must stop before the annihilation of all desires. For that to happen, Hegel assumes that one of the combatants must be prepared to fight to the end and risk his life; at

that point, the other accepts his superiority and surrenders. He who risks his life for prestige becomes the Master, the other his slave. The slave has subordinated his desire for recognition to that for survival. The Master's superiority will be realised hitherto in the slave's work, which transforms nature in the service of the Master. If history is seen as a unified totality, class division and the structure of subjectivity are attributed, logically if not empirically, to the struggle between desiring selves and its inevitable corollary, the creation of masters and slaves. History will end, for Hegel, when master and slave are dialectically overcome, sublated in a final synthesis 'that is the whole Man, the Citizen of the universal and homogeneous State', Hegel's Prussian state or the future utopia of his followers.[14] But for the non-Marxist Parisian intellectuals of the inter-war period, this promised reconciliation was no longer historically credible and the emphasis was placed on the agonistic aspect of intersubjectivity and desire.

For Kojeve, the other's recognition is essential for the creation of subjectivity, but this dependence reveals a fundamental lack at the heart of self. Both types of desire – for the other and for objects – can be mediated only through another's desire. Desire as the desire for the other's desire, the desire to be recognised in one's individuality, is therefore deeply narcissistic. If desire recognises itself in another desire, it finds in its object the essence of all desire, emptiness and lack. The mirror reveals desire's object to be nothingness, non-being. Death, Hegel's 'absolute master', is the 'truth' of desire and history is competitive and violent.[15]

This analysis contains the mainsprings of the Lacanian theory of desire. Lacan is quite categorical about desire's turn towards the void of death. Desire as the demand for recognition is a persistent and insatiable erotic request to be desired as a subject. The non-object of desire is the pure negativity of a subject who desires herself and cannot be satisfied by objects, because they are what the subject is not. The object of desire is a failed object, what the subject is not and what desire lacks. Desire as the desire of desire is not desire to be an object, not even the object of the other's desire, it bears witness to a constitutive lack. It is a pure desire of that emptiness that designates in the other another desire. But if desire desires itself as desire or as subject, it wants not to be an object: it wants not to be, it is a desire for death. Desire has no object other than the non-object of death; freedom has no ground other than the flight towards death.

In Lacan's interpretation, the Oedipal scene is an attempt to shield the subject from the reality of his abysmal desire. The rivalry with the father becomes

> ... the narrow footbridge thanks to which the subject does not feel invaded, directly swallowed up by the yawning chasm that opens

> itself to him as pure and simple confrontation with the anguish of death ... indeed we know of that shield of intervention, or substitution that the father [forms] between the subject and the absolute Master – that is death.[16]

It is preferable to identify symbolically and rivalously with the Other who bars enjoyment than be handed over to the abyss of its radical absence. Thus the non-object of desire becomes the target of repression. Non-being cannot be represented, it is beyond presence and representation. But this desire of nothing organises itself in imaginary scenarios, in which it imagines and pictures itself in objects (Lacan's *petit objet a*). Imaginary identifications with objects and ideals are failing attempts to deny death. They both misrecognise desire and defend the self from the spectre of its morbid desire. And as the object of desire cannot be present, it is represented through inadequate, failing representations and identifications and gives rise to images and imaginary constructions raised on the ground of repressed desire.

The discontent of civilisation is the result of these imaginary identifications which lead to intense competition for the love object. Lacan's partial solution to the irresolvable problem of intersubjective hostility is different from that of Hegel or Freud. Law is brought in again. A contract that lies behind speech allows the social bond to operate: 'This rivalrous, competitive base at the object's foundations is precisely what is surmounted in speech, insofar as it interests a third party. Speech is always a pact, an agreement; people understand each other, they agree – this is yours, that is mine, this is one thing, that is another.'[17] To speak to another is to deny death, to delay and defer desire, to avoid addressing the absolute Other or Master. Speaking leads to a truce, rivalry is abandoned in order to participate in discourse and share our imaginary scenarios or symbolic representations with the other. But speech is a lie, a denying, negating, deferring discourse which places the love-object, death and its desire (temporarily) in abeyance. But this lie is also the whole truth. If, in Lacan's famous formulation, the subject is a signifier for the another signifier, we reveal ourselves in speech in which we address an other. The act of speaking, the enunciation of discourse, is ontologically of greater importance than its contents:

> Let us set out from the conception of the Other as the locus of the signifier. Any statement of authority has no other guarantee than its very enunciation, and it is pointless for it to seek it in another signifier, which could not appear outside this locus in any way. Which is what I mean when I say that no metalanguage can be spoken, or, more aphoristically, that there is no Other of the Other.[18]

But why do people down arms and enter into debate? We must assume the existence of an initial pact, a hypothetical social contract which supports subjectivity and sociality. This contract is minimal in subject matter but far-reaching in consequences. The original pact cannot be questioned or justified – it must be assumed to be true, a fiction repeated in every act of speech. Its object is simply the agreement to speak, to exchange speech rather than blows and to conduct the rituals and the struggle for recognition through discourse rather than through mortal battle. All speech, speaking itself before any content of the utterance or intention to communicate enacts the terms of this contract. Its terms establish my speech as the locus of my truth and the addressee of my speech, as the guarantor of its truth:

> This Other, which is distinguished as the locus of Speech, imposes itself no less as witness to the Truth ... But it is clear that Speech begins only with the passage from 'pretence' to the order of the signifier, and that the signifier requires another locus – the locus of the Other, the Other witness, the witness Other than any of the partners – for the Speech that it supports to be capable of lying, that is to say, of presenting itself as Truth.[19]

The 'truth' of my speech, the only truth I have, is also the denial of my desire and therefore a lie. The law turns a lie into the truth of subjectivity and sociality by supporting a veritable and powerful legal fiction, according to which desire is not directed at death but at replacements and substitutes which become the matter of discourse and representation.

The function of this original contract is therefore strictly mythical. Its object is non-being; it diverts the desire of nothing into speech but its enactment and repetition is the absolute precondition of sociality. In classical political philosophy, the pact reveals an assumed original individual freedom, which must be restricted by the Sovereign to guarantee peaceful social intercourse. The psychoanalytic pact guarantees the subject: it makes the other testify to the subject's 'truth' and turns speech into the domain where this truth will be delivered. As long as we accept the authority of this fiction sociality survives. Only the 'truth' of speech can allow us to enter a peaceful intercourse with the other and that truth is based on a contract, a law, a convention which replaces competition for the imaginary object of desire.

The implications of this theory for jurisprudence are momentous. Law is the social face of the intersubjective contract of speech. It is not the law that needs legitimacy; legitimacy is the product of a primordial legality. The most important aspect of the legal institution is to guarantee the contract of speech, to offer a symbolic source or origin

– the Sovereign, the Legislator, the Law – which announces that law and speech have authority and must be obeyed:

> Every legitimate power always rests, as does any kind of power, on the symbol. And the police, like all powers, also rests on the symbol. In troubled times, as you have found, you would let yourselves be arrested like sheep if some guy has said *Police* to you and shown you a card, otherwise you would have started beating him up as soon as he laid a hand on you.[20]

We should add parenthetically that the police are colloquially called the Law and that statements by the police and judges are the 'word' of law. In this sense, that the law is and speaks is more important than what it is or says. It is the police or the judge speaking Law, in their magnificent or terrifying emblems, clothes and images, that reveal the subject's desire. The interpreter, confronted with an object – the legal materials – or another subject – the litigant – asserts his identity and wholeness through the enunciation of legal speech prior to its semantic component. The content of speech, the actual interpretation of the law, expresses the secondary or desire to ascribe definite legal meaning to the object and thus turn its mastery into a guarantee that the subject's lack has been overcome. The judge must be seen to declare rather than make the law, to be the mouthpiece of the institution, because his declaration serves a double function: the pronouncement of the word, law's signifier, carries law's power; this declaration expresses the legal intention to seize the object, to give it meaning and thus make it witness the unity and completeness of the law and its subjects.

But the original function of the legality that issues from the 'contract of speech' is to defer the desire for non-being and – temporarily – protect deathbound subjectivity. Law rises on the terrain of death: as an indispensable but always failing defence, it protects the subject from its object of desire. But at the same time, the prohibition intensifies the desire for the total 'other'. It is this unyielding and catastrophic desire that makes *Antigone* paradigmatic for Lacan's ethics.

IV

Lacan's reading of *Antigone* follows closely Heidegger's philosophical bravado and philological infelicities. The main difference is that the order of *Dike* which, for Heidegger, represents the overwhelming power of Being has now become the unconscious. For Lacan, the unconscious is organised as *logos*. We are thrown into language which makes us human but also defines the basic limit, the lack in the midst of the

subject. Language, like *logos,* is gathered and gathers to the overwhelming truth, the Real, the unfulfilable desire of the Other or death. And it is Antigone, the *omos* raw daughter of a raw father, who violently, inhumanely, acts on her desire. What are her characteristics? She is beautiful, radiant, fascinating; she is at the limit where life is about to cross into death and death enters into the sphere of life. But this is also the 'point where the false metaphors of being (l'étant) can be distinguished from the position of Being (l'être) itself'.[21] Her radiance and splendour derive from her place on this border. In pushing against the limit, her violence shatters against death and Being itself bursts through. Antigone's beauty is the radiance of Being, her image purges us of the order of the imaginary and gives us a glimpse of the real.

But what lies across the border? Lacan is specific. It is *ate* – fate, the curse, madness, infatuation. Nothing (*pampoly*) immense, vast, monstrous and wonderful (*herpei*) enters, literally creeps into the life of men (*ektos atas*), without and beyond *ate*, says the Chorus.[22] Dodds defines *ate* as 'a state of mind – a temporary clouding or bewildering of the normal consciousness ... a partial and temporary insanity ascribed ... to an external "daemonic" agency ... a "psychic intervention"'.[23] *Ate* is not connected originally with moral guilt or punishment but with a rashness, an overdetermination of action brought about by God, fate, alcohol or sexual passion. Lacan exploits these connections but takes them much further.

Ate is the crucial field, the limit that one can approach only fleetingly, 'it concerns the Other, the field of the Other'.[24] The gods lead men towards infatuation/*jouissance, ate*, but the effect is to make them confuse good and bad and to take them beyond the limit.[25] Antigone perpetuates, eternalises, immortalises *ate*.[26] She moves towards it, she briefly crosses the limit, she is *ektos ates*. But what is this field beyond? Lacan compares first the Other, with the order of the law, although its legality does not belong 'to any signifying chain'. Secondly, the Other is the desire of the mother, 'the origin of everything, the founding desire'.[27] Finally Antigone's *ate* is a desire of death. 'My life has long been given to death, so I might serve the dead', says Antigone to Ismene.[28] Antigone's desire takes her beyond the limits of humanity, beyond *ate,* into the field of *jouissance* where she will lie with the beloved in death. Her desire is a death drive, in desiring she becomes a deathbound being but 'she will not give way on her desire'. She lives her life at the limit, her passivity intimates that she is already dead and that she desires death, that she can only live her life as dead. What lies beyond and what language demands is that man realises 'that he is not'.[29]

We can hear here Antigone's death knell. Her obedience to *Dike,* her *eros* is monstrous; she is besotted with *thanatos,* and will be betrothed

with Hades and death. *Antigone* is full of references to the momentous linking of the primordial forces of love and death:

> Antigone: I go to wed the lord of the dark lake
> (*Acheronti nympheuso*).[30]

Antigone consummates her passionate and destructive love with her *philtatoi* – loved ones in death; her affection for her dead brother Polynices but also for her unlucky fiance, Creon's son Haemon, will be fulfilled in the burial and wedding chamber of Hades:

> Messenger: And there he lies, body enfolding body ...
> he has won his bride at last, poor boy,
> not here but in the houses of the dead.[31]

This is not the eros of Platonic harmony, nor the Hegelian familial love that unites the spouses and sublates them in the coming son. There is no gain to be made from it against Creon's enlightened utilitarianism, according to which there must be return for all investment.[32] Antigone's eros is pure expenditure, a gift with no return, Sappho's 'elemental force of nature, a whirlwind running down the mountains'.[33] It belongs to an *oiko-nome* of monstrosity and seems to support fully Lacan's reading of the tragedy as the foundational text of an ethics of deathbound desire.

Lacan models analytical ethics upon Antigone's desire. But what does Antigone want and what do we want of Antigone? Does she follow the law of family and the gods, the big O of the symbolic order, or does she act out her desire for death? We hear what she says, but what does she really want? What does the woman want? These are the questions that Creon asked Antigone and Freud repeated. Creon is convinced that there is a dislocation between Antigone's demand and act and her desire. Within the framework of his political rationalism, Antigone can only act for gain or as part of a conspiracy to overthrow him. The only alternative is that she is 'mad', that a permanent and unbridgeable gap has developed between her locution (what she says) and her illocution (what she aims at), a state that psychoanalysis examines under the name of hysteria. A dangerous political rebel or an unhinged hysteric?

Antigone's answer is: 'I was not born to hate but to love.' In Lacanian theory love has the character of fundamental deception:

> We try to fill out the unbearable gap of 'Che vuoi?', the opening of the Other's desire, by offering ourselves to the Other as object of its desire ... The operation of love is therefore double: the subject fills in his own lack by offering himself to the other as the object filling

> out the lack in the Other – love's deception is that this overlapping of two lacks annuls lack as such in a mutual completion.[34]

Antigone's sacrifice is the sign of absolute desire. She offers herself to Polynices in order to complete his passage and fill in his lack and at the same time she removes herself from the commotion of activity and passion onto the plane of pure desire and existence. Polynices, separated from all his characteristics, devoid of content, lies between his first, bodily death and the refusal of the second symbolic death, an empty vessel of existence. Creon's distinctions between friend and foe, hero and traitor are of no importance to Antigone in this state of limbo, in which the unique value of Polynices lies in his (non) being rather than any of his properties or actions.

We cannot know for certain Antigone's object of desire. We know however that she will always act on her desire and, as Lacan insists, that makes her deathbound. This can explain perhaps why the acting appears secondary. Her calm serenity intimates a saintly passivity, an ontological aloofness: like her brother, she is already elsewhere, her inscrutable desire is a state of being rather than an act. In the eyes of the chorus, Antigone is cold, inhuman, the raw *omos* daughter of a raw father, the symbolic uncooked that stands opposed to culture. She is one of civilisation's discontents prepared to act upon her desire. Creon's utilitarianism makes him unable to understand this 'bizarre' calculation and he finally adopts the 'female madness' alternative. But that makes her even more dangerous in his eyes. Her stubborn attachment to death, her frightening ontological ruthlessness which exempts her from the 'circle of everyday feelings and considerations, passions and fears'[35] turns her into a symbol of sedition. In desiring unto death, Antigone challenges the symbolic order of state law and male authority and becomes a rebel in the name of desire.

Creon's repeated refusals of god, family ties and the dead on the other hand are necessary aspects of all rationalist politics. They are part of a considered 'politics of forgetting' that every *polis* must use in order to ban what questions the legitimacy of the institution. This memorial politics – and all discourse of rational legitimation is necessarily in part a Periclean funeral oration – turns the imponderable powers that threaten the city into past, memory and recitation. It transcribes them into a well-organised narrative that re-presents and thus transcends the fearful past presence; and in putting them into *logos* it encloses them into a singular and familiar order of argument and persuasion. Our repeated and memorised myths help us elevate and remove the terrible predicaments of life, and forget the pain of the event.

Creon is a master of the strategy of forgetting and concealing through denial and memorisation. The temporal order he refers to is

finite; the past repeatedly comes to the service of the future through a temporality that is linear and quantitative, rationally organised and mastered. His time and the time of state and legality cannot answer to eternity or the time of the event. The function of the time of repetition and of memory is therapeutic. Their representations aim to make, forget and sublate, what is alien to self and the alien itself and thus heal the wound that the abyss opens in the psyche and the social bond. But it was never a presence in the homogeneous time of *logos*, and so cannot be fully represented and cannot be banned and forgotten. The abysmal always returns, as Creon finally learns.

Antigone belongs to a different temporality. Her measure is not a natural life-time. It is a gain to die before her time she says to Creon, and she adds to Ismene that her soul has died a long time ago.[36] Always, forever, eternity: these are the temporal markers of her existence. The sequential time of law and institutions which bind generations through calculations of gain and the totalising time of history have intruded upon Antigone's timelessness and have upset the cyclical rhythm of earth and blood that pre-exists and survives the writing of the law. But Antigone's infinite temporality does not appeal just to the time of nature, *physis*, but to the timelessness of *Dike*. It is the laws presided over by *Dike*, unwritten and everlasting, the laws of Hades, that Antigone gladly follows.[37]

This time of *Dike*, which is opposed to the finite time of the institution, but is not simply natural time, could be paralleled with the unsettling of temporal sequence that psychoanalysis diagnoses in the work of the unconscious. Antigone has suffered an original excitation, Freud's unconscious affect, that has disturbed the psychic apparatus but has not been 'experienced'. It will only surface and be acted upon later in an action that will 'remember' the original blow which however was never recorded as a memory and was thus always forgotten. Freud speaks of this parasite of the psyche who has come there uninvited and unacknowledged as 'the prehistoric, unforgettable other person who is never equalled by anyone later'.[38] Freud has Oedipus in mind; but Antigone too is a timeless recorder of the forgotten unforgettable as she acts out her desire. Antigone's devotion to Polynices is the outcome of a mad, immemorial desire that has been inscribed into her before and outside of the time of institutions and laws. Her action is the unconscious affect of a stranger in the house of Being that has never entered it. An originary seduction has taken place, the self has been taken hostage by the primordial Other whose desire is an excessive overflowing and an inexorable command. In this approach the conflict would be between the passion for the brother that emanates from recesses of the psyche not open to the operations of reminiscence and *logos* and the unspeakable wrong against the love object that the institution commits. Can there be a law

that emanates from this dark region of desire and challenges the legality of the city and the work of repression of the family? Lacan's ethics incorporates the tragic necessity of our desire and the fatal love and excessive passion of femininity. For this law, which is unwritten and eternal but also the most unique and singular, the social bond is not just about good and evil or about right and wrong. Its time is neither that of natural eternity nor of historical totality, but the infinite time of the event; in this diachronous time, that 'there is' comes before what 'there is'.

