AN AESTHETICS OF LAW AND CULTURE: TEXTS, IMAGES, SCREENS

STUDIES IN LAW, POLITICS, AND SOCIETY

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STUDIES IN LAW, POLITICS, AND SOCIETY VOLUME 34

AN AESTHETICS OF LAW AND CULTURE: TEXTS, IMAGES, SCREENS

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PREFACE

It is a rare privilege to work closely with a friend and colleague to produce a collection like this. Almost all the chapters in this book emerged from the 11th International Conference of the Law and Literature Association of Australia. The conference – "Mediating Law: Theory, Production, Culture" – was held at the University of Melbourne Law School late in 2002, in conjunction with the Association for the Study of Law, Culture, and the Humanities. The conference involved more than 90 international and interdisciplinary speakers across its three days. We thank all those who participated in the event for creating such a memorable, scholarly conference, and one which was a pleasure to organize.

We thank Michael Crommelin and Ian Ramsay, each of whom was Dean of the Law School during the planning and delivery stages of the conference, for the considerable support they provided. The event ran far more smoothly than we could have hoped for, in large part due to the outstanding administrative work of Lauren Holloway and Mark Wells, as well as many other staff in the Law School.

One of the most compelling aspects of the conference was the many papers addressing questions of law and aesthetics. Some of those papers have been developed by their authors for this book. Many thanks to all the authors for their thoughtful and engaging work, and to Austin Sarat for supporting this book's place in the series "Studies in Law, Politics, and Society." Thanks also to Emma Stacey, Administrator of the Centre for Media and Communications Law at the University of Melbourne, who provided substantial assistance during the editing phase.

From the inception of planning for the conference to the completion of the manuscript, Alison Young and Esther Milne offered us invaluable support, encouragement and advice.

We dedicate this book to Sophie.

Andrew Kenyon and Peter Rush.

1. ALTER EGOS: THE *MISE-EN-SCÈNE* OF LAW AND AESTHETICS

Peter D. Rush and Andrew T. Kenyon

> The misfortune in speaking is not speaking,
> but speaking *for others* or representing something (Deleuze, 1994, p. 52).

The order of law is not the order of the court; the law is not what the court says it is. What remains to be accounted by much of the contemporary study of law, politics and society is the mobile and nuanced relations between these two orders. On the supposition that there is a subject of law, we will suggest that the order of the court and the order of law are fated to be interrupted by the work of discourse. Both orders will only come to mean – and mean *something* – in the defiles of discourse. As Foucault taught us, discourses are constitutive and performative; they are "practices that systematically form the objects of which they speak" (1972, p. 49). If the order of the court does not simply repeat the order of law, how is a legal order transmitted? The law and literature movement provides one entrance to this question.

As an interdisciplinary enterprise, the relation between law and literature has more the character of a battle waged between already established and distinct disciplines. The disciplines of legal study and literary criticism have simply found another way to represent both their objects and themselves, without changing their epistemological and ontological concerns. This is as much the case for Dworkin's hermeneutics as it is for Fish's pragmatism and their various adherents.[1] More generally, as Shoshana Felman has noted:

> When not borrowing the tools of literature to analyse (rhetorically) legal opinions, scholars in the field of law and literature most often deal with the explicit, thematized reflection (or

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> "representation") of the institutions of the law in works of the imagination, focusing on the analysis of fictional trials in a literary plot and on the psychology or sociology of literary characters whose fate or whose profession ties them to the law (lawyers, judges, or accused) (2002, p. 55).

From one side, it is as if law would lose all its legal authority, but at least it would become more decorous and more humane. If no longer legitimate, law would be at least edifying for the chorus of professionals bored with their role of reproducing the functional orders of the court. From another side, literature would appear fated to be irrelevant in a social order answering to the demands of bureaucracy, technical efficiency, plain English, and the time of managerial reason. The attraction of law would be thus to enhance the legitimacy of literature, even if the price would be to lose that which is literary. The battle is fought in the name of authority and voice, and as such the law and literature debate returns to the classical question of jurisdiction. Jurisdiction is not simply a question of the determinations of authority within an extant legal system but rather refers to the power and authority to speak in the name of the law (Dorsett & McVeigh, forthcoming; Rush, 1997, p. 150). Yet, it is a question which quickly disappears – or is at least rendered opaque. Having fought, there would be a victor and a vanquished, or else the combatants would simply have turned around and gone home as if to fight another day. In either case, the relation between law and literature will have come to an end, hollowed out of all meaning and value in the same way that "signifying sound and fury" has become a cliché. Whether the critic identifies with the names of law or of literature, or both, the battleground is constituted by the presentation and reproduction of the disjunctive oppositions between rhetoric and substance, style and formalism, decoration and transparency, poiesis and mimesis, and pathos and logos (see Philadelphoff-Puren & Rush, 2003, p. 195). What then if we did not approach the study of law and literature as a question of disciplinary polemics? This possibility is broached by an inchoate movement in contemporary scholarship to which we here give the name of law and aesthetics.[2]

In its most general formulation, law and aesthetics names that weave within contemporary critical studies which turns to examine practices of representation and their relation to juridical and cultural formations. Rather than turning to a sociology of legal governance and domination, in order to provide an external critique of the effects of law, it explores the ways in which law emerges and performs as a modality of communication and transmission through which subjects relate to themselves, to others and to the text. It addresses itself to the textual politics of the institution in order to internally transform and interrupt doctrine. While recognisably literary texts continue to provide resources with which to attend to these incorporeal transformations of law, the emphasis is upon aesthetic formations as providing the very material through which the legal institution becomes juridical.