Antigone is, for both Heidegger and Lacan, a foundational text, a myth of origins which indicates and produces striking and unexpected similarities between fundamental ontology and psychoanalytical ethics. Historical being and law share the same structure and mythology. In Heidegger, the field of the Other is the overpowering *Dike* beyond *logos*-language which opens *Dasein*. Being human comes into being in the violent conflict between *techne*, knowledge and violent overpowering, and *Dike*, the order of Being; it is carried out in acts of heroic persons who acknowledge their issuelessness in the face of death. For Lacan, Antigone is one such person; she answers the call and the desire of the other and becomes the radiant beauty that represents the beyond. In Heidegger, *Dasein* happens in the violent confrontation between *Dike* and *techne*, while in Lacan the subject is born in the conflict between the order of the Real-*jouissance* and the multifold efforts to suppress it. If Being is radiantly beautiful for Heidegger, Antigone, who follows her desire against the state, is the splendid and blindingly beautiful heroine who opens the field of ethics *propre*. For Heidegger, violent men in their uncharted and doomed wanderings through and against the order of the world opened history and Lacan's Antigone is such a woman. Her beautiful image gives us a glimpse into the truth of desire and her brutal action shows the deep structure of subjectivity.

If death, however, is the limit that opens *Dasein*, *Antigone* shows that it is the loving turn to the suffering and unique other, her brother Polynices, that bestows on the individual her singularity. Death is the external limit or radical Otherness that must be brought inside life to put human life into being, while the other is the internal limit that in asking and receiving help creates individualities out of *Dasein*. It is in this sense that the original *Dike* divides and breaks; the paths and byways that destiny opens take their unpredictable directions and map out mortal possibilities, because they are signposted by the unique encounters with unrepeatable others who always come before us and impose on us the mystery of an originating ethical command. The tragic law of law, destiny, is always open to an outside, an otherwise than Being, death and the other.

We can conclude that destiny, the universal force of law according to the tragedy, lives and is enforced in singular, unpredictable and forceful manifestations. *Moira* and *tyche*, fate and luck, are both necessary and contingent. The other who arises before me and the demand she puts to me happen unpredictably and without warning and could have happened otherwise. But there is an inexorable necessity, a strict legality to this contingency; some other will arise before me and I will have to answer her demand. Indeed my own individual *Dasein* is the necessary opening to the contingent demands of fate that appears to me in the face of the other. This reading retains the basic insights of Heidegger's ontology. It accepts that the demand for a moral code, while indicating the ethical character of the destiny of Being, cannot be satisfied without violating the essence of the ethical relation. The reason why a definite ethics is not possible is that *Dasein* is primordially ethical and that openness to the other is part of the basic design of Being. Acts of destiny are not signs of an essence; they do not re-present an absent cause, fate, nor are they means used to achieve some unknown ends. On the contrary such acts are the manifestations, the epiphany of destiny. And if destiny is the 'unwritten law' before human and divine, in a more modern linguistic terminology, the writing of fate performs. It acts (forces) in speaking and it speaks by killing. In other words, destiny is life open to the call of something beyond self. This beyond is quite specific for Antigone. If she answers its call, she says, she could face her brother as the most beloved of friends and she will lie with him in nocturnal bliss.

Death, eros and the force of the (br)other are the registers of destiny, they put into operation its unwritten and universal law and they confirm the basic insight of Lacan's ethics. Its epiphany is always in the singular. Law is force: both the ethical force of the living, embodied other, entombed in the command to love and the destructive force of the other as shrouded corpse and death. Both a force internal to law, that befalls and obligates, binds the I to the law and saves it; and an externally applied force, the sanction and limit of the law, that kills the I to save the law. Law's force: a force that binds and preserves or a force that severs and preserves. There is death in law and violence beyond language. If *Antigone* is the foundation of Western law and jurisprudence, her stone is a burial stone that both conceals and reveals the deathbound nature of legality. It is this sepulchral quality of law that makes Walter Benjamin say there is 'something rotten in law'.[39] What is rotting are the corpses of Polynices and Antigone. This spectral, ghostly entombed presence puts both law and the desire for justice in circulation.

It is not Antigone therefore who follows the demands of justice; justice is the creation of Antigone. Justice is the fantasiacal screen that philosophers, poets and lawyers have erected to shield themselves

from the question of the desire of the other. The question of justice can only arise for us on the burial ground of Antigone. It is her death that first alerts us to the desire for the other in the midst of the law, to the unique and contingent character of the demand of the other, that is, to the reasons that make justice both necessary and impossible: we can only negotiate our own desire for the other through our fantasies of justice, but the radical dissymetry, the abyss of the other's desire, will always leave behind a remainder for which neither the law nor fantasy can fully account. In her own excessive love of her brother and death, Antigone is the eternal reminder of an abyss that enfolds and enforces all law.

NOTES

1. G. Steiner, *Antigones: The Antigone Myth in Western Literature, Art and Thought* (Oxford: Oxford University Press, 1986) p. 103. At key historical moments of state or foreign oppression, playwrights throughout the world have turned to Sophocles. Anouilh's *Antigone* captured the spirit of the French resistance; Brecht's symbolised the desperate hope of redemption of German dissidents under the Nazis. And when the cultural embargo of South Africa was lifted in early 1992, the first play to be performed in the homelands by a European company was a contemporary version of *Antigone* . 'New Antigones are being imagined, thought and lived now; and will be tomorrow', Steiner, *Antigones*, p. 304.
2. G.W.F. Hegel, *Aesthetics*, trans. F.P.B. Osmaston (New York: Hacker, 1975) p. 1217.
3. J. Lacan, *The Ethics of Psychoanalysis* (London: Routledge, 1992) p. 284.
4. M. Heidegger, *An Introduction to Metaphysics*, trans. R. Manheim (New York: Doubleday Anchor Books, 1961) p. 146.
5. Ibid., p. 131.
6. Sophocles, *Antigone*, in *The Three Theban Plays*, trans. R. Fagles with an introduction by B. Knox (London: Penguin, 1984) line 332.
7. Lacan, *Ethics of Psychoanalysis*, p. 275.
8. Sophocles, *Antigone*, lines 354–61.
9. Heidegger, *An Introduction to Metaphysics*, p. 156.
10. Ibid., p. 163.
11. Ibid.
12. Alexandre Kojeve, *Introduction to the Reading of Hegel*, ed. Allan Bloom, trans. James Nichols (Ithaca, NY: Cornell University Press, 1969).
13. See, amongst many, Vincent Descombes, *Modern French Philosophies*, trans. L. Scott-Fox and J.M. Harding (Cambridge: Cambridge University Press, 1980) ch. 1; Mikkel Borsch-Jacobson, *Lacan: The Absolute Master*, trans. Douglas Brick (Stanford, CA: Stanford

University Press 1991) p. 261; Michael Taylor, *Alterity*, (Chicago, IL: University of Chicago Press, 1987) chs 1 and 5; Slavoj Zizek, *The Sublime Object of Ideology* (London: Verso, 1989) *passim*.

14. Kojeve, *Introduction to the Reading of Hegel*.
15. On Hegel's attitude to death, the 'absolute master' see Costas Douzinas and Ronnie Warrington, 'Antigone's *Dike'*, in *Justice Miscarried* (Edinburgh: Edinburgh University Press, 1994) ch. 2.
16. Lacan in unpublished Seminar VI, quoted by Borch-Jacobsen, *Lacan*, p. 94.
17. Jacques Lacan, *Seminar III: The Psychoses* (London: Routledge, 1994) p. 50.
18. Jacques Lacan, *Ecrits: A Selection*, trans. Alan Sheridan (London: Routledge, 1977), pp. 310–11.
19. Ibid., p. 305.
20. Lacan, *The Seminars of Jacques Lacan,* Vol. 1, trans. John Forester (New York: Norton, 1988) p. 201.
21. Lacan, *Ethics of Psychoanalysis*, p. 248.
22. Sophocles, *Antigone*, line 611.
23. E.R. Dodds, *The Greeks and the Irrational* (Berkeley: University of California Press, 1951) p. 5.
24. Lacan, *Ethics of Psychoanalysis*, p. 277.
25. Sophocles, *Antigone,* lines 622–5.
26. Ibid., line 283.
27. Ibid.
28. Ibid., lines 559–90.
29. Lacan, *Ethics of Psychoanalysis*, p. 298.
30. Sophocles, *Antigone,* line 816.
31. Ibid., lines 1240–1.
32. Ibid., line 93.
33. Fragment 47LP, quoted in Segal, C., *Tragedy and Civilisation. An Interpretation of Sophocles* (Cambridge, MA: Harvard University Press, 1981) p. 198.
34. S. Zizek, *Sublime Object of Ideology*, p. 116.
35. Ibid., p. 117.
36. Sophocles, *Antigone*, lines 461, 559.
37. Ibid., lines 456–76.
38. Freud, quoted in J.-F. Lyotard, *Heidegger and "the jews"* (Minneapolis: University of Minnesota Press, 1990) p. 45.
39. W. Benjamin, *Reflections* (New York: Schocken Books, 1978) p. 286.

10
The Ethical Obligation to Show Allegiance to the Un-knowable

Marinos Diamantides

> *'S'il voit son semblable mourir, un vivant ne peut plus subsister que hors de soi.'* (To witness another's death, is to be forced to continue living outside oneself.)
> Georges Bataille

THE DEATH OF MY OTHER AND THE SURVIVING *ME*: NONSENSE AND SENSIBILITY

> [Before the other's death there is] affectivity without intentionality ... Nevertheless, the emotional state described here differs radically from ... inertia ... Non-intentionality – and nevertheless non-static state ... Emotion as *deference to death*, that is emotion as question which does not contain the elements of the answer. Question which becomes grafted on this profound rapport with infinity that is time (time as the rapport to infinity). Emotional rapport before the other's death. Fear and courage but also, through compassion and solidarity with the other, responsibility for him *in* the unknown. [emphasis added][1]

In *La Mort et le Temps* Emmanuel Lévinas points out that death – which is experienced only in witnessing my other dying – is irreducibly absurd and unknowable (not 'not-known', but an event of a total rupture of knowledge before the unorthodox 'object' of death). Dying is not being's passage into a 'new life', but its extreme pacification and passivity. However, although death brings about the destruction of being's movements and expressivity, it is not to be thought of merely as being's 'annihilation'. The latter view, for Lévinas, only radicalises the metaphysics of presence it wishes to subvert; for it reduces the significance of death to negative being and 'nothingness'. This implies an equality of terms between being/non-being which does not become the 'scandalous' and 'unjustifiable' event that is the death of my other for Lévinas. Further, it implies a totality of Being in which mortal beings

participate perpetually, without exit, without transcendence. In such models, death and birth constitute two radical events *in* Being to which each being must 'attach itself', and make them 'its own' – time after time, in the eternal recurrence of human fate. But, for Lévinas, the ultimate event in Being is not death (or the being 'for death') but society *qua* solidarity and compassion between mortal beings. In the concreteness of the *absurd* event of the death of my other, 'mortality' does not signify as information of a generic fate; it is an individuated, incomparable event of 'injustice' and a permanently shocking scandal which calls for sociality. Nor is the event of death to be thought of as 'a point in time' which allows recurrence and repetition. Instead the event of death constitutes the *durée* of time in which *time reverts to patience*.[2]

The irreducible relation of subjectivity is not the rapport with itself nor the 'authentic conscience' of the being before death or for death. Responsibility as emotion for my neighbour's death is not confinable inwardly by the subject of consciousness in the knowledge of its own mortality and in anxiety; rather, it is emotion which – like tears – spills outside the self. Nor is responsibility reducible to participating in the ritual social act of mourning, which attempts to fill the void opened by the other's disappearance. Rather it is to be understood as my obligation to be there *for* the perishable other or '[M]y presence before my other in so far as s/he absents him or herself in dying.'[3] All in all, the symmetrical and adequational proposition 'being/non-being' fails to attest to the scandalous aspect of the death of the other human, for the survivor who witnesses the death of the other human describes it as neither as a transformation nor as an annihilation, but instead as 'departure' and 'disappearance' of the other human into the unknowable. Death is an individualising force but not in the sense that in witnessing another dying, and becoming anonymous, 'I' become aware of the 'certainty' of my own death – a certainty which supposedly takes precedence over the absurdity of death and allows the creation of meaning. Rather the death of my other – always 'too soon' and 'for nothing' – is the event of *non-sense* in relation to which the consciousness of the survivor is emotionally moved and accedes to permanent 'restlessness'.

Lévinas, thus, attempts to trace in the rapport to death (as departure of the other into the un-knowable) an irreducible event of de-measurement in intersubjectivity, which upsets the contraction and consolidation of self-identity by the subject of intentionality. Because my other 'disappears' in death, the circle of perception (subject-object-subject) is interrupted. 'I' – as 'survivor' of my other's death – am the unique but not yet self-identified addressee of the universal moral demand to be-*for*-my-other-as-other. This demand is sustained and constantly renewed due to the impossibility to die 'in the place' of my other. To witness death's visitation upon my neighbour is to feel guilt

for their 'departure towards the unknowable',[4] 'without return' and without leaving an address.[5] The survivor who is unable to fully know or experience the other's 'death' is, thus, affected in a way more 'passive' than the idea of 'trauma' conveys. For evidence of this, Lévinas looks at *Phedon* – which is surprising since this is a classic work on the 'politicised meaning' (rather than the absurdity) of death. In *Phedon*, the task of expressing that which in death goes against meaning and *didache* goes to the marginal figures of Apollodorus and 'the women'. For them Socrates' death remains in the end 'non-sensical' and politically 'useless':

> Next to those who find in this death all the reasons to be hopeful, there are also some others (Apollodorus, 'the women') who cry more than one ought, without any measure; it is as if humanity is not subject to measure and there is an excess in death. [Death] is simple passage and departure – and, nevertheless, a source of emotion contrary to all effort of consolation.[6]

LEGAL VISION AND THE APPROPRIATION OF DEATH'S ABSURDITY

> *'... law masks death ...'*[7]

I argue that law can do more than 'mask' death. In showing a 'stiff upper lip' lawyers dealing with issues of life and death also manage to *appropriate* the non-sense of the other's death. Let me show how this happens by looking at the legal representation of patients in Persistent Vegetative State (or PVS). When such a patient – whom both the common lawyer and the lay person often imagine as a 'vegetable-man' – is brought before the law (usually in cases where doctors or relatives ask for law's permission to terminate life sustenance), the law always struggles to deal with it as if a still-living subject or/and as already dead and destroyed 'human nature'. For the law, this 'living-corpse' retains its essential subjectivity if it can be 'resuscitated' as a subject which either intends to persevere in being or is already dead-like. It is as if the law refuses to be moved by this other to consciousness, whose existence hesitates between persevering and giving-up. In short, for law's eyes the PVS patient is of no interest in so far as his or her existence remains indeterminate: it becomes an early abandoned corpse. More generally, this attitude implies a certain legal view of humanity and subjectivity: both are linked to the ability of being to be-for-itself, including in being able to assume the alterity of the world under its own intentions and enjoyment; this kind of engagement with subjectivity shows, in Lévinas' terms, a legal interest

in being's *esse* or *essence*, that is, being's capacity to persevere in the face of all adversity, filling with its presence the 'void' opened by the other. Alternatively, when the subject is confronted with death – where the work of intentionality becomes impossible and subjectivity's essential ability to persevere in being gives its place to the anxiety of being *for its own* death – subjectivity supposedly no longer matters to the law: it is a matter of (law's) indifference.[8]

In the United States, the problem becomes a right-to-die issue.[9] Decisions on withdrawing life-support systems are meant to respect the patient's past wishes (the so-called 'living will'). When there is no 'objective' evidence of such will, a ward is appointed who is expected to decide 'as the patient would have intended him/her'. In fact this is an expansion of the 'substituted judgment' doctrine – which English common law had originally devised for decisions regarding the administration of an incompetent's property. In the most infamous of decisions made under this law, a New York court asked the ward to reconstruct the will of a comatose patient even though the court had heard that throughout his conscious life that patient was legally sectioned![10] That the court took an interest in the patient's will *only after* it became inexpressible is an absurdity *at the heart* of that judgment.[11] This absurd twist also demonstrates that the courts' 'still-life' depiction of PVS patients (whereby life is assembled in a frozen presence, gathered by memory) is also a *nature-morte*. The actual patient is in a way treated like a corpse: almost any will can be attributed to it. In English law, on which this chapter is focusing, the depiction of the still-life does not raise constitutional issues but depends on the patient's so-called 'best interests'.[12] In this arrangement, too, there is absurdity. Can the incurably a-conscious be said to 'have' vital interests? No, according to the English courts: it is in fact dead and only 'artificially' kept alive. Yes, according to the *same* courts: as a 'still-life' – that is, a memorable subject of English medical law – the PVS patient is still an English gentleman who dislikes medicinal intrusions to his privacy and, incidentally, merits a 'dignified' death.

The absurd legal *co-presentation* of PVS patients as alive and dead revolves around one central difficulty of the judges. For PVS patients the end of life has not yet been present. In any case, the vagaries of our so-called 'scientific' definition of the moment of death as 'whole-brain death' are such that both 'life' and 'death' in such cases remain to be legislated by the judges.[13] In the words of Stevens J in the famous American *Cruzan* case, the judges 'engage in an effort to define life's meaning and not to safeguard the patient's life sanctity'. Thus, faced with vegetation, the judges have to assume openly the inventive aspect of their interpreting when they 'apply' or 'extend' the extant law. Yet, in all three decisions of the authoritative *Bland* case the judges held that their judgments were substantiated in a simple application of extant

law. In the first instance, Judge Brown had unproblematically admitted the applicability of the 'best interests' test (originally developed to tackle cases of *conscious* patients) by drawing an analogy between the vegetating and the conscious – albeit 'insane' – woman of the precedent. Taking the animal for the vegetable, the self-conscious for the a-conscious is a liminal case for the powers of legal analogy and metaphor. It appears that such overt animism was absolutely necessary not only for the willed animation of the vegetable-man as a zoetrope of still interests, rights, etc., but for the 'life' or possibility of legal metaphor and analogy themselves. The point is that the metaphor 'vegetable-man' would have been juridically unworkable unless it somehow alluded to either of the clear categories: 'dead' man or 'living' man. But A. Bland was not yet juridically dead. Thus for the jurist he had to be still-alive despite the absence of consciousness. The juridical operability of the metaphor required the repression of what human 'vegetation' is taken to express, namely, a human *neither* dead *nor* alive but in constitutive transit, whose actuality demands from the judge more than the ambiguous metaphor 'vegetable' suggests. In sum, the life or possibility of a juridically working visual metaphor for A. Bland already required a compromise of the ethical affect of his indeterminate actuality, that is, the fact that he was neither alive nor dead, neither essence nor a void. As the case proceeded to the Court of Appeal and the House of Lords, the judges continued applying the best interests test but now with a significant degree of self-admitted contradiction. The judgments continued to take vegetation for a 'still-life' (so that the precedent could still apply) but, at the same time, they increasingly portrayed the image of 'vegetable' in blurred and disturbing ways. It could be said that 'still-life' is now also represented as '*nature-morte*'. In a non-fictional or 'non-juridical' sense, the judges indulgently implied, the PVS patient had no interests whatsoever. Thus, Lord Keith observed that for A. Bland, 'it must be a matter of complete indifference whether he lives or dies'.[14] Lord Goff found that 'there is in reality no weighing operation to be performed';[15] Lord Mustill wondered, 'What other considerations could make it better for him to die now rather than later? None that we can now measure, for of death we know nothing. The distressing truth must be shirked in that the proposed conduct is not in the best interests of A. Bland, for he has no interests of any kind.'[16]

THE OTHER AS 'LIVING-THING' AND LEGAL CLOSURE

> The defining feature of legal modernity lies in the attempt to make law self-founding ... to seek ... the justification of judgment ... within law itself. The science of law was thus predicated upon legal closure.

> The thesis on the death of law can be approached as a question relating to the decay of legal reason and specifically to the demise of certain forms of speaking or invoking legal judgment In either case, it is first a matter of death and of what it means for an institution to die. Hermeneutically, it is a paradox in so far as institutions are by definition legal fictions that do not die; institutions such as religion, law or economics ... are forms of (social) life and as such they cannot die ... In consequence, to speak of the death of law is to appropriate a metaphor ... which is contradicted by the classical principle of *lex aeternitas* and the maxim *dignitas [ius] non moritur*.[17]

In the ways the PVS patient is constituted juridically we discriminate distinctly the *phantasmatic* nature of the ideal object of legal judgment – which is no other than the very subject of law. The judicial emphasis on the comatose patient's 'rights/interests' demonstrates an interest in his 'essence' as 'still-life'; at the same time, the complete absence of emotion from the judgment indicates an indifference towards the patient, as if he was a 'lost case' or already dead. What is repressed is the emotional experience of the others' death as disappearance into the un-knowable and as non-sense *in* which the judges were ethically demanded to *risk* themselves. Ethically, the relationship to the man without consciousness must go beyond the one between *ego* and *alter* which is based either on knowledge of, or on mimetic desire for, what the other is/has. For 'knowledge' presupposes an adequacy of correspondence between ego and other which is not available in the relation of the one for the mortal other. And 'desire' articulates the mimetic identification between ego and its alter as a dual impulse of being and having, which, again, does not extend to the gratuitous concern of the one for the other who, in dying, departs into the 'unknowable'. What was, in *Bland,* the universal investiture of the man without consciousness in law as a legal subject? In other words, who (or what) *is* the Anthony Bland which the judges insisted in 'knowing' as dead and 'desiring' as still-living? The 'object' of knowledge (death) is that which cannot be known by the judges but as negation of Being. The patient's lack of consciousness in this case becomes an excuse for the judges to relate to him as already dead, 'devoid' of interests and rights, a 'nothingness'. Thus, one can 'know' what death is: non-essence. On the other hand, the judges' mimetic desire is directed at Anthony Bland as an organism which still perseveres. It is the combination of the knowledge with the desire that allowed the judges to formulate, absurdly, that 'it is in the interests of the patients to die although he is devoid of all interests'.

Law's 'still' interest in PVS patients is directed at their blind biological persistence.[18] This persevering being is entirely blind to and ignorant of the external provenance of the substances which

sustain it. The oxygen, food or medicine which is pumped into it is automatically 'assumed' by it. All in all, the vegetating patient (who was fed and sustained only thanks to exterior others) is 'known' and 'desired' by the court as:

> ... the living thing (*le vivant*) [which] exists in totality as totality, as if it occupied the centre of Being, in being its source ... For it, all the forces which traverse it are always already assumed, [it] experiences these forces as if they were already integrated in its needs and enjoyment. That which the thinking being perceives as exteriority which requires work of appropriation, is experienced by the [thoughtless] living-thing as essentially immediate, as both element and *milieu* ... Its senses ... do not bestow it with anything other than sensations. It *is* its sensations. This sensibility [without consciousness] is of a consciousness without thought ... without problems, that is without exteriority ... intimity of being which occupies the centre of its own world ... consciousness without the consciousness to which correspond the terms unconscious and instinct. The interiority which, for the thinking being is opposed to exteriority, is played in the living thing as absence of exteriority. The identity of the living thing ... is essentially the Same, the same which determines the Other, without the Other ever determining the Same. [In so far as the living thing is concerned] if the Other ever affects it – if exteriority touched it – this would kill the instinctive being. The living thing lives under the sign of *freedom* [from the Other *or death* ...]. [original emphasis][19]

The juridical desire to see biological life as if autonomous from affectivity – as if a closure threatened by the exteriority of death – corresponds to the desire to see law's life too as a closed circuit, an indifferent, self-same body of systematically organised impersonal judgments which 'assume' and 'consume' all factual exteriority. It is thus, that the otherness of Anthony Bland was unproblematically digested by the logic of precedent. The important thing was to connect this case with the one which laid the best interests test. Indeed, legal positivism claims 'law' to have a life of its own and the arrival at a judgment to be almost a mechanical process. It claims, in other words, the closure of legal meaning which it purports to be contained in the stillness of the letter of the law which is eternally and universally applicable – a universality and timelessness under which all infinity is subsumed. Further, according to legal theory, a juridical decision is legally sound not only if it is substantially in coherence with a system of law but also 'mythically' so. Stanley Fish, for instance, would agree that the decision in *Bland* reiterates successfully the myth of 'full

readability of existing law' since the judges insisted that their decision was a mere application of the precedent's 'best interests' test.[20]

Critical theory, on the other hand, denies that legal meaning can be contained in this 'still life' of the letter of the law. For critical legal theorists, such closure of legal meaning is equated to a death.[21] A judge is claimed to be able to always give new meaning to the supposedly fixed or 'still' letter of the law. Yet, as I already pointed out, in the *Bland* case the judges had to be more active than passive in order to tie that case with precedent, that is, to affirm legal closure. From a critical perspective this effort is not exhaustive of the judges' activity: choices *were* made and the judges cannot divest their personal responsibility for choosing to interpret the law in the way they did. Yet, was the *Bland* judgment entirely a matter of personal choice, as the critical lawyers usually note but also as the judges in *Bland* voluntarily admitted? 'Choice' has a meaning so long as the judges saw the vegetable as either alive or dead. But what can we claim to be the *sense* of choice before what is neither merely alive nor merely dead?

BEYOND THE KNOWLEDGE AND DESIRE OF THE 'LIVING-THING': RUPTURE OF LEGAL CLOSURE

> ... in universal investiture ... there lies coiled the dispossession of dis-inter-estment beneath the concreteness of responsibility, of non-indifference, of love. There is responsibility for the unique, shattering the totality: responsibility before the unique that rebels against every category, a signifier outside the concept, free, for an instant, from all graspable form in the nakedness of his exposure to death, pure appresentation or expression in his or her supreme precariousness and in the imperative that calls out to me. Behold vision turning back into non-vision, into insinuation of a face, into the refutation of vision within sight's centre, into that of which vision, already assuming a plastic form, is but forgetfulness and re-presentation.[22]

> It is to catch sight of an extreme passivity, a passivity that is not assumed, in the relationship with the other, and, paradoxically, in pure saying itself. The act of saying will turn out to have been ... from the start the supreme passivity of exposure to another, which is responsibility for the free initiatives of the other. Whence there is an 'inversion' of intentionality which, for its part, always preserves enough 'presence of mind' to assume them. There is an abandonment of the sovereign and active subjectivity, of undeclined self-consciousness, as the subject in the nominative form in an apophasis. And there is in subjectivity's relationship with the other,

> ... a quasi-hagiographic style that wishes to be neither the sermon nor the confession of a 'beautiful soul' ... [It is to show to be] ... bound by an irreducible, unrepresentable past, in a diachrony.[23]

In the higher court the judges of the man without consciousness lamented their inevitable subjectivism.[24] Although the court supposedly only decided that the decision of the doctor to withdraw life-support 'has always been lawful' – in time immemorial – and that it is up to the doctors to determine 'objectively' whether such a course of action would be in the patient's 'best interests', this decision '... remains ethical, not medical, and there is no reason in logic why on such a decision the opinion of the doctor should be so decisive.[25] But, is the (denied) personal responsibility of judges really governed by their 'secret' intentions/anxiety *vis-à-vis* the dilemma 'to be or not to be' which are 'hidden' in the depths of their psyche? If so, one can forget the particular vegetable-man altogether: he is no more than the 'scalp' in the hands of the judge-as-Hamlet. I argue, that this view of the problem may be as restrictive as Hamlet's famous dilemma is banal. Finding out what the judge knew and felt about the 'passage' of being into non-being, from essence to nothingness, does not yet answer how the judge is *affected* by the arrested transit of the vegetable-man who is *neither* alive *nor* dead. The latter is not just vegetating in the sense that he is 'between life and death', being and non-being. He is *otherwise-than-being/not-being*. Must we equate the effect that this other has on the judge with the latter's reaction to either being/non-being? The point is that PVS exemplifies that the experience of the other's mortality is neither a knowledge nor an empathic apprehension of death. The experience of mortality is 'affectivity beyond representation' and subjection to a 'passivity more passive than trauma'.

In this regard, I argue that in the encounter with the vegetable-man, the dialectics of being/non-being are surpassed, and a different ethical analysis is asked for if we are to understand fully the judicial attitudes to PVS. The vegetable-man incarnates for the survivor the absurd and purely un-knowable dimension to being's mortality. The significance of the fact that the other is perishable exceeds the neat conceptual opposition life–death. It acts as a source of infinite responsibility of the one-for-the-other which results in the suspension of all ability, respectively, to take an interest in each other's life and/or remain indifferent to each other's death; it calls for the substitution of interest and indifference (respectively towards the other's being/having and not-being/not having) by *disinterested engagement* with the mortal other – whereby the other is claimed by me to be more unique than s/he can afford to manifest as 'difference'. This kind of relationship is not based on knowledge and mimetic desire of what the other is/has and is otherwise than a 'relationship' of indifference: it is

pure emotion of the one-for-the-other. The relation to the other that follows is far from 'inoffensive' – in fact Lévinas speaks of the 'ineluctable violence' of approaching and compassion for the other as unique at the very time when his essential difference is being crushed by death.[26] Hence, being disinterestedly moved by the other's death is no licence to treat him in any way I like. That would mean that the absurdity of my other's death has been 'appropriated' by me. Although I am free to act my compassion, I am, simultaneously, bound by extreme responsibility.

I submit that what was 'held' from the *Bland* judgments by the editor of All ER excludes the *radical passivity* of the judges towards the absurdity of vegetating existence which is very unfortunate because it is there that we find the most convincing justification of the decision. As we saw, the decision was legitimated by reference to precedent in a way that suspends Anthony Bland's being between being and not-being. But the vegetable was not 'alive' nor simply 'kept' from dying. He was *neither* alive *nor* dead. He was otherwise than being/non-being. That 'otherwise' could not become the object of choice and the subject of law's interest (essence) but nor could it be brushed aside as meaningless nothingness. The absurdity of the vegetable-man's condition had to be responded to neither 'actively' (in choosing to re-invent the laws so as to prevent them becoming meaningless) nor in passivity-as-absence-of-activity (in mechanically applying rules). Rather, the 'otherwise than being/non-being' had to be responded to in *radical passivity* whereby the judge *let the law suffer* the absurdity of the vegetable-man. And this 'letting the law suffer' is no choice. In this connection, Lords Goff[27] and Keith[28] offer us (unintentionally) good material for thought. Both attempted to justify their decision by saying, in short, that if it is *not* possible to prove that withdrawing life-support is lawful, *neither* is it to prove that the continuation of treatment without consent is. I argue that this admission *in effect suffices as a justification* of their decision and renders their insistence to refer to the test of the patient's 'best interests' totally useless. It is a justification primarily addressed to Anthony Bland as a 'uniquely different' subject of law (non-essential, thus exempt from juridical interest, and yet ethically unique) and otherwise than being/not-being. And it is expressed with an ingenuity that is at once passive towards the indeterminacy of the vegetable-man *and* capable of bringing about a new decision. The legal problem which corresponds to the existential dilemma 'to be or not to be' was not resolved but turned *on its head*: neither one nor the other but 'to-*be*-for-the-mortal-other'. It is an ingenuity provided by the conscience of law's agents which surpasses their capacity to interpret 'inventively' the legal precedent.

NOTES

1. Emmanuel Lévinas, *La Mort et le Temps* (Paris: L'Herne, 1991) p. 23 (my translation).
2. Ibid., especially pp. 134–5.
3. Ibid., p. 21.
4. Ibid., 'Depart vers l'inconnu', p. 10.
5. Ibid.,'sans laisser d'addresse', p. 10.
6. Ibid., my translation.
7. P. Goodrich, 'Fate as Seduction: The Other Scene of Legal Judgement' in A. Norrie (ed.) *Closure Or Critique. New Directions In Legal Theory* (Edinburgh: University of Edinburgh Press, 1993) p. 121.
8. For a similar type of analysis – albeit from very different premises – see Giorgio Agamben, *Homo Sacer: le pouvoir souverain et la vie nue* (Paris: Seuil, 1997). There Agamben concentrates on the classical separation between *zoe* and *bios* (being's biological life and its political/juridical one) which contrasts law's interest in beings' political life to its indifference towards 'raw', or 'naked life'. Analogies could be drawn between the intersubjectivity in its legal constitution and representation and what Lévinas calls society as *inter-esse*.
9. The 'right-to-die' for PVS patients had for some time been discussed in the US on the basis of the common law doctrine of informed consent and of the federal right to privacy. In the authoritative *Cruzan* case the US Supreme Court found that 'this issue is more properly analyzed in terms of a Fourteenth Amendment Liberty Interest' (*Cruzan*, 110 S. Ct. at 2851 n. 7).
10. *Superintendent State School* v *Saikewitcz* 73 Mass 728, 370 NE 2d 417.
11. Momeyer observes that where in *Quinlan* the court '... created a legal fiction in having one person exercising the rights of another ...', in *Saikewicz* the court goes a step further and creates '... a legal fantasy and logical absurdity' in asking the person who undertakes to make the substituted judgment to 'choose what she thinks her ward would choose while remembering that her ward cannot and never could make such choices!' This is 'either meaningless or pernicious': R.W Momeyer, *Confronting Death* (Indianapolis: Indiana University Press, 1989) p. 157.
12. The main case study here is *Airedale NHS Trust* v *Bland* [1993] 1 All ER, Fam.D.CA.& HL concerning the issuing of declarations to a doctor that he may lawfully withdraw life support from his patient Anthony Bland. The extant law the judges considered here was the 'Best Interests Test' developed in in *F.* v *West Berkshire Health Authority (Mental Health Act Commission Intervening)* [1989] 2 All ER 545.
13. 'Consciousness' replaced 'blood circulation' as the 'criterion' for establishing death in the late 1960s following the recommendations of the 'Harvard ad hoc Brain Death Committee'. For evidence of the

arbitrariness of the new definition see Peter Singer's *Rethinking Life and Death: the collapse of our traditional ethics* (Oxford: Oxford University Press, 1995).