The alter-egos of law – literature, and now extended to include television, film, photography, visual arts, digitisation and media studies – become the very singular subject of law, yet without losing their alterity. The textual, the imagistic and the affective are read as so many dispersed signifiers of the persistence of jurisdiction in the managerialism of the contemporary legal institution (see Goodrich, 1991, 1994). The question of analysis would then be concerned with how we identify and identify with the (imaginary and symbolic) places from which we receive the message of our law and take up our genealogy. After all, lawyers are first and foremost children of the text, or what may amount to the same thing, children of the revolution.[3] How can the child rebel against the parent, without destroying the family? How is it possible to interrupt the transmission of law and at the same time remain faithful to the precedence of law? What are the scenes through which legal and literary characters perversely assume the genealogy of law? In short, these questions of law and aesthetics respond to and take responsibility for law in an "era of transmissive crisis."[4]

HANDIWORK

"Streams of Justice Clear and Pure"

The contours of the question of transmission or jurisdiction receive a particularly sharp delineation in a recent judgment from the annals of contempt of court. How can the solicitor scandalise the court, without destroying the law? Consider *Anissa v Parsons*. It involves the doctrine of contempt by scandalising – the most feudal of the three legally recognised types of contempt used to keep "the streams of justice clear and pure."[5] And the question that the judgment confronts is the technical and representational ordering of law, and specifically the articulation and disarticulation of two orders – that of the court and that of law.

The report of the judgment opens:

> The hills of south of Yarragon are green and shaded. The hourglass of the Latrobe Valley is there at its most slender, nestling between the grandeur of the Great Dividing Range to the north and the finely delineated Strzelecki Ranges to the south. Nine kilometres south of the Princes Highway, off Yarragon South Road, in pastoral serenity stood fifty trees. They had the ill fortune to stand on the property of the defendant – landowner, disaffected son and solicitor of this honourable Court (*Anissa v. Parsons*, 1999, para. 1).[6]

Here the judgment performs what could be read as the prologue to a pastoral melodrama in which nature is fated to be dug up and cut down. In this theatre of nature, the judgment will set in place and in motion two scenes of action. It is the relations – familial, curial, political, juridical – between these scenes which will

guide our reading of the text of the judgment, which lays them out for the legal audience as a problem of scandalous contempt.

The first scene – like many first scenes of law, literature and culture – is one of family conflict. The son owns land beside land owned by the Anissa company. Anissa is owned by the family – one part by each parent and two parts by the son. The son has resided on his own land, and the parents on the plot owned by Anissa. But the family has become unhappy. It is at this point that Justice Cummins introduces us to the first scene: "There had been a falling out between parents and son. It appeared to be irreconcilable. The parents decided to move away." There is no backstory. Justice Cummins does not tell us what was the object-cause of the conflict, though some clue may be gained from his use of the language of irreconcilability that is more at home in matrimonial disputes. From the midst of the conflict the judgment also recalls "happier times" between the son and his mother in the "pastoral serenity" of the opening "bucolic scene." The father is not mentioned here nor, in fact, throughout the text of this judgment. His only trace, at least in the familial scene of conflict, is in the parental referent and reference.

The conflict between son and parents means that Anissa is being wound up and its land is being sold by auction. The dramatic appeal of the first scene, then, is whether the family will suffer the same fate as the company. (Or will the conflict provide the occasion for the continuation of the familial relation?) A "handful of suited professionals" were in attendance "to effect the sale" of the Anissa land. The cast of characters includes a chorus of functionaries – a solicitor, a liquidator and an accountant. In addition, a bulldozer makes an appearance.[7] The bulldozer is variously referred to as a "menacing behemoth" and the son's "alter ego." After the auction has failed, the bulldozer begins to plough the boundary between the son's and the family's property and parents' residence. Although "the legal landscape in many parts of the world is littered with cases concerning fencing disputes, overhanging trees, parking rights, [and] boundary disputes" (*Jeffrey v. Honig*, 1999, para. 1), on its face the bulldozing is not a boundary dispute between neighbours, let alone between son and parents. On one of its faces, the dispute is between a behemoth that rumbles "pregnantly" and pastoral serenity.

The behemoth "obliterated the bucolic scene." It "razed 47 trees," knocked down fences, posts and vegetation, and damaged a concrete driveway. Justice Cummins explains:

> The trees were on the defendant's side of the boundary. The damage to the driveway and the gates were said (in an affidavit by the defendant's mother) to be on the Anissa property.