14. *Airedale NHS Trust v Bland* [1993] 1 All ER, Fam.D.CA.& HL at 861.
15. Ibid. at 870.
16. Ibid. at 894.
17. Goodrich, 'Fate as Seduction', p. 165.
18. For different philosophical accounts of 'life' as instinctive functionality of the organism we can compare Hegel's '*Notion*' with Levinas' '*Vivant*'. For the first, 'life' is a notion which incorporates the (Kantian) logic of 'inner teleology'. It 'is immanent in [the living thing], the purposiveness of the living being is to be grasped as inner; the Notion is in it as determinate Notion, distinct from its externality, and in its distinguishing, pervading the externality and remaining identical with itself. This objectivity of the living being is the organism', Hegel cited in Lévinas, *La Mort Et Le Temps*, p. 85. Levinas' views are explained later in my main text.
19. Lévinas, *La Mort et le Temps,* pp. 25–6 (my translation).
20. See Stanley Fish, *Doing what comes naturally: change, rhetoric and the practice of legal theory in literary studies*, (Durham, NC: Duke University Press, 1989).
21. See Goodrich 'Fate As Seduction', pp. 116–42.
22. E. Lévinas, *Outside The Subject* (London: The Athlone Press, 1993) p. 115.
23. Ibid., p. 47.
24. Judge Hoffman of the Court of Appeal: '... if the judge seeks to develop new law to regulate the new circumstances, the law so laid down will of necessity reflect the judge's view's on the underlying ethical questions, questions where there is a legitimate division of opinion', *Bland* [1993] 1 All ER, Fam.D.CA.& HL at 879. Lord Brown-Wilkinson says the doctor's decision to either continue or withdraw life-support in this case 'in the best interests of the patient ... may well be influenced by his own attitude to the sanctity of human life', ibid. at 875. And Lord Mustill: 'If the criteria for the legitimacy of the proposed conduct are essentially factual, a decision upon them is one which the Court is accustomed to perform ... If, however, they contain an element of ethical judgement, for example if the law requires the decision maker to consider whether a certain course is "in the best interests of the patient" [his inverted commas], the skill and experience of the judge will carry him only so far ... When the intellectual part of the task is complete and the decision maker has to choose the factors which he will take into account ... the judge is no better equipped, though no worse, than anyone else. In the end, it is a matter of personal choice dictated by his or her background. Legal expertise gives no special advantage to her', ibid. at 886.
25. Ibid. at 895.

26. 'The responsibility for another is … a saying for the other prior to anything said. The surprising saying ... is against the "winds and tides" of being, is an interruption of essence, a disinterestedness imposed with good violence', E. Lévinas, *Otherwise than Being Or Beyond Essence*, 2nd edn (Den Haag: Kluwer, 1991) p. 43.
27. [1993] 1 All ER, Fam.D.CA.& HL at 870, per Lord Goff.
28. Ibid. 860, per Lord Keith.

11
Stephen Dedalus' Magic Words: Death and the Law between James Joyce and Pierre Legendre

Adam Gearey*

INTRODUCTION

How is death central both to the institution of the law, and also to an overcoming of that institution, to an opposition to the law? An answer to these questions can be suggested by reading James Joyce as an oblique commentator on Pierre Legendre's theory of the centrality of the image to the constitution of law.[1] The superficial difference of their writings conceals a much greater affinity. Both are concerned with what could be described as a being in language,[2] and hence the construction of the subject in language, but, more particularly, they share a common fascination with the scholastics, with both orthodox and heretical discourses.[3] What is of the greatest importance, though, is the common focus on the institution and the fictive nature of the subject. Scholars have attempted to track the path of the law through Joyce's *oeuvre*,[4] but this trace can only really become apparent in the light cast by Legendre's dark sun.

Legendre's work has consistently shown that contemporary, secular Western law has to be understood in terms of its development from the theological and religious discourses of the Church. It is not possible to understand the operation of juristic institutions without taking into account this derivation. Social life is made possible and given meaning by the Church's organisation of a discourse of death and eternal punishment. Through its liturgies and symbols, the Church mediates the pure alterity of an absent God and creates community out of the threat of the void, the abyss on which all institutions must be built. Through love for the Church the individual is given a viable social identity which can be moulded and fashioned to create allegiance to certain forms and beliefs. It is impossible to reject the Church and to sustain a viable sense of being, as this would be to face the terrifying void and to embrace death as non-being.

The early history of legal institutions shows that it operates through the capture of a subject's desire and the denial of death. Just as theological order is founded on symbols, law operates through its construction of symbols of filiation or legitimacy. In the same way that the image or the icon spoke to the believer and brought them into the community of the Church, the institution of the law attempts to take hold of the soul. Western law may have forgotten this root of its power, but it persists in law's rituals and concern with legitimacy. Law's hold over the subject is essentially the manipulation of a discourse of legitimacy, inheritance and correct title. The modern subject of law, as a bearer and enforcer of rights is unthinkable without law's pact with death. To be a subject of law is still to forget a deeper void, a more profound absence.

Joyce's work is essential as it not only exemplifies Legendre's reading, but shows that to reject the law is also, essentially, to court death, or to take the meaning of one's death upon oneself, to contend with the constituting void. Joyce had an intuitive insight into the power of law to hold the subject through a manipulation of a theological discourse. It is this insight that has made a text such as *A Portrait of the Artist as a Young Man* so compelling. Within the confines of this article, it is impossible to trace the development of this thematic through Joyce's *oeuvre*, so the focus will remain on Joyce's early writing, his first novel and the pivotal short story 'The Dead'. This concentration is essential for another reason. Reading Joyce as a commentator on Legendre opens up a further question: a question of the possibility and the cost of opposing the law. The success with which Joyce can refigure the law, or write his own law, is the extent to which death can be mediated by the artist through his own creation of himself in his writing. Clearly these issues are the tensions that animate Joyce's first presentation of himself as a writer, a literary artist. This strange textual encounter between Joyce and Legendre must thus take place as a meditation on death, law and writing.

This chapter will fall into a number of sections. Following a brief exposition of the importance of death and absence in Legendre's work on the institution of law, Joyce's epiphanies will be considered. Fragmentary, pieces of a writing yet to take place, the epiphanies sketch the contours of a revolt against the symbolic order in the name of a self-fashioning where death is a central theme. These concerns will then be traced through *A Portrait of the Artist as a Young Man*, where the symbolic order of the institution will be further investigated. The discourse of death, judgment and punishment will be seen as a central way in which the law operates. However, revolt against this order is possible. Joyce's self-fashioning provides 'a certain resistance',[5] a thinking and living for oneself which is the original impulse for any critical position. The final section will be a reading of 'The Dead', a

story from the collection *Dubliners*, in which Joyce realises in his writing the creative, fictive intensity of the law itself.

INSTITUTING LAW: DEATH, DESIRE AND THE VOID

Legendre's theory of the image shows that to achieve social life and become a subject of the law, the individual must be shielded from the very real threat of non-being. A point of access into this reading of the image is provided by the myth of Narcissus. In Ovid's story, Narcissus falls in love with his own image reflected in a pool, and, unable to reach the object of his affection, slowly fades away until 'nothing remains'.[6] At first glance this tale may appear to have little relevance to a theory of the legal institution, but, as one looks deeper, Narcissus' death and his fascination with his own image opens onto a central truth about both the constitution of the subject and the order of images that creates and sustains social being.

Narcissus' death reveals the very operation of a symbolic logic that is necessary for the construction of the sense of self.[7] When Narcissus stares in the waters of the Styx, he falls in love with his reflection, but realises that it is forever separate from him. His separation from his image and the resulting sense of loss cause him to waste away: he cannot join with his own image. Narcissus thus fails to sustain and master the basic separation which allows any human subject to enter into language. He should have been able to understand that his image represents him as an object to himself, as it is only this mastering of one's image that allows the accession to language. Becoming a mature speaker of words means accepting that to speak of yourself is to represent yourself, and thus, in a very real sense, to be absent from your words. To be a user of language is to employ signs or words which represent or replace absent 'things'. The separation of the self from the self, which allows the self to become an object to the self, is the basic and fundamental structure of subjectivity. Narcissus fades away because he cannot master his separation from himself: 'on pain of death, the human subject must give up any attempt to undo this basic division of human life'.[8]

It might be suggested, then, that there is a cost to becoming a speaking subject. This cost is the extent to which the subject has to remain divided, inhabited by an absence. For Narcissus it is the 'gap' which is occupied by the reflecting medium, a space which is more than simply the surface of a mirror. It is the gap which separates Narcissus from himself and allows him to speak and think of himself, allows his words to return to himself as the image of himself. To have a constitutive image, to accede to speech, is thus to lose any sense of real unity. At the same time there is a desire for unity and for a sense

of being a complete self. This desire is the key for understanding the subject who has to interpret his own image in the torment of separation. When Narcissus sighs 'I love myself', he becomes an object of his own desirous gaze, or, to put it another way, he becomes transported at the very moment of recognising himself as another.

It is this desire for a lost and unrecoverable object that the institution must manipulate. Legendre has always stressed that the institution binds the subject to it erotically, entrapping the subject's desire. The only way in which death can be held at bay is to transfer desire to a love of what will survive us all: a love for the fatherland or for the law which will sustain not just the individual, but all social being. Just as the individual subject is founded on an absence, at the base of the social order is a similar constituting loss. The key question for the institution of the social is how to make this absence constitute a symbolic order which will sustain the subject. In the poem Narcissus is replaced by a flower which, although it takes his name, represents his eternal absence. For the reader, the flower becomes the trope of the subject's relationship to the constituting absence of their place in language. Indeed, at an even more general level the flower becomes a metaphor for what the symbolic order must achieve. It is necessary that the symbolic order organise and articulate this absence in such a way that the subject can find itself reflected in social institutions and thus gain a viable sense of social being. The structure of the symbolic order is thus already implied by the structure of specularity which founds subjectivity as a regard of itself. It is not as if the social order is founded on a plenitude or an identity which is of a higher order of the subject and can thus bestow a sense of being as belonging. Beneath the social order is a profound alterity, the void.

A foundation on the void is presupposed by the great pre-scientific discourses of the West. It was the task of the religious, theological and juristic discourses to create the social through the construction of God as the absolute Other who founds human existence. The object of analysis is not so much the content of any particular text, but the function of transmitting a 'nothing, the Nothing'.[9] Law is thought of as one of the primary social discourses which organises these discourses of legitimate authority. The sense of this operation can be illuminated by studying the terms of juristic dogmatic communication. Etymologically, the Greek word *dogma* signifies that which is taught, and thus deemed to be worthy of preservation. *Communis*, the Latin root of the word communication, refers to that which is held in common. The Legendrain approach sees the common organising principle of legal dogmatics in terms of preservation of the 'third term',[10] a structurally necessary mediation between alterity and the human world. Law must provide this mediating membrane; it must organise an immemorial and inaccessible space in order to allow the production of social being.

This process of reproduction cannot be considered without considering the foundational notion of reference.

Reference is necessary to the whole discourse of reason, the guarantee that the signifier will coincide with the signified and thus that the world can be known or represented through language. This rational discourse is built on a mystic foundation. The human subject can only know itself through a structure of specularity which is in turn supported by the social provision of images. The question would become, then, what supports these images? As suggested above, the social rests on pure alterity: it creates a discourse where rituals and other mediating structures speak for a divinity that is foundational but also unknowable and unrepresentable. The divinity itself, however, is complete and identical with itself. Theological and religious discourses thus transmit an ultimate point of reference and identity that can be made available to the mundane world. In Western textual systems, this reference function, whilst explicit in the beginnings of the law, becomes increasingly associated with the textual organisation of law. Law's texts, and hence law's truths, are organised hierarchically and with reference to a preserving sovereign truth, a signifier who represents, or stands in for, the ultimate guarantor – the Godhead himself.

The supporting structures of this text of law, can be approached through the notion of genealogy. This notion is, once again, constructed on the way in which law can stand in for an absent figure. Just as the text must fix reference and truth, the social order itself must locate and define the individual subject around the coordinates of ancestor or descendant. Genealogy and the logic of law also come together in the notion of the legitimacy of kinship which defines the precise terms of inheritance. Psychoanalysis would specify that at the root of this genealogical order is the figure of the father and the incest taboo, the primary interdiction which defines human society. Again, it would be possible to describe a link between the notion of the totemic father and the order of law.[11] It is possible to trace the 'device' of paternity which would relate the father to the emperor, and the emperor to God. The father's power and authority is founded ultimately on the notion of his representing the emperor. To assume the position of law, to speak as the voice of the law would be to adopt the speech of the father. Paternity would thus guarantee the whole notion of truth and reference, and the principle of generation of the social. It would, moreover, sustain the genealogical sense in which the legitimacy of the community is preserved.

WRITING AND THE CONSTITUTING VOID: THE EPIPHANY

The extent to which this symbolic order can mandate and control the forms of social life, the degree to which the text without subjects[12]

can provide a predetermined role for all of us are put in question by Joyce's work. However, this is not to suggest that the symbolic order described by Legendre can be naively rejected. It is to dispute the extent to which it is fixed, or, indeed, can control its own production of meaning. Joyce's experiments in writing, his presentation of the artist as self-artificer, open the problematic of the individual's response to defining structures. In the following section of this chapter, it will be suggested that the key to this self-fashioning in Joyce is the question of death and language.

Joyce's writing presupposes the whole apparatus of the Church and juristic notions of text and transmission. His early writings, the epiphanies,[13] reflect a number of Legendrian themes. Just as the law must stage an origin, present the subject to his/herself, the epiphanies represent Joyce writing Joyce. They raise the problem of the authenticity of the self and ultimately suggest that the writer must engage with both death and the path of their desire before they can conceive a kind of writing which will effectively replace the law by providing a reflection of the writer's self. The epiphanies that will be studied here are also interesting as they become repeated in the text of *A Portrait*. It is as if Joyce's writing must circle around a number of primal scenes before it can progress. The precise cost and trajectory of this movement will now be plotted.

Joyce's vision of Hell which will conclude the traumatic sermon sequence of *A Portrait* was first developed as an epiphany.[14] It reveals how the image of death is impressed upon the believer's conscience and linked to the idea of judgment in the religious discourse of the Catholic Church. The narrator of the piece imagines himself in Hell amongst malformed creatures, 'half men, half goats',[15] punishing demons driven by a 'secret personal sin'. The presence of the narrator in Hell suggests that he too has a dreadful secret. In other words, the epiphany shows how the image of Hell is internalised, and how the penitent must take the meaning of sin upon himself. This piece reveals the Church's jurisdiction over the unconscious of the subject. Any strategy of resistance must do more than simply record and hope for the catharsis of writing. The problem becomes how to plot the determinates of the institutional hold over the subject. As Legendre's work suggests, the law must be related to a complex network of kinship structures and signifying practices.

Presupposed by this network is an entrance into language, and a sense in which language controls and defines. The following epiphany can be read as an illustration of the notion that social being is achieved not just through the image of the self as object, but through the 'image of the speech of another'.[16] Joyce presents the child beginning to coincide with himself through his representation in speech. At the

same time, there is a resistance to the symbolic organising principle of language:

> Mr. Vance – (comes in with a stick) … O, you know,
> he'll have to apologise, Mrs. Joyce,
> Mrs. Joyce – O yes … Do you hear that, Jim?
> Mr. Vance – Or else – if he doesn't – the eagles'll come and pull out his eyes.
>
> Mrs. Joyce – O, but I'm sure that he will apologise.
> Joyce – (under the table, to himself) – Pull out his eyes,
> Apologise
> Apologise
> Pull out his eyes.
>
> Apologise
> Pull out his eyes,
> Pull out his eyes,
> Apologise.[17]

In this epiphany the adult figures are positioning the young child as a subject of penitence but he is resisting this location of his self. Joyce has written this scene so as to represent himself as a subject in and of language. He is explicitly reflecting to himself his own fictioning, his own self-making. Mr. Vance tries to frighten Joyce with a tale of punishment so that he will apologise for the unspecified wrongdoing. Joyce's response is that of the fledgeling writer. Instead of using words as tokens of social exchange and offering an apology, he repeats the words in a rhythmic order. Repetition suggests the child's awe and fascination with words, but also that words can be fashioned, taken out of conventional social discourse and rearranged for aesthetic purposes which ultimately deny any ultimate referential function of language. This enacts the whole revolt within and against the words and the symbolic order that will initiate Joyce's career as a writer.

Even at this early stage, Joyce's writing takes him towards a confrontation with death. The epiphanies contain the intimation that representing death, or at least imaginatively confronting it, will allow a confrontation with the institution. Death must be regarded unflinchingly:

> They are all asleep. I will go up now ... He lies on my bed where I lay last night: they have covered him with a sheet and closed his eyes with pennies ... Poor little fellow! We have often laughed together – he bore his body very lightly ... I am very sorry he died. I cannot

> pray for him as others do ... Poor little fellow! Everything else is so uncertain![18]

Here Joyce fixes on the materiality of death. Nothing is 'revealed'. The epiphany demonstrates the growth of the consciousness that death must come to the other first: 'He lies where I lay last night' is a powerful realisation that the writer must also face his ultimate demise. In this writing of death, there can be no prayers, as to pray would once more assume the institutional hold over the experience. There can only be a sympathy for a fate which is shared. What is affirmed, though, and linked to the very writing of the piece, is the memory of a death which is now preserved and associated with the name of Joyce as a writer. It is this very impulse to remember, and authorise the self through representing it as remembered that will counter the institutional deployment of memory that *A Portrait* will record and which Legendre has seen as the genealogical principle which both presupposes and confirms the law.

Joyce's gaze on death is arrested by a fascination with the erotic other. The epiphanies show that to fixate desire on the erotic and feminine could be to deprive the institution of its own due; this could represent the point of slippage where an 'escape' might be possible. At risk are the very guarantees of meaning and correspondence that the institution can give. To become a writer Joyce must exploit this in his self-authorisation. Recorded in the next epiphany is the significant moment when Joyce links writing and desire:

> ... I am on the upper step and she on the lower. She comes up to my step many times and goes down again, between our phrases, and once or twice remains beside me, forgetting to go down, and then goes down ... Let be; let be ... And now she does not urge her vanities – her fine dress and sash and long black stockings – for now (wisdom of children) we seem to know that this end will please us better than any end we have laboured for.[19]

It is as if this fragment dramatizes the game of *fort-da* that Freud described. *Fort-da* is a way of possessing what is destined to be lost.[20] For Legendre it is a way of passing 'through a symbolic void',[21] a process that has to be linked to the fashioning of the subject. Joyce inscribes the scene in a somewhat different way; it might even be possible to describe it as passing into writing. The girl both moves towards and away from the narrator; the epiphany records what only 'seems' to be a moment of correspondence. There can be no certainty. In other words, there seems to be a link between experiencing the slippage of the message that the other may be sending and the recording of the moment itself,[22] a theme which will become writ

large in *A Portrait* where writing will be related to a summoning of the lost and absent object. This absence of the desired other is itself a kind of death, if death is to be understood as a silence, an absence of a response. Joyce's has to mediate this alterity if he is to become a writer.