The bulldozer and its driver, acting on the son's instructions, had left "devastated fields," destroying the record of the son's close relationship with his mother and,

more generally, the record of parental ties. What is left in suspense is whether the son has destroyed the family. With this issue left hanging, the judgment turns to the second scene, a curial one which is seemingly not a familial scene.

The second scene begins with interrupted communication: the bulldozer had cut the underground telephone cables forcing Anissa's solicitor and liquidator to rely on both car phones and mobile phones. These two legal functionaries had been trying to obtain an urgent injunction from the court to stop the son from interfering with the Anissa property. But where there had been a conflict between son and parent in the first scene, the conflict defining the narrative of the second tableau is one between the son – who is now a "disaffected solicitor" – and the court.

The injunction is granted by Justice Beach to the Anissa solicitor, via telephone, who reads aloud the order of the court to the son-solicitor. Here, it is significant to note that, at least on an initial reading of the judgment, the court is embodied in the person of the Anissa solicitor as the reader of the court's order. In much the same way as the disaffected son interrupted the family auction, the disaffected solicitor "constantly interrupted" the reading of the court's order by the Anissa solicitor. He usurped the authority of the court, since after all it is the role of the judge to interrupt the speech of the advocate. But the solicitor, who is now becoming the defendant, does more:

> At the conclusion of the reading of the Orders, the defendant said "Is that all?" and [the Anissa solicitor] said "Yes and when Justice Beach signs the Orders I will fax you a copy". The defendant then said: "And Justice Beach has got his hand on his dick". [The Anissa solicitor] replied: "I'll have to remember to tell him you said that." The defendant said "Tell him, because if you don't I will". The defendant then put his wrists out to the police officers and said "Guys, please arrest me if you like but this has been the funniest day of my life."

Both the reading of the court order and the defendant's reply are within earshot of a chorus of stock legal characters: two police officers, the "handful" of suited professionals from the failed auction, and the defendant's female sidekick. In a subsequent hearing related to the injunction, Justice Beach was told the defendant responded: "And Justice Beach has got his hand on his dick." Upon hearing this, Justice Beach – "a robust and independent judge in full measure" – directed that the disaffected son and solicitor face charges of contempt by scandalising the court.

The Supreme Court of Victoria, in the person of Justice Cummins, moves to decide whether or not the charge of contempt has been made out against Simon Parsons – the "landowner, disaffected son and solicitor of this honourable Court." It is the text of this decision that we have begun to interpolate and interrupt. Justice Cummins decides that the scandal of telling the lawyer who was executing Justice Beach's Order that the judge "has got his hand on his dick" does not amount to contempt by scandalising the court:

> It may be offensive, but it is not contempt of court, for a person to describe a judge as a wanker. The words uttered by the defendant, albeit particularised, say just that. The words spoken by the defendant do not undermine confidence in the administration of justice. They undermine confidence in the persona of the solicitor who spoke them.

There was an unsuccessful appeal. Phillips JA held that the son or solicitor's words did not undermine confidence in the administration of justice:

> It seems to me that what was said can properly be characterised as the immediate and unpremeditated response of the respondent to the first notification to him of the injunction which had just been granted against him. The words spoken were an emotional response to the communication being made and there was nothing in them, I think, of intimidation or defiance; just vulgar abuse. . . . True it is, a solicitor should have known better than to let his tongue run away with him in the way that happened here . . . (*Saltalamacchia v. Parsons*, 2000, para. 10).

What is remarkable, and requires a reading, is the slippage from the actual words of the solicitor-son to their characterisation by Justice Cummins as a description of the judge as a "wanker." It is not obvious to us that "hand on dick" is an attribution of onanism, albeit that it might inscribe a relation to a more general structure of auto-eroticism. Nor is it obvious to the Court of Appeal. It noted that, while the son obeyed the order of Justice Beach, "he did, to put it shortly, abuse the judge." (*Saltalamacchia v. Parsons*, 2000, para. 1) The slippage is all the more forceful in the judgment for being unmarked and tacit.[8] We will suggest that the figure of onanism condenses a number of figures of speech – *hypotyposis*, or vivid images – that are threaded throughout and form the texture of the judgment. A reading of these images and their affective force enables us to give an accounting of the articulated relations between the familial and curial scenes which are staged by the judgment against the backdrop of the legal spectacle of nature with its mountain ranges, valleys and its "streams of justice." The figures are images of technology and its relation to nature, of the bully and its relation to the rule of law, and of the wanker and its relation to the order of the court. We will argue that these are all figures of transmission, and specifically the interruption of the handing down and on of law.

Of Bullies and Bulldozers

Let us begin the reading with technology and its relation to nature. Typically, in modern culture nature has been the site for the representation of the sublime. In this tradition, nature is double. Nature as sublime is awe-inspiring, terrifying, immemorial, majestic and monumental. This nature is external to the social, but is the condition of its possibility. Yet nature, under modernity, shifts from subject to object. Modernity turns to technology as a way of mastering nature and harnessing

its force as productive, nurturing and ordering. Nature is domesticated, while still echoing its sublime past.