The female figures in the epiphanies are frequently linked to just such a tension. In a later piece a woman will 'give herself to no one'. She fascinates the writer, and at the same time cannot be possessed by him. She will not return his message: 'She dances with them in the round-evenly, discretely, giving herself to no one. The white spray is ruffled as she dances, and when she is in shadow the glow is deeper on her cheek.'[23]

Joyce's epiphany returns to flowers and what they symbolise. The flower remains in the artists' memory, becoming a symbol of the girl and her disappearance from him in a dance which seems to repeat the *fort-da* game. In a further metonymic shift, this discourse of sensuous dancing, of touch and embrace, becomes associated with a scene of escape; 'the white arms of roads, their promise of close embraces, and the black arms of tall ships'.[24] This is destined to become the closing sequence of *A Portrait*, where writing is achieved and the escape seems possible. It is now necessary to entangle this web of associations.

DEATH AND *A PORTRAIT*

In *A Portrait*, Joyce describes a complex nexus of concerns that reveal how the institution manipulates a discourse of death. It creates a fear of judgment in the conscience of the believer. Through the sufferings of Stephen Dedalus, the reader perceives that this deployment of death operates in Legendrian terms as an essentially juristic logic. The institution's power is based on a process of delegation, where the institution represents to the subject both the figure of his own father, and, the ultimate absent object, the figure of the divine father. But the importance of the novel is not just its exemplification of these themes. The book provides a portrait of the artist, a counter-image to that provided by the institution. It suggests that the institution cannot completely determine social being, and that the task of writing is to adopt and disrupt the symbolic order. The next section of this chapter will show how the self-memorialisation of the artist must return to questions of death and absence in resistance to the law of the institution.

The institution's pact with death in the creation of legitimised social being is revealed in the eschatological sermon which lies at the heart of *A Portrait*. Joyce's depiction of the sermon contains an insight into how the institution becomes mobile, creates a time of judgment for the subject. This is a juristic operation, an attempt to dramatise God and

'His laws'.[25] The sermon is introduced by the memory of the founder, St Xavier, a summoning of an exemplary figure to whom the listeners are meant to compare themselves. Secluded from the 'busy bustle of the outer world',[26] the penitents retreat from vulgar time, the sequential time of normal being, into a timeless time which contains the truth: 'Now the time for repentance has gone by. Time is, time was, but time shall be no more!'[27]

The truth is that of the four finalities, the 'last things' – heaven and Hell, death and judgment – a truth which is recalled and enacted by the voice of the priest who in turn recalls a timeless text, Ecclesiastes 4:7, and speaks 'In the name of the Father, and of the Son and of the Holy Ghost.'[28] The strength of the institution is that it can command the authority of speaking for this truth, of interpellating the soul of the believer. To capture the soul of the penitent, it is necessary to organise the instance of anxiety, the individual's confrontation with his/her own finitude, a capture that can become a 'covenant'[29] between God and the soul:

> He who remembers the last things, says Ecclesiastes, shall not sin for ever.
> He who remembers the last things will act and think with them always before his eyes.
> He will live a good life and die a good death ...[30]

The institution is not the fixed physical space of Clongowes College or the Catholic Church but has become a time which inhabits the believer and becomes an internalised space of judgment. This capture is made possible through a kind of speech, a rhetoric which deploys a terror of judgment linked to the very certainty of death. It is no surprise, therefore, to see that the next part of the sermon employs a passage drawn from Isaiah 5:14, 'Hell has enlarged its soul and opened its mouth without limits.'[31] It is as if this verse could, ironically, describe the very operation of the sermon itself which is to vocalise Hell, to give the possibility of judgment a language and a location.

It has the required effect on Stephen Dedalus: 'He had died. Yes. He was judged.'[32]

Dedalus has been captured by the Church, he has died into institutional life. Just as the first chapter had detailed the momentary crisis which made Dedalus' faith stronger, the aftermath of the sermon and the existential crisis it precipitates produces Dedalus as penitent, confessor of his sins on the pain of mortal death; the necessary pain before Dedalus can ascend to the name. After the ordeal, invited to join the priesthood, he imagines himself as 'The Reverend Stephen Dedalus, S.J.'[33] This moment is the apogee of Stephen's identification with the

establishment. He begins to separate himself from this fate. As much as the institution can deploy the discourse of the name and death, the artist has to learn how this discourse imprisons him, and how he can stage a revolt.

The name must stand in for the absent object; its functioning is symptomatic of the operation of language, and how, as Legendre has commented, it necessitates a mastering of death and absence. *A Portrait* offers an insight into the institutional pact between language, absence and delegation. It has often been pointed out that *A Portrait* begins with a birth into language and a scene of the imposition of the name in a world presided over by the father and the mother:

> Once upon a time and a very good time it was there was a moocow coming down along the road and this moocow that was down along the road met a nicens little boy named baby tuckoo …
>
> His father told him that story: his father looked at him through a glass: he had a hairy face …
>
> When you wet the bed first it gets warm then it gets cold. His mother put on the oilsheet. That had a queer smell.[34]

These opening paragraphs fix on the exchange of a name. The writing suggests the point at which the subject identifies with the way in which he is named and perceived by others and thus becomes an object for others and a subject for himself. That the name and the institution should be inexorably linked is the concern of the next scene of the book:

> – What is your name?
> Stephen had answered: Stephen Dedalus.
> Then Nasty Roche had said
> – What kind of name is that?
> And when Stephen had not been able to answer Nasty Roach had asked:
> – What is your father?
> Stephen had answered:
> – A gentleman
> Then Nasty Roche had asked
> – Is he a magistrate?[35]

This exchange presupposes the absence of the father; an absence which makes his influence stronger. It occurs at a point of transmission in the book, the point at which the authority of the parents becomes the authority of the school, as represented by Stephen Dedalus' Jesuit masters. Why should the status of the magistrate be given such prominence? It is because at this moment of transmission, the law and

the social identity that the law imparts can preserve the identity of the son. Stephen's inability to answer the original question provokes Roche to articulate his real demand: what is it that guarantees your identity? The reply given indicates the law without explicitly stating it: a gentleman is defined by the genealogy of the law which preserves blood and property in the face of death. Nasty Roche's demand reveals this logic: it articulates the need to identify paternity with the law, and to make this the mark of authenticity.

Dedalus' exchange with Roche is part of a wider problematic in the novel. Joyce's text is filled with a concern with portraits and masks; the suggestion is that the mask is linked to the deployment of the name and central to the institution's remembering and perpetuation of itself. To assume the mask is to accept the position that the institution has prepared for the subject. The intimate connection of this theme with law and death is stressed in the second chapter when Stephen accompanies his father to Cork. Mr Dedalus' property is to be sold by auction, a dissipation of an inheritance which should have sustained the family after the death of the father and made his memory concrete. The agonies of Stephen Dedalus could be described as an agony of the image. Stephen becomes acutely aware that his father is less than the commanding paternal figure; the anxiety is precisely one of non-correspondence. This non-correspondence is also with surrogate father figures, the priests, a problem which is at the heart of the description of the Whitsun play. Although Stephen is to play a priest in the play, to assume the mask of the father figure, he feels a disassociation from the role. Stephen's disassociation is linked to a vision of the void, a fate worse than death. For a fleeting moment Stephen perceives the 'the innumerable faces of the void'. [36] Dedalus hurriedly rids himself of the experience. Suspended, neither himself nor the character he is meant to be playing, the glimpse of the void is that of the blankness of identity, or social death. To not adopt the mask is to risk non-being; but as the force of the narrative suggests, what is at stake in *A Portrait* is not the failure to adopt any mask, but Stephen's increasing reluctance to assume the Irish Catholic identity that is being provided for him.

The essential conjunction of these themes is the incident when Stephen Dedalus is unfairly punished. This is the necessary prelude for engaging with the institution's discourse of death, and seeing the void as the void. Joyce is describing the individual subject's fidelity to the institution, but also the point at which the individual could recognise that the reality the institution sustains is at odds with itself. It is the focus of this first episode of the book as it reveals both the symbolic order of the institution and the possibility of imagining otherwise, although in this case the world of the institution preserves itself. The scene is a class room. Dedalus is ordered to kneel in the middle of the

room to receive his punishment. It is interesting to note that this quasi-legal ritual takes place in a Latin lesson. In its most symbolic sense, then, what is narrated here is the presence of an institutional language that demands obedience to rules and forms. The learning of the language of power is inseparable from a wider form of life: a hierarchised class room presided over by a priest who stands in for both the father and God. Dedalus' own reflections on the action immediately suggest the slippage he is experiencing. He thinks of the master's actions as a sin, and wonders how he could absolve himself if he wrongly punished a boy:

> Perhaps he would go to confession at the minister: and if the minister did it he would go to the rector: and the rector to the provincial: and the provincial to the general of the Jesuits. That was called order: and he had heard his father say that they were all clever men.[37]

Joyce is indicating here that the effect of the punishment on Dedalus is only understandable if placed in the context of an institutional order. Although disturbed by the master's brutality, the boy is trying to rationalise it within the principle of order that the system has licensed. At its most profound this justification of order operates with the same deferral of truth to an absent cause that founds any social meaning. The ultimate referent of the truth is the absent signifier, the name of God which both founds and is inaccessible. It communicates with an earlier sequence: 'It was very big to think of about everything and everywhere. Only God could do that. He tried to think what a big thought that must be; but he could only think of God. God was God's name just as his name was Stephen.'[38]

To affirm the link between himself and his name, and the link between himself and his father is to participate in a symbolic logic which is founded by the name of God. Once Stephen has established the sense of the symbolic order, it is immediately thrown into doubt. The punishment scene is important because it is this whole structure that is important for Stephen. Joyce describes a very strange moment after the beating: 'To think of them beaten and swollen with pain all in a moment made him feel sorry for them as if they were not his own, but someone else's that he felt sorry for ... .'[39]

Why this moment of disassociation? The whole movement of the book to this point is in stressing the link between word and thing. Now, in this moment of crisis the link is broken at the most fundamental bodily level. Just as Narcissus misidentifies his own image and fails to master his own absence from himself, at this moment Stephen experiences the gap, the rupture: '... he began to wonder whether it might not really be that there was something in his face

which made him look like a schemer and he wished he had a little mirror to see. But there could not be; and it was unjust and cruel and unfair.'[40]

The shock of the disassociation and the rage and shame that follows is an epiphanic moment when the system both affirms itself and – the very moment when Stephen perceives albeit at an inarticulate level – the method of its operation. Stephen's desperate hope is that he can coincide with the reflection of himself. In the conclusion of the episode Stephen bravely goes to see the rector, and despite his nervousness explains that he has been wrongfully punished. The rector promises to let Father Dolan know that there has been a mistake and Dedalus is not an idle schemer. The episode is thus resolved by a statement of the recapture of Stephen by the institution: 'He was happy and free; but he would not be anyway proud with Father Dolan. He would be very quiet and obedient: and he wished that he could do something kind for him to show that he was not proud.'[41]

Stephen's happiness is described in terms which refer back to the theological discourse of sin and pride that introduced the punishment episode. The system has sustained itself by admitting that an individual has made a mistake; in this instance it reaffirms its hold over Stephen Dedalus. But, nevertheless, the moment of slippage disturbs Stephen; the revolt becomes possible.

WRITING THE REVOLT

To read *A Portrait of the Artist* is to realise that the revolt has already happened. Rather then being a naming of the son by the father, *A Portrait* is an autobiographical novel; a story of the son telling a story of the father; it is an act of the son's authorisation that is preparatory to the reinscription of the structures that have defined him: Joyce's writing shows that the revolt must appropriate the mechanisms of the transmission that operate in the dominant order.

It was argued above that love is love of the self. The life that the institution stages is the transport of this love to itself; the subject falls in love with the institution as the 'thing' in which he perceives himself. It therefore completes an essentially narcissistic circuit. What is essential for Dedalus, and for Joyce as a writer, is that this love should become directed not towards the Church or the law, but to writing and to what Joyce links with writing. It is possible to describe this as a process: Joyce identifies himself as a writer and also as the object of his writing. This identification is inseparable from a fascination with the feminine erotic other. However, the risk of writing, and the risk of desire, is that it will not coincide with the wishes of the other subject and the narcissistic message will not be

returned. Joyce increasingly associates writing with a failure of reference, the moment of slippage, of non-coincidence. The final figure of this movement is in 'The Dead'; a portrayal of his own death as a delirium: a mad, profoundly ambiguous epiphany in which he takes upon himself the failure of his identity and the responsibility for his own self-authorship. Joyce's drama of writing leaves an important question remaining: what law is founded by this writing which replaces and interrupts the law?

Writing appropriates the discourse of death that the institution had used to capture the soul. The writing of the young Dedalus is seen as taking place between the same monikers that frame and authorise Jesuit writing:

> From force of habit he had written at the top of the first page of the initial letters of the Jesuit motto: AMDG. On the first line of the page appeared the title of the verse he was trying to write: To E–C–. He knew it was right to begin so for he had seen similar titles in the collected poems of Lord Byron.[42]

Why does Joyce record with such precision the scene of this inscription? This is the first time that Dedalus has been depicted as a poet. His understanding of the craft that will bring him into opposition with the Church takes shape in the very space of writing that the Church has given him. It is no coincidence that Legendre is so fascinated with the forms and material practices of writing; Dedalus is here a child of the text, an artifex who is entering into the mystery of the written form. Why must the name remain a glyph, a secret sign? It is part of a strategy where the artist begins to define his own symbols. The episode concludes with the following scene: '... the letters L.D.S. were written at the foot of the page and, having hidden the book, he went into his mother's bedroom and gazed at his face for a long time in the mirror of her dressingtable'.[43]

A text could provide no more an explicit link between writing and the function of the mirror! Joyce is intimating that the role of Stephen's writing is to provide a way of reflecting himself to himself. Dedalus' poem is a summoning of the girl who fascinates him, a person who is absent. Writing thus appears, like the institution, to have a pact with death; in other words, for Stephen to become a writer, he has to understand death and disappearance in a way unmediated by the dominant symbols: he must construct his own signs of absence.

This artistic process is examined most completely in the description of Stephen writing a villanelle to 'E.C.'. Inspiration comes in a dream; the suggestion is that the poem deals with the unconscious space which is the site of the fixing of the institutional bond. The poem returns obsessively to the object of Dedalus' affections:[44]

And still you hold our longing gaze
With languorous look and lavish limb
Are you not weary of ardent ways?
Tell no more of enchanted days.[45]

It is a poem of fascination and enchantment. The poem and the woman are completely identified. To write the poem is to create a 'eucharistic hymn',[46] to summon a memory and a presence. The lyrical melancholy is a recognition that this is futile, the word must stand in for the beloved. But this is exactly the point. The woman/text 'still holds our longing gaze', thus representing the mirror in which the lover-poet finds himself reflected. Joyce suggests that Dedalus' poem is an appropriation of a legal logic, when the following image occurs in the meditations on the poetic text: '... it made him think of a bottlenosed judge in a wig, putting commas into a document which he held at arms length ...'.[47]

Joyce's writing must take place in a juristic space. The metaphor of the judge is linked to the Jesuit monikers, as writing is inconceivable without the logic of transmission that is defined and preserved by a logic that holds the Church and the law together.

These insights are necessary, but they are still incomplete. Joyce can only become a writer and thus completely incomplete when he can vision his own death, take upon himself its meaning and mediate it through his writing, rather than the symbols handed down by the institution.

'THE DEAD': DEATH, LOVE AND THE COUNTER-LAW

Both the epiphanies and *A Portrait* have shown Joyce summoning the lost object of love, and realising his writing in this process as an appropriation of a juristic logic of transmission. 'The Dead' suggests that any viable articulation of the desire which holds the subject to the law, and also any escape from the law must be based on a realisation of the void. This can be mediated through a realisation of the inaccessibility of the other, and ultimately, through the strange delirium that concludes the story.

The central character of 'The Dead', Gabriel Conroy, is another portrait of the artist. The story is set on the night of the Misses Morkans' annual dance. It focuses on Gabriel and his wife Gretta. At the dance Gretta becomes strangely distracted and absent to both herself and Gabriel's entreaties, for he very much needs her support in the ordeal that the social gathering becomes for him. In the haunting conclusion of the piece, the reader discovers that Gretta has been moved by the memory of her first lover, who died young, and

Gabriel realises that he does not know his wife in the intimate way he had at first believed. The story can be read as an attempt to articulate the difficult space that can exist between two people, the space across which communication must take place. It thus introduces a notion of dialogue that does not figure, as such, in Legendre's theory of the image; the only speech in the Narcissus story is that of Narcissus' own monologue with himself, or the institutional speech that interpellates the subject. The question that 'The Dead' raises is thus the relationship that exists between dialogue and the image. The climax of the story returns to the image of the mirror:

> She did not answer at once. Then she said in an outburst of tears: O I am thinking about that song, The lass of Aughrim. She broke loose from him and ran to the bed and, throwing her arms across the bed rail, hid her face. Gabriel stood stock-still for a moment in astonishment and then followed her. As he passed in the way of the cheval-glass he caught sight of himself in full length, his broad, well-filled shirt front, the face whose expression always puzzled him when he saw it in a mirror, and his glimmering gilt rimmed eyeglasses ...[48]

The scene of the story has now shifted from the social ordeal of the party, to the hotel room where Gabriel and his wife are staying. Joyce is presenting a scene of intimate communication as an interplay between the reflection, the self-image and the reply of the other as that which disturbs the self-image. In this description the mirror plays a complex role. When Gabriel notices the mirror, his presence to his own reflection surprises him, as it is the only point of clarity in the argument between him and Gretta. His puzzlement is what happens when this most common of experiences is deciphered: what does my reflection mean to myself? In other words, the hope that the mirror first signified is destroyed: there can be no certainty. Gabriel's failure to make sense of himself is but a prelude to his failure to make sense of the other. His lover fails to return his narcissistic message. She will not confirm his desire. 'The Dead' effectively carries forward the lessons of *A Portrait*. As much as it is necessary to see in the erotic other the reflection of the self, the risk is that the message will not be returned. It is in this sense that 'The Dead' is the most profound of realisations of the moments of disassociation that run through the earlier work.

The discussion between the lovers refers to a song 'The Lass of Aughrim' which is perhaps the key to the story. The resonances of this ballad are complex. At one level it provokes in Gabriel's wife a memory of a first love, a symbol to Gabriel of what he cannot share with her, of the unknown that must infest his relationship with the intimate other. The ballad is a lovers' discourse:

Oh if you be the lass of Aughrim
As I suppose you not to be
Come and tell me the last token
Between you and me.[49]

The dramatic tension of the ballad comes from its presentation of the absence, the space between people that allows both language and the failure of communication. It dramatises the problem between Gretta and Gabriel, the search for 'tokens' that can exist between them. The root of the problem is that for all the separation of the lovers, they are bound to each other. This is the law of their desire. Just as the two characters in the song are bound together by their desire, Gabriel must follow Gretta, and it is an attempt to articulate this bond that is the most mysterious moment of the story. Gabriel's crisis is one of coming before the inscrutability of the other who remains unknowable to the self. The other appears to be that which will always escape the self, that which makes communion possible, and at the same time, prevents communion taking place. It is a 'presentation' of this negative moment that the final great sequence of the story moves towards:

> A few light taps of snow upon the pane made him turn to the window. It had begun to snow again. He watched sleepily the flakes, silver and dark, falling obliquely against the lamplight. The time had come for him to set off on his journey westward. Yes, the newspapers were right: snow was general all over Ireland. It was falling on every part of the dark central plain, on the treeless hills, falling softly upon the Bog of Allen and, further westward, softly falling into the dark mutinous Shannon waves. It was falling too, upon every part of the lonely churchyard where Michael Furey lay buried. It lay thickly drifted on the crooked crosses and headstones, on the spears of the little gate, on the barren thorns. His soul swooned slowly as he heard the snow falling faintly through the universe and faintly falling, like the descent of their last end, upon all the living and the dead.[50]

Before this final vision, 'generous tears' had filled Gabriel's eyes as he acknowledges to himself that he is truly in love, a feeling accompanied by the fading away of his own identity. At this last moment of the story, then, is there a final message, an ultimate determination of the token that exists between the lovers? This moment is hopelessly double and indeterminate. Rather than a moment of revelation, of blinding light and insight into the heart of meaning, it is a negative epiphany that removes from the world of both the living and the dead. The erotic communication is inherently ambiguous. What Gabriel perceived as the shared secret of their life together runs against her loss

to him the world of her own memories of death and love. In this profound failure of communication, Gabriel enters into a new communion with his wife, which seems to go beyond life and death, a moment of both being and non-being. It is this non-space that dissolves Gabriel; his puzzlement at the inaccessible mystery of himself becomes the self's final dissolution. But what is revealed? Is Gabriel's vision one of certainty? Or another revelation of his sentimentality? Is this moment one of communion, or the end of a relationship? The story offers no final answer, no final denouement, just the inscrutable mystery of the final silence, and the possibility for writing to begin again.

The vision at the end of 'The Dead' could be described as a shaping madness, an appropriation of the institution's power to fashion images. What can this tell us about the nature of obligation, the quality of a law that is bound up with writing? Rather than appearing as the specific and specialised concern of the writer, writing is the token of an affirmation that to be human is to inhabit a contradiction: to be bound to others, and yet never knowing the nature of that obligation. It is in this contradiction that Joyce comes to writing. Joyce's work shows that the roots of the counter-law are in the anxious, existential space of human relationship: the counter-law comes to being between desire and death.

ENDNOTE

Reading Joyce and Legendre presents two figures drawn from Ovid's *Metamorphosis* which can be associated with both the legal institution and the resistance to its empire. Both suffer a death which can be interpreted as showing different aspects of the fate of the legal subject. Narcissus' death is that of the subject who does not master his own absence; his disappearance is what the subject must not suffer. Dedalus, however, represents the subject as self-fashioning, as artificer. In Joyce's appropriation of the name, Dedalus as artificer exploits the failure of the symbolic order to mandate identity and signification; he is the ultimate artificer, author of the most dreadful transformation: to take death upon yourself is to write the law.[51]

NOTES

* This paper is for Mary.

1. Peter Goodrich (ed.), *Law and the Unconscious: A Legendre Reader* (London: Macmillan, 1997) pp. 211–56.

2. Jacques Derrida's writing on Joyce reveals a strong Heideggerian thematic in Joyce's writing. See 'Ulysses Gramophone' in Bernard Benstock (ed.), *The Augmented Ninth* (New York: Syracuse University Press, 1988). Derrida also brings Joyce and Heidegger together in *The Post Card* (Chicago, IL: University of Chicago Press, 1987).
3. See J. Mitchell Morse, *The Sympathetic Alien, James Joyce and Catholicism* (New York: University Press of New York, 1959).
4. Joycean criticism shows an increasing fascination with the law. The major studies to date are: Frances Restuccia, *Joyce and the Law of the Father* (New Haven, CT: Yale University Press, 1989); Beryl Schlossman, *Joyce's Catholic Comedy of Language* (Madison: University of Wisconsin Press, 1985) and Joseph Valente *James Joyce and the Problem of Justice* (Cambridge: Cambridge University Press, 1995). These studies are all informed by psychoanalytic theory, but none of them have been influenced by Legendre's work on juristic communication.
5. Goodrich, *Law and the Unconscious*, p. 69.
6. Ibid., p. 247.
7. Legendre works within a broadly Lacanian framework. Central to his reading of Narcissus is Lacan's notion of the mirror stage which describes the foundation of identity on the child's identification with her reflection in the mirror. The mirror stage suggests that structure of the subject is thus fundamentally narcissistic. See his *Les Ecrits: A Selection* (London: Tavistock, 1977). Lacan's positing of the imaginary structure of subjectivity is also essential to an understanding of Legendre's notion of the institution of law. For both Lacan and Legendre, the subject is 'inserted in a pre-established order'. In the background is Claude Levi-Strauss' understanding of culture as a system of signification: 'Any culture may be looked upon as an ensemble of symbolic systems, in the front rank of which are to be found marriage laws, economic relations, art science and religion', quoted and further discussed in J. Laplanche and J.B. Pontalis, *The Language of Psychoanalysis* (London: Karnac, 1988) pp. 439–40. For a general location of Legendre within psychoanalytic theory, see Peter Goodrich's introductory chapter in Goodrich, *Law and the Unconscious*.
8. Goodrich, *Law and the Unconscious*, p. 214.
9. Ibid., p. 68.
10. Ibid., p. 262.
11. See Sigmund Freud, *Totem and Taboo* (London: Hogarth Press, 1964).
12. See Legendre's notion of the Text without Subjects, in Goodrich, *Law and the Unconscious*, pp. 67–72.
13. *The Poems and Shorter Writings of James Joyce*, Richard Ellmann, A. Walton Litz and John Whittier-Ferguson (eds), (London: Faber and Faber, 1991) pp. 157–8. Critics have frequently attempted to describe the mystical aspect of Joyce's epiphany, tracing it either to the manifestation of Christ to the Magi, or the sudden appearance of the *deus ex machina* in Greek drama. Undoubtedly, the epiphanies

exploit a textual, revelatory power. They work within a theological orientation, underpinned by the notion of the appearance of divine presence which can be mediated in writing. From a Legendrian perspective, however, it is equally possible to see in the epiphanies as anti-revelations, which, whilst taking their form from theology, reveals the void itself.

14. Ellmann et al. (eds), *The Poems and Shorter Writings of James Joyce*, p. 166.
15. Ibid.
16. Ibid., p. 217.
17. Ibid., p. 161.
18. Ibid., p. 180.
19. Ibid., p. 163.
20. See Sigmund Freud, *Beyond the Pleasure Principle* (London: Hogarth Press, 1965). Freud describes how he observed a young child at play with a cotton reel. The cries of *fort* and *da* were associated with the disappearance and reappearance of the reel as the child threw it over the side of his cot and then retrieved it. Freud suggested that the game was related to 'the child's great achievement, the instinctual renunciation [in allowing] his mother to go away without protesting … [the child] compensated for this by staging the disappearance and return of objects in his reach'. Freud goes on to tentatively speculate that this recovery of lost objects may be linked to 'artistic play and artistic imitation', p. 17. *Fort-da* thus suggests itself as one way of describing Joyce's writing.
21. Goodrich, *Law and the Unconscious*, p. 141.
22. For a development of this point with reference to *Finnegan's Wake*, see Shari Benstock, 'The Letter and the Law', 1 *Modern Philology* (1984) p. 63.
23. Ellmann et al. (eds), *The Poems and Shorter Writings of James Joyce*, p. 186.
24. Ibid., p. 190.
25. *The Essential James Joyce*, Harry Levin (ed.) (London: Granada, 1977) p. 263.
26. Ibid., p. 255.
27. Ibid., p. 266.
28. Ibid., p. 255.
29. Ibid., p. 356.
30. Ibid., p. 257.
31. Ibid., p. 261.
32. Ibid., p. 267.
33. Ibid., p. 295.
34. Ibid., p. 176.
35. Ibid., p. 178.
36. Ibid., p. 237.
37. Ibid., p. 213.
38. Ibid., p. 183.
39. Ibid., p. 211.

40. Ibid., p. 212.
41. Ibid., p. 217.
42. Ibid., p. 225.
43. Ibid., p. 226.
44. Many critics have seized upon Dedalus' vision of a girl on the beach at Howth as a pivotal moment in Dedalus' developing sense of himself and his erotic life. She is compared to a seabird in an idealising of the female form which, some have argued, robs her of any fleshy reality. Although there is some truth in this charge, the description does play with her 'mortal beauty' and she is perceived, at least by Dedalus with 'profane joy', *The Essential James Joyce*, p. 303. What is important here, though, is the precise way in which she is described as entering into Dedalus' perception: 'Her image had passed into his soul for ever and no word had broken the holy silence of his ecstasy. Her eyes had called him and his soul had leaped at the call. To live, to err, to fall in triumph, to recreate life out of life!' Although the girl might appear as a passive object of his gaze in the opening description, it is now Dedalus who responds to her; it is as if she has penetrated his consciousness. In his ecstasy he exceeds himself. This passage demonstrates a complex play between word and image. The silence testifies to the presence of some form of divinity, which can only be witnessed through the trace or the image. But what is it ultimately that is testified to? The sense of the vision is one of creative process; it indeed echoes the last line of the book itself. Bringing these themes together, it might be suggested that what here is an intimation of the very fictive fashioning that Legendre links to the institution and Joyce, increasingly, links to the flesh and to his own text.
45. *The Essential James Joyce*, p. 342.
46. Ibid., p. 344.
47. Ibid.
48. *The Dead, Case Studies in Contemporary Criticism*, Daniel R. Schwarz (ed.) (Basingstoke: Macmillan, 1994) p. 170.
49. Ibid., p. 49.
50. Ibid., p. 173.
51. For a further development of these themes, see Adam Gearey 'Finnegan's Wake and the Law of Love', 8(2) *Law and Critique* (1997), pp. 245–67 and 'Law in The Gospel of The Female Messiah; Myth, Gnosticism and Finnegan's Wake', 10 *Australian Feminist Law Journal* (1988), pp. 61–85.

12
Courting Death
Peter Goodrich

There is a species of death that comes as a judgment upon life, and as a revenge upon the living. It is a death which is chosen in the name of some ideal or person or cause, and for the reason that social being or the deadening weight of convention has already closed off the possibility of living according to the ideal or love in question. Historically, at least within the Western juridical tradition, the death which is courted, this desired demise or epistemically ostentatious threat of suicide, expresses a higher law and, being rendered in the name of love or truth, refuses the compromises that living brings.

A death which judges the living, a death acted out as a revenge upon life, is an act of rebellion, a radical and tragic act in defiance of convention and of positive law. While the death which is courted or consciously risked in the spirit of a greater cause may flirt with law and indeed attempt to rewrite it in a minor key, the willingness to risk the absolute consequences of the pursuit of desire must always place the lover or heretic in conflict with positive law. For the secular legal tradition, rooted in a monotheistic Christian eschatology, death was something to be transcended or overcome, it was to be mastered through the observance of moral rules and through faith in a being beyond mortality.[1] Within this conception, death was no more than the rite of passage from body to soul, from the corporeal to the spiritual, a dance of mortification of the flesh in which the body was cast off so as to free the essence to live eternally. If secular legal structures of property relation were gauged primarily to passing on what remained to posterity, they did so according to an endless trajectory towards perfection, the reunification of the corporeal and the spiritual in the kingdom yet to come. Which is to say that both in its positive and in its equitable forms, law has mapped the linear and ameliorating line of succession that allows the living rapidly and with extreme unction to stand in for, to take the place of the deceased in the march towards final judgment. Christian law, in this aspect, was doctrinally engaged in the endless task of preparing its subjects for death[2] in the form of acquiescence or of passing on into another realm. It was precisely this dualism whereby the order of the body and

of the living was simply a preparation for a better or transcendental state, that the death that is courted by lovers heretically acted against.

By definition, to court death is to accept the sign and the fact, the reality of the risk of death, and to manipulate that sign of the absolute according to the dictates of desire. Thus in the courtly tradition, that of the poetics of courtship and of the laws of love, death was the symbol of an amorous fatality, of a loss in the cause of a higher law, and in consequence the code of love dictated a constant acknowledgement of the risk of death in the pursuit of desire.[3] Where the Christian tradition had elaborated a *lex caritatis* according to which *agape*, an abstract love of the absolute, was to be the guiding sign of the believer's life, the erotic tradition of courtship was never prepared to cede so much of life to death.[4] To court death was here to risk life so as to live well, so as to put death in its appropriate place in the realm of the 'not yet', so as to engender the possibility of love, of spaces in between.[5] And if the risk proved fatal, at least the doctrine of love had been served and the cause of desire augmented through the fidelity of the subject to the jurisdiction or spirit and laws of love.

Even in these very preliminary terms, the notion of 'courting death' can be given a reasonably precise historical and literary meaning that derives from the alternative and arguably radical tradition of women's courts and laws of love. This essentially poetic and, at least in terms of surviving evidence, episodic tradition dates back to the twelfth-century reception of Ovid's *Ars amatoriae*, and to the subsequent Italian and French traditions and institutions of statutes, judgments and courts that applied the laws of the first Venus, the laws of kind, nature or love.[6] It is a tradition that legal historiography and jurisprudence more generally have ignored or marginalised to the point of non-existence. That law itself might be judged according to the criteria of love and legal practice subject to the jurisdiction of poets was quite simply, for long periods of institutional time, unthinkable. The recourse to laws of love was thus deemed historically to be heretical, and more recently has been judged by modernist critics as a literary fiction without the solace of law.[7] It is primarily for that reason, because the courts, laws and judgments of love remain largely unrecuperated, distant and obscure, that I will here address the courtship of death by way of the literal and literary institutions and judgments of the jurisdiction of love.

Framed by the historical antinomy of *eros* and *thanatos*, love and death or, equally plausibly, the conflicting principles of desire and law, the early tradition of the art and laws of love addressed the domain of amatory passion as the most radical and political of arts. In an age in which love was constantly at war with distance and in conflict with convention, with doctrine and moral governance, the art of love was necessarily precarious or touched by a certain oblivion to the

consequences of the pursuit of corporeal desire. To love was to court death in the dual sense that courtly love was the pursuit of a mixed desire, both corporeal and spiritual, and that it was inexorably tied to affairs that took place outside of marriage. The fulfilment of love, the physical satisfaction of desire as the end of love or *fin amors*, was in doctrine fornication and in secular law adultery. And thus, shrouded though courtly passion might be in the poetry of distance (*amour lointain*), the spiritual metaphors of service, and the idiosyncratic institutions of an aberrant gynocracy, it was historically a wild and ultimately perilous pursuit.[8] In René Nelli's erudite depiction, the law of love to which the 'troubadour erotic' was committed, was an outlaw ethics, one predicated upon an honesty or fidelity within the domain of love, and a corresponding hypocrisy and dissimulation toward any that would stand in the path of this radical and jealous desire. The erotic of the *fin amors* was a rigorous and disciplined pursuit of adulterous passion, an early species of libertine practice outside of the loveless marriages of twelfth-century artistocratic circles, such that 'in its essence this love was conceived as passion and as fatality, and yet for it to become that, it had first to be strictly governed by its own interior laws'.[9]

It is the linking of passion and fatality, the horrifying possibility of the cold embrace of death as the consequence of pursuing the fevers of the flesh, that marks the risk that was courted by love. Death, the inert form of the unconscious, was a constant spectre on the borders of the love affair, an unremitting shadow that *eros* invoked as the ultimate measure of desire, and that the poetry of unrequited love declaimed as the necessary boundary or marker of a life without love. In the medieval drama of the courts of love, to love was to engage in a terrible risk. The medieval version of the modern psychoanalytic aphorism 'either I love or I die' was that in making love I am courting death. It was perhaps for this reason that the interior law of love required that the lover pursue their desire to its limit, to that absolute that came to be marked by the term *fin amors* or ends of love. Thus, to turn momentarily to the first of the great sources of the laws of love, the *De amore* of Capellanus, desire for the beloved was an absolute end in itself, a constant obsession, an all-absorbing physical condition that was registered most directly by bodily insignia of desire, by symptoms of fatality such as stammering, blushing, heart palpitations, fever, loss of appetite, distraction, sleeplessness and all the other obdurate and tender tones that mark the subjection of the flesh to the dictates or moods of a higher law.[10]

Death was the wager of love or the gamble that the enamoured must necessarily undertake in the radical cause of living according to their desire. Thus in cases where the pursuit of desire was immediately and obviously dangerous, the lover was to be ready to sacrifice

everything to their passion. Law six of the *Statutes of Love* set out in the anonymous English sixteenth-century poem *The Court of Love*, stated clearly that the lover should 'think it no force to live or die'.[11] The greater cause or, to borrow from Boethius, the greater law is that of love. Death was here the lover's revenge upon life. It was their retribution upon the dullness of the mundane, their judgment of those who have failed to love. The fatality that pursued passion was the literal risk of death that the lover faced in the pursuit of the truth of love or erotic authenticity. It was the risk of fatality that both marked the pleasure of love, the *jouissance* of coitus, and exhibited the freedom from fear that the ethic of courtship demanded. If the lover died, then so much the worse for life.