In our text, the judgment begins with domesticated nature – a romantic, pastoral idyll. But this idyll echoes elements of the sublime in as much as it inscribes the "grandeur" and "finely delineated" qualities of the mountain ranges. Despite these echoes of the sublime, nature is presented overwhelmingly as domesticated. Such domesticity is to be read in the barely-suppressed gendering of the description of the valley as having a "slender" "hourglass" figure which "nestles" amongst the mountain ranges. Moreover, the land that is described by Justice Cummins – without being commented upon in the text – is valleys and mountains that have been cleared for habitation by colonial settlers. An indigenous population has been displaced and erased,[9] trees have been felled and others planted by and for the white settlers. Land has been subdivided and boundary lines have been drawn. The new trees will function as boundary markers, and as mementos of a time prior to destruction – of how emotions, familial relations and traditions have endured. The trees record the family's past and become a signifier of the survival of the family. Justice Cummins recalls that trees have been planted by mother and son "in happier times," just as his judgment begins by recalling the pastoral serenity of nature. The survival of the trees is presented as an icon or image of the family's ability to live on as a family. But technology, as a modern "will to mastery," is already on the horizon of this domestic fable of nature. As much as technology has been presented as destroying traditionary forms of knowledge, so in this text a D9 bulldozer comes to interrupt the blissful memory of the union of mother and son.

The specific image of technology for the judgment is this bulldozer. Its action is represented as destructive. It is a "menacing behemoth" whose "engine rumbled pregnantly" and cut "a path of destruction" through natural serenity and domestic bliss.[10] The behemoth is a mythological creature associated with qualities of enormous power, materialised in destructive action and excessive appetite:

> Behold Behemoth,
> which I made as I made you;
> he eats grass like an ox.
> Behold, his strength is in his loins,
> and his power in the muscles of his belly.
> He makes his tail stiff like a cedar;
> the sinews of his thighs are knit together.
> His bones are tubes of bronze,
> his limbs like bars of iron.
> He is the first of the works of God;
> let him who made him bring near his sword!
> For the mountains yield food for him
> where all the wild beast play (Job 40, 15–20).

The behemoth is one of three monstrous and primeval figures, respectively associated with water, land and air. The two most familiar creatures are Leviathan, a female sea monster coiled upon itself, and Behemoth, a landed creature which has been represented in the Book of Job as an ox, and by William Blake as a hippopotamus with tusks, a lion's tail, elephantine human ears, and a greatly distended belly (Blake, 1987).[11] What we would emphasise from the tradition of the behemoth's representations is that it is an ambivalent creature in at least three respects. Not only is it ambivalent in that its morphology borrows from various human and animal forms, it is also ambivalent in relation both to gender and to reproduction. The behemoth is typically understood to be male. Yet, it has a distended belly – at least for Blake – and in Justice Cummins' representation it "rumbles pregnantly." At the same time, it is a singular creature. There is only one behemoth, and according to some interpretive traditions this makes it non-reproductive.

Moreover, when we turn to law, the ambivalence of the behemoth is not so much a sign of illegality; rather the excess is a mark of the alegal foundation of law. This is made all the more clear by the fate of the behemoth. In the rabbinic tradition, it is part of the reward of the righteous who will feast on it in a messianic banquet at the end of history:

> And Behemoth will appear from its land, and the Leviathan will rise from the sea: the two monsters which I formed on the fifth day of creation and which I kept until that time shall be nourishment for all who are left (*The Apocalypse of Baruch* in Charlesworth, 1983, p. 630).

The righteous are those who have obeyed the law and observed the prescriptions of the Torah. More specifically, the law does not hold sway during the time and space of the feast. At the end of human history, the feast is the opening onto a realm in which the categorical distinctions between legality and illegality are not inscribed and cannot be observed. This is the lesson of mythopoeisis when it comes to the "menacing behemoth."[12]

But the subject of technology is not simply a menacing behemoth. When first introduced by the judgment, the bulldozer is presented as one of a cast of characters. Alongside the "handful of suited professionals" present to conduct the auction, the judgment notes offhandedly that the "defendant was not present. But his alter-ego was – a bulldozer."

So what does it matter that the alter-ego cuts down the trees? We have already emphasised that the trees are an image of past, happier times of mother and son. And that the son is represented as willing the destruction of this blissful union. Technology, then, interrupts the parental or familial inheritance. But a closer attention to the text of the judgment indicates that such inheritance has a double face. Where Justice Cummins explicitly invokes and mourns the loss of a *maternal*

inheritance, it is nevertheless possible to read another transmission by way of the alter-ego. Does not the alter-ego also hand down a *paternal* inheritance? The father is dead to both nature and its arboreal scene of memory; he is, however, not absent from the text. As a parent, he has simply decided "to move away." Yet, as a father, he returns we suggest in Justice Cummins' figure of the bulldozer, and more precisely in the image of the bulldozer as the alter-ego of the defendant. The father haunts the familial scene of this judgment in the guise of the alter-ego of, and more generally the legal image of, the son. The son is captured and captivated by this other inheritance, this other law, which echoes the threatening and awe-inspiring qualities of nature that had been forgotten from the pastoral fable with which the judgment opens. That is to say, the "landowner, disaffected son, and solicitor of this honourable Court" is not simply using technology as an egological instrument to dominate the maternal inheritance, but rather he shares in the predicament of technology for modernity. Is not the son fatally subject to technology and hence to the image of the father? If we assume that this reading is warranted by the text, then can we not say that it is the *alter*-ego of the son that has scandalised the court?[13] Or to put it in a figure that we now turn to, has not the bully assumed the aspect of the rule of the law? This is what is so troubling for the judgment and also that which has provoked us to read it.

The figure of the bully interposes itself immediately after the judgment has presented the "unedifying words and conduct" of the son.[14] But by now, for this text, the son has dropped out of view to take on the guise of the solicitor. Simon Parsons, the defendant, is initially presented as a "landowner, disaffected son and solicitor of this honourable Court," for the purposes of the family scene and technological devastation. By the time of the curial scene of law, he has become a "landowner, and solicitor of this honourable Court." What makes up for the filial absence is the figure of the bully. Justice Cummins writes:

> Justice Beach – a robust and independent judge in full measure – did not refer the matter because of any personal affront to him. He referred the matter in the necessary interests of the administration of justice. For there is a long line of authority which establishes that it is in the community's interests that due respect – not uncritical or craven respect – due respect needs to be paid to the administration of justice in order that the decisions of the Court are not undermined. Otherwise the rule of law will become the rule of the bully and of the bulldozer.

Here, Justice Cummins assimilates law and administration, rule and order, justice and respect. And against this backdrop, the bully emerges as an awesome and menacing figure. But what does the bully threaten? Perhaps a clue can be gleaned from the analogy between bully and bulldozer that the judge draws. Recall that the bulldozer destroys order and therefore, if the analogy is to hold, we would expect the bully to destroy order. Further, if Justice Cummins is to be taken at his word,

the particular order that is destroyed is the order of law. But the image of the bully suggests things are more complicated.

The order of law is not reducible to the order of the court, and this would suggest that law has debts and responsibilities which exceed due respect for the administration of justice and the decisions of the court. Despite a parallelism in the judgment between bulldozer as technology and the order of law as the administration of justice, the bully can be read as the return of an older order – thematised variously as nature, maternity, common law, feudalism, justice, amongst various others. The bully recalls the forgotten order of sublime nature that continues to trouble the domestication of land. In place of the rules and regulations that administer and create a pastoral serenity for contemporary landowners (territory as heritage), the excessiveness of the bully represents the natural law of the land. The order of the bully is also functioning in this judgment as an order of maternal inheritance and cultural transmission that is cut down by technology. It is also the order of the common law, understood as a premodern modus operandi organised around tradition, custom, experience and adjudication, and conventionally referred to as our lady the common law. The question to which all of these representations repeatedly return is a question of transmission – from the past to the future, from law to court, from nature to justice. At least since the nineteenth century, it has appeared as if this primordial order of law has been killed off.[15] The usual suspect has been named as positivism, both in its analytical and sociological guises. The text of this judgment, however, suggests that the verdict has not yet been handed down; no order of the court has been signed. The subjective relations through which the text inscribes both the familial and curial conflict are strikingly feudal – they are parent-son, master-servant, court-solicitor, law-subject – all of which are condensed in the concern with whether the rule of the bully becomes the rule of law. In yet broader terms, then, the question being played out here – and more generally in debates on the continued existence of the offence of contempt by scandalising the court[16] – is whether an offence of scandalising, which is feudal in origin, structure and imaginary, can operate in a liberal democracy whose imaginary narrative of community, state and citizenship is beholden to the ideal of the rule of law. The text of Justice Cummins' judgment would suggest that it cannot – at least to the extent that we imagine the rule of law as an administrative technology, as reducible to "the administration of justice" with its chorus of functionaries (liquidator, accountant, solicitor). At this constative level, the text assimilates the order of law to the rule of law, and the rule of law to the order of the court. The law becomes what the court says it is; yet such speech puts to one side the order of law. Nevertheless, the bully comes to remind us, and this speech, that the order of the court cannot be assimilated to the order of law. The work of the bully is done in this judgment in the name of law, not in the name of the court

to which "due respect – not uncritical or craven respect – due respect needs to be paid." For us, then, the bully scandalously represents to the court the law – the law which the court has disavowed in favour of the administrative, the technological and the regulatory. What the bully threatens is the return of the dogmatic order of law in the images of the text of judgment. Echoing the scandalous acts of the son's alter-ego, it would seem the return of the image of the law would also scandalise the court, displace administration and rule from its sovereign position, and criticise without deference.