The death, whether literal or poetic, that came from not loving is one instance of the tendency of the courts of love to understand the profundity of passion or the authenticity of desire by reference to the conscious proximity or risk of death. The signs of love and death were linked poetically and ethically and hence placed love before an aesthetic law. The prescription of that law was that the greater the risk of death, the closer passion came to fatality, the more just and the more authentic the love that was followed. Thus, to take one example, amongst the decisions on disputed questions of love handed down by the judge Fiammetta, reported in Boccaccio's *Filocolo*, one *topos* was that of the relation between love and the risk of death.[12] The specific form in which this casuistic question of love was formulated and determined was that of a choice between two male lovers:

> *Two men were in love with a woman who had been accused falsely of causing the death of her husband. The woman was charged with murder and sentenced to death by burning. The judge, who suspected that the accusations were unjust, decided to trust to* Fortuna *as well as to law and so imposed a condition upon the sentence. The condition was that if the woman was successfully defended in combat then the sentence would be remitted. If she was unsuccessfully defended then she would be burned in accordance with the sentence.*
>
> *One of the men in love with the woman heard of the condition first and immediately proclaimed himself her defender. When her other suitor heard what had happened he was greatly saddened by the lost opportunity of proving his passion. He decided that his only recourse was to pretend to maintain his lover's guilt and so ensure her safety by willingly being vanquished in combat. The two men fought and the woman's champion was easily able to win.*
>
> *Which of these two men should the woman reward with her love? Fiammetta held that the first suitor was to be loved and the latter was to be left. She reasoned that the first had openly and honestly risked death, while the latter suitor knew that he would not die. In that the latter man*

> *knew that he was risking little by pretending to accuse her, he should properly gain little from his action.*
>
> *In justification of her judgment, Fiammetta further argued that the pretence undertaken by the second suitor was dishonest and travelled under the guise of 'coloured words',*[13] *dishonesty and dissimulation. It would be unjust to reward such envious friendship and such guileful seduction. By way of contrast, the suitor who openly and honestly risked death in defence of the absolute cause of love, displayed a genuine friendship and faced an authentic risk of fatality. Such virtue was properly to be rewarded with love.*

The erotic courtship of death in this case equated virtue and ethics with an amorous justice that could correct the infidelities and the coldly prosaic infelicities of positive law – authentic passion, true love, fused body and soul, *eros* and *agape*, in a delirium whose just expression defied both the limits of mortality and the dead weight of convention. To pass close to death was to touch lightly upon the power of love and to evidence an appreciation of the poetic and aesthetic grounds of which the laws of love were the expression.

Both early and late within the tradition of the courtship of death, the other and darker face of *thanatos*, that of Nemesis or the Furies, also regularly appears in the judgments of love. To invoke the figure of death or to judge life as failing and hence to court death, also had a dispassionate or tragic aspect. The proximity of passion to fatality, the judgment or revenge of the lover who willingly embraces the absolute consequences of their amorous desire, is also to be understood in terms of the measures of pain, of grief and suffering that the prospect and the event of death will bring.

The proximity of love to death is thus also to be understood according to an unconscious trajectory in which the poetry and the delirium, the madness of love is juxtaposed with a cruel fatality. Convention and law, the dull narrative of custom and the empty calculations and manipulations of the juridical sphere are also the survivors of the judgment of love. The Dionysian and hedonistic play of the lover here constantly battles the sedentary and dessicated jurisdiction of a secular and essentially masculine law. At the risk of syncretically mixing not only the forms of love but also the languages of interpretation, I am tempted to hazard the hypothesis that every time the unconscious is reduced to prose, there is a minor victory of the juridical over the poetics of an interior law. In judging life lacking, in acting out the failure of social being to incorporate the radicality of love, the lover who risks death both unconsciously revenges themself upon life but also cedes a part of life to the cold fatality of law. Only the dead escape death and it is this paradoxical principle that is worked

through in complex figurative forms in a thirteenth-century erotic story appropriately titled the 'Song of Ignorance':[14]

In the Lai of Ignauré, *the protagonist Ignauré was a highly accomplished and well-respected knight living in Brittany. He was gay and gracious, and devoted his life to pleasure and to love: 'love burned in his breast and inflamed his soul', so much so that women called him Rossignol or the Nightingale, that is, one who sings.*

While travelling in Brittany one May, he came upon the château of Riol. There he was offered a warm welcome and invited to stay.

Twelve knights lived in the château of Riol and each had a beautiful and noble wife. Ignauré, who was pleasing to women and ardent in his passions, soon became the lover of all twelve of these women. He promised each of the women in turn that he would be their faithful servant. Each in turn imagined that he was exclusively theirs and showed him great affection and tenderness.

Ignauré managed to satisfy each of his lovers without forgetting or abandoning the others. For over a year he lived most happily in the château of Riol and preserved intact the secret of his plural loves. One holiday, however, the twelve wives happened to be alone together in an orchard and, by way of amusing diversion, began to discuss their love affairs. The day was the festival of Saint John and the wives wished to entertain themselves fully. They decided that they would play a game of confession. One of the women would pretend to be a priest and each of the other women would confess to her the name of their lover. The priest would then declare which of them loved the most noble man.

Each woman in turn went to confess, and each named Ignauré as their valiant, noble and only lover.

When the woman playing the role of priest returned to the orchard and was asked to nominate which of the women had the most noble lover, she was forced to reply that each in turn had given her the same name. She admitted also that she too was his lover.

The women were astonished and upset by this revelation. He had deceived them and they demanded revenge.

The women decided that whomever of them was visited next by Ignauré would make an excuse that precluded making love there and then, and would instead make an assignation with Ignauré to meet in the orchard the next Sunday. She would then tell each of the other women and at the appointed hour, each with a knife under her cloak, they would all be waiting for him.

Ignauré, blissfully ignorant of this deadly ruse, arrived in the orchard and was greeted by the woman he had arranged to meet. He sat down on a fallen branch and kissed the woman warmly. Her desire for him, however, appeared to have evaporated and she rebuffed his advance. When he asked her why, she responded that such a presumptious,

deceitful, traiterous and unfaithful a man deserved a terrible punishment. At this moment the other women came out from their hiding place and confronted Ignauré, this sensuous man, this early version of Ezra Pound's 'ordinary, everyday Erotomaniac'.

Each woman in turn berated him with his infidelity and despite his protestations that he loved each woman equally and constantly, they drew out their knives. On seeing their weapons and realising their deadly intent, Ignauré shouted out: 'Ladies, you would never have the cruelty to commit such a great sin!' He then declared that even if armed he would make no attempt to defend himself against such beautiful adversaries: 'If I were to die by such pretty hands, I would be buried a martyr and would be placed beside the saints, sure in the knowledge that fate had blessed me.' In other words, he was glad to die at the hand of love. It would be an easy satisfaction of the Statute of Love *that required the lover to sacrifice all to the cause of desire. It would also and ironically have been an end preferable to the fate that he subsequently suffered.*

The women then relented of their desire to kill him and instead demanded that he choose one of their number as his only lover. Despite his sorrow at losing the others, Ignauré eventually chose as his lover the woman who had played the role of the priest. The others swore never to love him again and left the orchard.

Reduced to a single lover, Ignauré visited her frequently and this led rapidly to his demise. In the words of the medieval author of this story, 'a mouse with only one hole does not last long.'

Unknown to them, the women had been overheard while talking in the orchard and their husbands were eventually told the story of their wives' love affairs with the prodigious Ignauré.

The husbands plotted a revenge that would mimic, though in more extreme and corporeal form, the judgment of the women's court that had earlier excised Ignauré from all but one lover. It was decided that the husband of the woman who was now Ignauré's sole lover would carry out the revenge of the group. He was to surprise the lovers together and extract a peculiar vengeance.

A short while later the husband managed to surprise the lovers in bed together. He ordered his wife to fill a bath with hot water for her lover. He then dismissed her with the words that Ignauré was going to be bled.

When the women heard the news of the capture of Ignauré, they were much distressed and wanted to learn if he was alive or dead. They swore to fast until they learned his fate.

As for the husbands, their plan was the following. For four days Ignauré was to be held prisoner. The following day they would cut off his fifth member and, having chopped it up finely, would cook it in a stew. This would then be served to the women.

The castration took place and Ignauré died. The secretly phallic casserole was made and the wives were coaxed into eating it. They were then told that they had just eaten the object of their collective desire.

The women reacted with a profound melancholia or lovesickness and all of them refused from then on to eat again. They died, one by one, during the following month. They chose death, courted death, as the just measure of a life without love.

In the courts of love, death does not arrive without reason, pretext or consideration. The fate of Ignauré, enacted through the husbands' revenge, was dictated enigmatically by the failure of love. To love was always to risk exposure and to court death. Love dictated that risk and here both Ignauré and the women he loved paid one price of passion, that of fatality. The song of ignorance ended in the prosaic law of exposure. Indeed at one level the history of Ignauré was an allegory of the death of poetry, the subjection of love to the prose of law. Where law in its secular and positive meaning comes to dominate the emotional and poetic world of relationships, then there is no choice but the lover must die for the joy in their song. It was not taking a lover, or betraying their husbands, that caused the women to die. It was rather that they had lost a love, and in dying to love they took their own lives.

In a later judgment of love, the literal or physical death of a lover was the occasion for elaborating upon those aspects of love that could stand in judgment or revenge the sorrow inflicted by death upon the living. Death was already here treated as a metaphor not only of passage but also of the lamentable trajectory of poetry reduced to prose, and of love subjected to convention or law. The suffering of the lover was marked by the gradation of extremes: to love was to suffer and the question of love to be posed of that suffering, was who suffered most. The extent of suffering was marked at its furthest extreme by death. In that the loss of a lover was a species of death, the surviving lover was to mark their fidelity by risking death and so remaining faithful to the ideal of a love. Death was not only the lover's revenge upon the living, it was also the interposition of a more permanent distance between the lovers, and so too reflected the baleful revenge of *eros* upon the melancholy of living.

According to the *Code of Love*, reported in Book 2 of the *De amore*, if a lover dies, the survivor is required to spend two years alone before taking another lover. This suspension of relationship was in part an attempt at recognition of the place of death in life. The interim seems also to have expressed a sensitivity to the separation of the spiritual as well as the corporeal bonds of love. The shared space of amorous affinity was not simply one of carnal affection: it exceeded the bounds of physical desire and deserved the respect not only of memory but of

continued affection. Love does not need to end immediately upon death, nor should the tomb that encloses the remains of the lover necessarily symbolise the death of spiritual attachment or of a lifelong passion on the part of the survivor, a passion now marked indelibly by the figures of memory and the images conjured by continued affection.

If death need not end the affection of love, then it was incumbent upon the laws of love to preserve the space and the images through which love could be continued or kept alive. In a peculiar case from the *High Court of Love* the question raised was that of the appropriate respect or honour to be shown to a deceased woman.[15] The action was brought by her heirs:

> *The plaintiffs stated that the deceased had been a gentle and happy woman. She had been wise, knowledgeable, brave and experienced in the adventures of love.*
>
> *Some time ago, it so happened that a young and uncouth young man, whom she did not know, came and asked her to dance. The young man was ill-dressed and appeared unkempt. The woman refused his request, saying that she did not wish to dance. He left her but returned somewhat later and demanded a kiss. She refused and turned her face away from him. The young man felt insulted and as a result conceived a mortal hatred of the deceased.*
>
> *Out of spite, the young man reported the woman to the Officials of Love and so maligned her that she was excommunicated from the domain of love. Not long after this she contracted a fever and died. Because of the judgment against her, which she had not had the time or health to appeal, she was refused the right to be buried according to her wishes, in ground blessed by the Officials of Love, and was taken rather to a plain patch of earth in a field and there interred amongst thistles and nettles.*
>
> *The dishonour with which she had been treated was appealed by her friends and heirs.*
>
> *The young man argued that she had been punished appropriately for having withheld love.*
>
> *The Court found in favour of the deceased. She had rejected the young man quite justifiably and had never deserted the cause of love. In consequence, the earlier orders of the Official, Deputy and Procurator of Love were annulled and the woman was disinterred and reburied, according to her last request. In the most classical of senses, her image was reinstated and an ethics of memory reinstated within the domain of love.*

Love, both as an animating principle and as a spiritual affection, survived death. It did not, however, live on in any obvious or tangible form. It remained or was 'sent on' in the space of relationship and in the affections of the survivor, in the phantasmatic life of images and

in the respect that the living show to the remains, the shadows or ghosts of past loves.

In another case before the *High Court of Love*, an action was brought by the heirs of a deceased man against the woman he had loved.

The heirs argued that, by amorous promise and by a formal alliance or agreement of love, the woman had bound herself to perform various services for her beloved, the deceased. Amongst other things, she had promised to give him flowers, to curtsey and to say 'God guard you' when she encountered him in public. She had promised to kiss him whenever an opportunity arose. It was these 'debts and duties' that – bizarre though it seems – the heirs sought to have performed for their benefit. They claimed, in other words, to be the legitimate inheritors of all the possessions and 'goods' that the deceased had owned and these included her promises of amorous grace.

It was held by the Court that the loyalty and generosity of the things she did for her deceased lover were not duties that she wished or could be compelled to do for his heirs. The ancient and known customs of love dictated that whenever two people were joined in love, then when one of them died, the incidents of love that they shared died also with the deceased. The material goods and physical pleasures of love, the intimacies of lovers, were held to be peculiar and specific to their relationship and would subsist, if at all, in the images and affections, the phantasmatic loyalty of the surviving lover.

The significance of death as the fate inflicted by time, convention or circumstance upon lovers, varies during the course of the tradition. The trajectory of this change parallels the slow-moving transition from a tradition of poetry to that of prose, from the jurisdiction of love to the dominance of a secular and positivised law, from an aesthetic or art of life to a Christianised moral governance in which rules had greater status than relationships and affections.

A lover who ceased loving altogether would be dead to love. Exclusion from the realm of love marked those that were banished 'as if' they were dead: no one could talk with them or offer them any species of hospitality, comfort or love. In the terms of one judgment, those that had abandoned love, either through narcissism or by virtue of some heinous crime against another lover, were to be banished from the domain of love. They were from then on to be accounted outside the jurisdiction, and could never again appear in the courts of love.

The death that came with not loving is but one instance of the tendency of courts of love to oppose death to love.

In later cases, and consonant with the transition from poetry to prose, and from the jurisdiction of love to the dominance of secular or common law, indeed in some accounts from feminine to masculine,[16] death was not simply correlated to the judgment of

extreme betrayals of the cause of love, but also frequently arrived as recompense or retribution for acts that defiled or distrained the space of love. The laws of love began, in other words, to mimic the inelegant prose of law:

> *In a case reported by Donneau de Visé,[17] a young Prince was in love with a woman called Aristie. He would visit her every night for a few hours, and enjoy her company and her embraces. After he left her, another man, a friend of his by the name of Theodate, who was also in love with the woman, would visit her.*
>
> *Theodate had a valet whom he treated very badly. The valet knew his secret and because of the ill-will that he bore towards Theodate, he went to the Prince and told him of his rival. He also promised to inform the Prince the next time that Theodate visited Aristie. The Prince could then surprise them together.*
>
> *The Prince told one of his confidantes of his plan. The confidante happened to be a friend of Theodate's and she warned him of the Prince's intentions. Theodate thanked her and then sent for his valet.*
>
> *Theodate gave the valet a letter addressed to a friend of his who was an important official in a provincial town a great distance from Paris. The easiest route to the town was by sea, and the valet travelled to the coast and then embarked on a ship. The boat sank in a storm and the valet was one of those drowned in the accident.*
>
> *When Theodate learned of the demise of the valet, he was gladdened by the news. The Prince, meanwhile, was disheartened because he felt that he now had no means of learning of the affair of his rival. Theodate desisted from visiting Aristie at night and there was little that the Prince could do to discover the liaison which he suspected existed.*
>
> *The Prince did not despair of discovering the truth. One day, while visiting the coast, his attention was attracted by a commotion on the beach. The cause of the excitation was that a fisherman had discovered the body of a drowned man and had brought it to shore. It transpired that it was the body of the valet.*
>
> *When the body was searched, the letter that he was carrying was discovered in a sealed inner pocket and was still intact. The Prince opened the letter and read it. In the letter, Theodate greeted his distant friend and reminded him that he owed him a favour. He asked the friend to repay the favour now. He then described the infidelity of the valet in betraying his affair with Aristie. He asked finally that the favour be repaid by getting rid of the man who delivered the letter bearing this request, namely the valet.*
>
> *On reading the letter, the Prince was overcome with grief and anger. He ordered that Theodate be arrested and tried for the crime he intended, and he ordered further that Aristie be banished.*

The narrative of this case of love ironically parallels the trajectory or fate of the courtly tradition and specifically the lengthy passage from poetry to prose, or from lyric to epic. Of primary import is the reduction of the case to a narrative of cause and effect, to questions of law that are incribed not in verse but in the circulation of meaning between two competing men. In a sense, the case is a perfect example of Jean-Charles Huchet's thesis that courtly love is a homosexual tradition in which 'the woman circulates from one man to another, but as the sole signifier of a love that does not concern her, an unavowable homosexual desire ... She is always taken, captured by a communication in which she has the role of support of a desire of which she cannot be the object, except as a pretence or as an object of derision.'[18]

To the extent that woman had become other to a nameless love between men, the laws of love had been displaced by a positivised secular legality. Put differently, modern law is by any accounting initially and predominantly a masculine enterprise and a homosocial profession. In a sense, it came to define itself early on by distinguishing the modernity and reason of law from the plural, local and in our case feminine, jurisdictions that belonged to the earlier tradtion.[19] Where law judges death to be the moral retribution of unfaithful acts or hermeneutic deceit between men, and leaves no place for a woman other than as the empty space through which the communication of masculine desire passes, then we are close to the modern concept of positive law and correlatively to a derisive or negative expression of the laws of love.