We began with a scene of family conflict and one of curial conflict. As we have read, each has its privileged figures of speech. The scene of family conflict is staged as a question of technology and its relation to nature; the scene of curial conflict appears through the bully and its relation to the modern rule of law. Our reading has suggested that the figure of technology is a figure of paternity, in which can be read an absent father who returns to act on the field of nature as the alter-ego of the son, and in such acting out displays a will to master and destroy the maternal order. However, a maternal order returns to haunt and exceed the statements of Justice Cummins, in particular the statements which force an identification of the order of law with the order and rules of the court. On our reading, it is the bully *as image* that reminds us of a maternal law that makes possible a criticism and writing of judgment, with and without deference. More generally, we have argued that the transmissibility of law takes place as, and through, its images.

The Hand that Signs

Our third and final figure, namely the figure of the judge as wanker, also embodies the material question of transmissibility. What is figured here is a problem of the handing on or handing down of law. Recall the scene in which the attribution of onanism is seemingly destined for Justice Beach. Unlike many modern scenes concerned with transmissibility, the genre is not so much tragedy as farce:[17]

> At the conclusion of the reading of the Orders, the defendant said "Is that all?" and [the Anissa solicitor] said "Yes and when Justice Beach signs the Orders I will fax you a copy". The defendant then said: "And Justice Beach has got his hand on his dick" . . . The defendant then put his wrists out to the police officers and said "Guys, please arrest me if you like but this has been the funniest day of my life."

Justice Cummins will then translate the defendant's comment as calling a judge "a wanker." He elaborates: "The words uttered by the defendant, albeit particularised, say just that." In this interpretation, the relation between the defendant solicitor and Justice Beach is a filial relation to the father – it is as if the son is simply saying:

'Why should you have all the fun? I want some for myself.' This is consistent with the decision of Justice Cummins that the words do not amount to contempt: the words confirm the position of the son, rather than call into question the authority of, and confidence in, the father.

But there is another reading, one which emphasises the relations of technology and authority that are invoked by the defendant saying that the judge "has got his hand on his dick." The defendant's comment can be read as a description of the judicial *signing* of the order of the court. Judging is a handicraft, a grasping, and the order of the court takes place through masturbation. After all, the convention is to describe the ruling or *ratio decidendi* of the court as that which is held by the court. But still, this is not enough since we have not displaced a consequential understanding of the order of the court and of masturbation. In such an understanding, calling a judge an onanist would simply suggest that the order of the court falls on deaf ears, like seed on barren ground. But the defendant *does* obey an order: the bulldozer stops and he holds out his wrists to be cuffed by the police in waiting. And he does so *before* the order of the court has been signed. It is this obedience prior to signature which needs to be accounted, and which cannot be accounted by a consequential reading. What order does he obey? Who signs the order?

According to Justice Cummins, the words of the defendant are to be understood as having a subjective reference:

> The words spoken by the defendant do not undermine confidence in the administration of justice. They undermine confidence in the persona of the solicitor who spoke them.

This suggests that, in calling the judge a wanker, all that has happened is that the defendant has put into question his own name, honour and reputation as a solicitor.[18] But this is to forget the defendant and solicitor's *alter-ego*. The object and target of the comment is the performance of law – it is the signing of an injunctive order by the judge. As such, it is the persona – name, office and *dignitas* – of the court that is called into question by the objective reference of the defendant's words. This reference cannot be bypassed, as Justice Cummins seems to do, since it is the very matter of the law.[19] The solicitor-son-defendant has precisely reminded us that the moment of law is the moment of signature. The words of the defendant say that a judge signs an order with his dick. And they say just that. But what is indeterminate is whether it is the order of the court or the order of law that is signed. In Teubner's terms, the problematic of the signature is a paradox of self-reference (1993). From within the historical and political form of the legal institution, the sign of law cannot be observed. What the defendant has done, in autopoietic fashion, is call attention to the alegal foundation of law. And he has particularised that alegal foundation as a paradox of auto-eroticism.[20] There is an

ineliminable margin between having your hand on your dick and wanking, between authority and authorisation. It is only on condition of this marginal difference that an order of law – a jurisdiction – becomes transmissible. Is not this the lesson we have read in our other images or figures from the judgment? The technological behemoth, the bully and the wanker – buried within each of these figures is the memory and image of another law, a law of the other, of a handing down and handing on that exceeds the order of the court. In short, the transmissibility of law is a question of the alter-ego, an other that emerges as the innermost exteriority of law. And it is this other law, more precisely these images of another law, which the decision of Justice Cummins puts to one side. In deciding that the words are not contemptuous, Justice Cummins ironically and unwittingly disavows the alter-egos which make his decision possible.

Be this as it may, it is the affective and veiled force of the figure of the wanker that condenses the question of the transmission of the law in terms of the representation of authority. Here in this figure that is contemptuous of the order of the court, but not contemptuous of law, it is possible to read a perverse assumption of the genealogy of law and hence the jurisdiction of criticism. It is such a perverse assumption that the appeal to the aesthetics of the image and of the text has augured in contemporary scholarship and current legal criticism.

AN AESTHETICS OF LAW AND CULTURE

In reading the handiwork of judgment as a question of transmission and jurisdiction, we hoped to have indicated something of the stakes in the mode of criticism and reflection which we collate here under the title of "an aesthetics of law and culture." What remains to be done, by way of introduction to this volume, is to specify the terrain which the subsequent chapters of *An Aesthetics of Law and Culture: Texts, Images, Screens* traverse.