The case of Aristie is an expression or premonition of the transition from lyric or verse to law. Writing gradually becomes linear and uniform, a lawful prose. The parallel to be drawn at the level of writing is thus between amorous correspondence and legal writ, in which the trajectory portrayed is that of the passage from the former towards the latter. Just as the love letter or *billet doux* carries with it a vast excess of meaning relating to the intention and hopes of impassioned correspondents, so too the law of the letter here marked an absolute and inescapable fate. The form of the letter – and one must remember that it was always an opaque species of message – is that of a providence that the subject harbours unconsciously or carries within. Death, as we know only too well, cannot but arrive. The letter, the symbol of transmission or of passing on, here represents death, the circulation of the absolute at the level of the danger or absolute risk of the love affair. Where the letter more usually marks the entry into love, it here signalled departure from the domain of love and the revenge that love thereby takes upon life. It should be remembered that those that are banished from love are dead to its cause. They have loved and failed and are no more.

In the case of Aristie, the infidelity of the valet was hermeneutic, it was that of betraying the secrets of love. His infidelity to his master and to the cause of love literally signed his death warrant twice, once in spirit and once in fact. As soon as it was written the letter became the law and in this instance it took effect, it arrived, before it was delivered to its manifest addressee. The letter marked the valet as one dead to the domain of love, and death thereby found its mark before the need for any further human intervention. Death judged the valet without the need for any mortal hand to carry out the sentence that the valet carried in the form of a letter.

To betray love was to invoke the sentence of death, first through dying to love, and second in a literal or, more properly, physical death. Death was the antonym of love and although a lover would die at least twice – once to love and once to life – the absoluteness of their fate also marked the extremity of value that was placed upon love. To love was to live; the art of love was the art of life; to be deprived of one was to lose the other.

To love was also and necessarily to risk death. In a final case, taken this time from François Callières, a man was in love with a woman who already had a lover:[20]

> *The man pursued the woman with zeal and persistence. Despite his protestations, his tears and his pleas, she remained distant and treated him with what he experienced as a cruel lack of warmth. She kept her love and her tenderness for her lover and faithfully told the man that he was wasting his time and his tears in pursuing her. Unfortunately his passion was so great that it could not simply be undone.*
>
> *A while later the disconsolate suitor overheard another man speaking impertinently to the woman, to this object of his every desire. The woman reprimanded the man and the suitor decided to right this wrong. He accosted the man and challenged him to a fight. The suitor won the ensuing duel and forced the loser to swear never to speak ill of the woman again. When the woman heard of his valorous and gallant behaviour she was greatly pleased. Her attitude towards this suitor softened somewhat and she was kinder and more open when she met him. He began to harbour hopes of one day being able to touch her heart and win her love.*
>
> *The woman's lover began to suffer because he feared that he was losing her affections. She was becoming colder towards him and he felt that he was now having to share her love with another. He grew listless and pale, he ceased to eat and became quite ill. Sorrow disfigured him, and to appear even more morose he took herbs that would make him weaker and more pallid. While thus gaunt and suffering, he devised a plan for winning back his lover.*
>
> *The unhappy man had a wax mask made of his face. The mask appeared so lifelike that it could easily be mistaken for the face itself: Art*

had imitated nature so well that it was almost impossible to distinguish the real face from the counterfeit one.

The lovesick man then challenged the suitor to a duel to be fought at night. During the fight the lover fell to the ground screaming so horribly that the suitor assumed that he had killed him. While the victor went to look for help, friends of the apparently dead man hurried him away and put a fresh corpse with his mask on its face in his place. They covered the corpse with blood and left the scene. The ingenious lover then went and hid in a house nearby, while his friends continued to bewail his death and to spread the news of what had happened.

The whole combat took place at night and so no one saw what had happened. When the suitor returned he was threatened with arrest and fled. Meanwhile the lover was pronounced dead.

The suitor took sanctuary first in a church. Later that night, he was forced out of the church and he fled to seek shelter in several nearby houses. When news of what he had done spread, he was moved from house to house until, by chance, he happened upon the house where the supposedly dead lover was hiding.

While the wounded lover slept, the suitor ran into his room and by dint of the commotion awoke him. The lover sat up and both he and the suitor were equally astonished at what they saw. The suitor because he assumed that this was the ghost of the lover returned from the dead to haunt him. The lover because he thought that the suitor should by now have been imprisoned or banished.

The lover was pronounced dead and his sister, who inherited his estate, swore to kill the suitor and so avenge her brother's death. The suitor fled Paris fearful for his life.

The lover remained in hiding for fear of the full extent of his murderous scheme being discovered. When he emerged eventually in public he had lost both his property and his lover. A short while later he died.

While the *Court of Love* on occasion would recognise extreme jealousy as an incident of an extreme passion, not even love could exonerate one who pretended to die. The deceit of his plan condemned the lover to a living death, while the cowardice and the indirection of his design ensured that he lost the love of the woman whose affections he had so hoped to retain.

Masks, one might conclude, are always redolent of danger and proximate to death. The mask was, after all, in classical terms designated *imago* or an image in the strongest of senses. Thus in the present case, the mask was quite literally the impress or mould that captures the living in the moment of their death. Here, however, the mask did not actually seize the likeness – the soul – of the deceased, but rather and more unusually portended a living death and the displacement or perversion of the spirit. The mask *was* death, in the

same sense that it could be said that those that hide from love enter the domain of a living death.

The final question to be posed is that of what dies when a lover dies in a story of love. At the end of the *longue durée* of the judgments of love, the laws of love have lost their relation to the art of life and have been displaced into the domain of literary fiction that now dominates the historical and jurisprudential study of women's courts and their judgments. The trajectory traced in this chapter has used the figure of death within the courtly tradition to mark a movement from poetry to prose and from love to law. Needless to say, that trajectory is also witness to a shift from emotion to reason, and from art to science. There is, in other words, another death that is figured in the stories of amorous fatality that litter the tradition of the laws of love.

The death that the singular events or stories of death prefigure is that of an amorous tradition and its laws. By the time that François Callières was writing his *Nouvelles amoureuses* in the latter portion of the seventeenth century, the rules of love had become the object of satire, while women's courts had become the object of derision and denunciation. The trajectory of this demise was from fiction to farce, and is mirrored in the historiography of the laws of love. By the eighteenth century, the tradition was defunct, and women's courts and the jurisdiction of love belonged only to that unconscious of knowledge which harbours the remnants of failure or loss. Historiography contributed generously to that farce by rewriting the history of the jurisdiction of love as the history of a farce, and as the narrative of the death of an institution that never existed. Denied even that minimal ontological status necessary to die once in the real and once in historical reconstruction, the death of the jurisdiction of love foretells the demise of a political institution, a radically other vision of civil society, and of a law of difference that contemporaneity has at times sought weakly to recall and even to reinstitute.

NOTES

1. For a brief outline of this doctrine, see Peter Goodrich, 'Law and Modernity', 49 *Modern Law Review* (1986) p. 545.
2. See Pierre Legendre's intriguing analysis: 'If the destiny of the body is somewhere other than terrestrial space, namely a space where the I that I am cannot speak because this I is not dead, and if the body waits to become Other ... this life outside time has to be merited, that is to say negotiated, because we have to have something to exchange it for', Peter Goodrich (ed.) *Law and the Unconscious: A Legendre Reader* (London: Macmillan, 1997) p. 51.

3. A useful introduction to this theme can be found in Jean Markale, *L'amour courtois ou le couple infernale* (Paris: Imago, 1987).
4. For an interesting elaboration of the aporia of *eros* and *agape*, see Adam Gearey, 'Finnegan's Wake and the Law of Love: The Aporia of Eros and Agape', 8 *Law and Critique* (1997) p. 245.
5. For elaboration of this concept of love as the space in between, see Luce Irigaray, *I Love to You* (London: Routledge, 1996). For lucid commentary, see Alain Pottage, 'Recreating Difference', 5 *Law and Critique* (1993) p. 131; Alain Pottage, 'A Unique and Different Subject of Law' in Goodrich and Carlson (eds), *Law and the Postmodern Mind* (Ann Arbor: University of Michigan Press, 1998).
6. For a critical overview of the evidence of courts of love, see Paul Remy, 'Les "cours d'amour": légende et réalité', 7 *Revue de l'Université de Bruxelles* (1954–55) p. 179, arguing that at best the courts of love had a literary and didactic existence. See also Jacques Lafitte-Houssat, *Troubadours et cours d'amour* (Paris: Presses Universitaires de France, 1971), arguing that the courts of love undoubtedly did exist but that they were a social diversion or amusement rather than genuine tribunals; M. Lazar, *Amour courtois et fin'amors* (Paris: Seuil, 1974). At the undoubted risk of oscurantist self-reference, I have also addressed this question in P. Goodrich, *Law in the Courts of Love: Literature and Other Minor Jurisprudences* (London: Routledge, 1996) ch. 3, and in 'Epistolary Justice: The Love Letter as Law', 9 *Yale Journal of Law and Humanities* (1997) p. 617.
7. On the heresy of courtly love, see A.J. Denomy, 'The De Amore of Andreas Capellanus and the Condemnation', VIII *Mediaeval Studies* (1946) p. 107; and more extensively Denomy, *The Heresy of Courtly Love* (Gloucester, MA: P. Smith, 1965).
8. The most interesting study remains that of René Nelli, *L'Erotique des troubadours*, Vol. 2 (Toulouse: Union Générale des Editions, 1974) p. 140: '[a]t the very least it had to be recognised that courtly society generally practised sodomy so as to avoid the normal carnal fact of procreation; one cannot but acknowledge that courtly love was in its essence, love "against nature"'.
9. Nelli, *L'Erotique*, Vol. 2, pp. 61–2. Reference should also be made to Henri Rey-Flaud, *La Névrose courtoise* (Paris: Navarin, 1975); and more recently to Julia Kristeva, *Tales of Love* (New York: Columbia University Press, 1987).
10. Andreas Capellanus, *On Love*, Bk 2 (trans. P.G. Walsh, London, 1982).
11. 'The Court of Love' is printed in Skete (ed.), *The Complete Works of Geoffrey Chaucer* (Oxford: Oxford University Press, 1897).
12. The *questioni d'amore* are available in English in Giovanni Boccaccio, *Thirteen Questions of Love* (New York: Potter, 1974).
13. Boccaccio, *Thirteen Questions*, p. 118.
14. Danielle Régnier-Bohler (ed.) *La Coeur mangé* (Paris: Stock, 1996). There is a useful commentary on this lai in Gregory Stone, *The Death of the Troubadour* (Philadelphia: University of Pennsylvania

Press, 1996). Also instructive is Howard Bloch, *Medieval Misogyny* (Chicago, IL: University of Chicago Press, 1995).

15. Reported in Martial d'Auvergne, *Les arrêts d'amor* [1460] (Paris: Picard, 1951 edn.)
16. This argument is made in cultural-historical terms in Markale, *L'amour courtois*; and in theoretical terms by Luce Irigaray, *Thinking the Difference* (New York: Routledge, 1996). For the argument that the tradition and concept of courtly love was homosexual, see Jean-Charles Huchet, *L'amour discourtois* (Toulouse: Privat, 1987).
17. Jean Donneau de Visé, *Les nouvelles galantes, comiques et tragiques* (Paris: Estienne Loyson, 1680).
18. Huchet, *L'amour discourtois*, p. 27.
19. I cannot here deal with this vast and neglected historical issue, stemming from the salic law. For a preliminary discussion, see P. Goodrich, 'Gynaetopia: Feminine Genealogies of Common Law', 20 *Journal of Law and Society* (1993) p. 276.
20. François Callières, *Nouvelles amoureuses et galantes* (Paris: Quinet, 1679).

Notes on Contributors

Marinos Diamantides BA (Athens) LLM Lancaster, joined the Department of Law at Birkbeck College, University of London as a lecturer in law in 1995. His specialisations include ethics, legal philosophy, medical law and public law which he also teaches. He is currently completing a doctoral thesis on ethics, intimacy and judgment. He is a contributing author of a forthcoming book to be published by Routledge, *Children and the Law: Moral Agendas*.

Costas Douzinas is Professor and Head of the Department of Law, Birkbeck College, University of London. His books include *Postmodern Jurisprudence* (Routledge: 1993), *Justice Miscarried* (Harvester/ Wheatsheaf: 1994), *The Logos of the Nomos* (Alexandria Press (Athens): 1996), and *Law and the Image* (forthcoming).

Peter Fitzpatrick is Professor of Law at Queen Mary and Westfield College, University of London. His recent work has mainly involved edited collections such as *Europe's Other: European Law Between Modernity and Postmodernity*, with James Bergeron (Ashgate: 1998), and *Laws of the Postcolonial*, with Eve Darian-Smith (University of Michigan Press: 1999).

Adam Gearey is a lecturer in law at Birkbeck College, University of London. He has published in the areas of law and literature and legal theory, and is at present researching a book on law and aesthetics.

Peter Goodrich is Corporation of London Professor of Law, Birkbeck College, University of London. His most recent books are *Oedipus Lex: Psychoanalysis, History, Law* (University of California Press: 1995) and *Law in the Courts of Love: Literature and Other Minor Jurisprudences* (Routledge: 1996). He is currently working on a history of women's courts entitled *Lovers' Laws*.

Desmond Manderson is Senior Lecturer in the Faculty of Law at the University of Sydney. He has written extensively in the field of drug history and policy. His recent work focuses on contemporary legal philosophy, with particular emphasis on cultural, literary, and discourse theories of law. His latest book is *Songs Without Music: Aesthetic dimensions of law and justice* (University of California Press: forthcoming).

Ngaire Naffine is a Reader in Law at the University of Adelaide. She has published in the areas of criminal law, criminology and feminist theory, and recently, in medical law. She is the author of *Female Crime* (Allen and Unwin: 1987), *Law and the Sexes* (Allen and Unwin: 1990), *Juvenile Justice*, edited with Wundersitz and Gale (Allen and Unwin: 1993), *Gender, Crime and Feminism* (Dartmouth: 1995), *Feminism and Criminology,* (Polity: 1997) and *Sexing the Subject of Law*, edited with Owens (Law Book/Sweet and Maxwell: 1997).

Austin Sarat is William Nelson Cromwell Professor of Jurisprudence and Political Science and Chair of the Department of Law, Jurisprudence and Social Thought at Amherst College. He is currently President of the Law and Society Association and Chair of the Working Group on Law, Culture and the Humanities. His most recent book is entitled *The Killing State: Capital Punishment in Law, Politics and Culture* (Oxford: 1998).

Scott Veitch is Reader in Law at the University of Glasgow. He has been published in the area of philosophy of law and is the author of the forthcoming *Moral Conflict and Legal Reasoning*. He is currently working on the legal and ethical dimension of political transitions.

Prue Vines is Senior Lecturer in the Faculty of Law at the University of New South Wales. She writes in the areas of tort and succession. Recent work has included articles and papers on attitudes to death and post mortem examinations in the context of inheritance law. Her work includes the treatise of *Australian Succession Law Commentary and Materials – Families, Property and Death*, with Rosalind Atherton (Butterworths: 1996).

Melanie Williams is a Lecturer in Law at the University of Wales, Aberystwyth, with research interests in medical law and ethics, feminist jurisprudence, criminal law and legal history with a particular focus upon intersections between law and literature. Her recent publications include a study of the expert medical evidence offered in three Victorian nullity cases – 'Three Nullity Suits' in 6 *Feminist Legal Studies* (1998). She is currently working on a critique of *Tess of the d'Urbervilles* and the law of provocation, as well as a study of legal and literary constructions of rape and seduction in relation to *Tess of the d'Urbervilles*. A version of 'Sanctity of Death' first appeared in 10 *Australian Feminist Law Journal* (1998).

Jon Willis is a medical anthropologist currently working at LaTrobe University, Melbourne. He has spent twelve years living with and working for the Pitjantjatjara people of Australia's Western Desert. His current research interests include male sexuality, post-colonial cultural change, and the conflict of agency and public health.

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