The chapters engage with diverse materials. They range across the media of speech and writing, document and script, word and image, legislation and judgment, literature, film, and photography. The disciplines which house them include jurisprudence, literary criticism, philosophy, cinema studies, fine art and visual studies, cartography, historiography, medicine, not to mention legal studies and jurisprudence. The genres they invoke include melodrama, tragedy, comedy, and farce; while the modalities range from symbol to allegory. There are many ways in which such a proliferation of materials, forms and idioms could be ordered; our choice is to do so by reference to four constellations which have been prominent in contemporary critical scholarship – at least where that scholarship is theoretically informed and interdisciplinary. These constellations are – Crime Scenes: Sexuality

and Representation (Part I); Sites Unsaid: Testimony, Image, Genre (Part II); (Post)Colonial Appropriations (Part III); Screen Culture: Sovereignty, Cinema and Law (Part IV).

Crime Scenes: Sexuality and Representation

Part I of *An Aesthetics of Law and Culture* brings together three essays which variously interrogate the scenic elements of crime and law, the sexual body and its representation. The sexual has occupied a determined and determining place in attempts to reconstruct the politics of law around the question of the subject and responsibility. Here, the subject is understood as a question of the relation between the voice and authority of law or, in a classical idiom, a question of the jurisdiction of law. This relation between voice and authority, speech and law, is mediated and interrupted by the writing of law. The difficulty of analysis or criticism then is to not only read between the lines but also to read between the letters of law. It is this figure of the in-between that Nina Philadelphoff-Puren – literary critic and political theorist – puts to work in Chapter 2. The site of legal speech that provides the focus of her reading is a *judgment* of the High Court of Australia concerned with the law of rape – namely, *M. v. The Queen* (1994). This judgment provides the occasion for an archaeology of the hymen as a juridical, medical and cultural figure of rape law. Philadelphoff-Puren demonstrates that the hegemonic figure of the hymen is unstable. It is continually brought before and contested by the counter-figure of the "folding" hymen. To the extent that the judgment in *M.* is a judgment according to law, then the image of law that it bodies forth is fractured by two countervailing strategies of sexual difference. Moreover, to the extent that the judgment devotes its allegiance to the hegemonic hymen, the jurisdiction of rape law disqualifies the testimony of young girls. While the evidence and arguments of such disqualification is frequently heard in law reform debates and in the critical study of law, what Philadelphoff-Puren contributes to these debates and our understanding is a reading which proceeds without disavowing the representational medium and textual material of law. It is Philadelphoff-Puren's argument that the disqualification or dereliction of the testimony of young girls is legible in the grammar and rhetoric of judgment. More generally, the predicament of legal judgment is that it writes, and it is at the level of the text that the dogmatic – or in Philadelphoff-Puren's terms, hegemonic – inheritance of law inheres and is embodied for us.

Where then would we turn in the effort to reconstruct an other that contests and displaces the dogmatic and textual figure of the hymen in law? Philadelphoff-Puren suggests that a counter-memory can be found(ed) in literature – and specifically,

a short story by Isak Dinesen. Yet this contestation does not emerge as a simple opposition of literature to law. It is not so much the literary qualities of literature that provide the resources for Philadelphoff-Puren's contestation. Rather, Dinesen's story "The Blank Page" offers a repository of legal concepts that would form the matter of a new legal strategy that would contest the disqualification of sexual difference. In sum, the hymen is not only a hierarchical figure of the legal and dogmatic text, it is also a figure of the complicated relation between law and literature. Law and literature are enfolded as the hymeneal text of culture.

Chapter 3 also engages the jurisdiction of the subject of law in the context of the embodied relation between crime and sexuality. The negative image against which the doctrinal body of law is constructed is an image of the homosexual man as a predatory and penetratory subject and as a paedophile. In his chapter – entitled " 'It Forced Me to Open More than I Could Bear': H.A.D., Paedophilia, and the Discursive Limits of the Male Heterosexual Body" – Ben Golder explores these two symptomatic images of the male homosexual in the context of what was initially referred to in the USA as the "homosexual panic defence" and is now more commonly known in Australia as the "homosexual advance defence." This defence operates in criminal legal doctrine as an evidential and factual rather than substantive and formal defence to a charge of homicide and specifically murder. Used primarily in the context of the defences of provocation and self-defence (and to a lesser extent diminished responsibility or capacity), it has been accepted in Australia and the USA as mitigating the criminal responsibility of the accused. It is used when the death took place in the context of an amorous encounter – an encounter which is reconstructed as violent and assaultive. And it involves the accused – almost always a heterosexual male – arguing that he was provoked by or defending himself against the actions of the homosexual victim. The juridical narrative requires the heterosexual accused to argue that the victim "started it first" and hence relieves him of responsibility for the killing of the homosexual victim. In short, to accept the relevance of this homosexual advance defence is to blame the victim. It is this constitutive structure of blame that Golder documents in detail for us. By reading the discursive structure of the legal narrative of homosexual advance defence, he is able to give an accounting of the manner by which the politico-legal practicality of blaming the homosexual emerges in the joint articulation of paedophilia and predatory penetration. Yet just as importantly, the positive image against which the law constructs this negative narrative of the homosexual legal subject is the corporeal integrity of the male heterosexual. The male heterosexual body is only ever the advancing shadow of law; it is unified, integral, enclosed and, by the same token, forever open to attack, forever vulnerable to the other. Hence, as one heterosexual accused claimed, "he forced me to open more than I could bear."

While disparate in themes, methodologies and topics, these two chapters can be brought closer together in terms of their mutual concern to read the textual and discursive formations of law as a question of the embodied subject of responsibility. While the dogmatic or hegemonic body of law has conventionally been understood as unmarked, Philadelphoff-Puren and Golder provide us with the resources to read the inscription of this body on the site of law. The body of law may be unmarked but the stains left on the texts of law are legible – and legible as the penetrative regime of images inscribed in the judgments of rape law and of the homosexual advance defence. Against this seemingly monolithic construction, Philadelphoff-Puren's chapter suggests that the tradition of the folding hymen provides the resources for rearticulating sexual difference in law and legal study. Similarly, Golder's chapter suggests that the narrative of penetration and penetrated – understood as a dialectic of subject and object – can be reconstructed on the site of law. Read together, then, the chapters by Golder and Philadelphoff-Puren suggest the contemporary possibilities for a poetics of law reform.

The next chapter continues this concern to displace and reconstruct the jurisdiction of sexual difference. Here, however, the essay leaves aside the scriptural text of law and turns to visual materials that engender the body. Since the nineteenth century, photography has been implicated in taking hold of or arresting the body and in determining its guilt. The archive of photography is a veritable storehouse of images of crime scenes. In Chapter 4 entitled "Arresting Images/Fugitive Testimony: the resistant photography of Evergon," Derek Dalton recalls this aesthetic of the crime scene in exploring the "manscapes" of beat and cruising spaces by Canadian photographer Evergon. Evergon's photographs speak to criminology's and to law's fascination and obsession with the (in)visibility of the gay man. They are a record and testimonial to the disturbance in the field of vision that the image of the gay man generates in and for the crimino-legal complex. Dalton reads Evergon's resistant images to elucidate the ways that gay men defy their outlaw status by occupying public spaces and leaving traces of their occupation and their desire. These photographs remain then as traces of a disturbance in the juridical field of vision which the traditions of law and criminology would erase as so many stains on the masculine and heterosexual body of the social.

Sites Unsaid: Testimony, Image, Genre

If each of the chapters in Part I perform the contemporary ethics of criticism not so much as an appeal to moral conscience and responsibility but as one of bearing witness to the other that inhabits the margins of the texts of law, Part II

of this volume takes up the motif of witnessing and pursues it into a tribunal of the senses. Here, the jurisdiction of law and aesthetics is submitted to questions of testimony and proof, genre and litigation, image and place, desire and death, virtue and truth. Each of these questions responds to and traverses that which *in* law takes place beneath the level of legal reason and is other than law.

Chapter 5 provides a reading of a now-classic textual instance in the tradition of law and literature studies, namely, Franz Kafka's *The Trial*. With some notable exceptions, this tradition has provided a commentary on key legal motifs in the novel. In his chapter, however, Edward Mussawir takes Kafka's novel as the occasion for the elaboration of a "legal assemblage of desire." From this perspective, it makes little if any sense to ask if literature would provide access to a law that had heretofore been inaccessible, since we are already entranced by or held before the law. It is not so much a question of taking hold of another text and digesting it. Instead, Kafka's legal problematic is a question of *poeisis* or of enunciation. What is at stake according to Mussawir is "how to invent a mode of expression as the only real way to desire, or alternatively how to desire as the only real way to express oneself." The concept of a law-machine, as much as a literature-machine, is necessary to do justice to the paradoxical situation within which the contemporary debates on interpretation and law find themselves. Crime, jurisdiction and advocacy – these are presented in this chapter as three elements of a juridical assemblage of desire, elements of a law-machine through which Kafka's characters and legal interpreters happen to speak and desire. Jurisprudence, Mussawir argues, will express nothing but despair in so far as it fails to confront and hence resist the machinic conditions immanent to juridical being.

Juridical being is framed, in the next chapter, as a question of character and so of judgment according to law. Where much attention in contemporary critical jurisprudence has devolved upon the aporias and indeterminacies of legal foundation, somewhat less work has addressed itself to reconstructing judgment. In a certain sense, the juxtaposition of law and aesthetics is particularly suited to the latter task – and one could say, that much of the conventional recourse to literature from the side of jurisprudence has been addressed to improving (reforming or edifying) the character of the judge (critic or judicial). While somewhat refractory to this edifying tradition of scholarship, the four chapters in this second Part address judgment as a question of character.

Michael FitzGerald's chapter takes up the conjunction of character and judgment so as to reconstruct the site of judgment as truth. The particular context is the practice of judicial proof and the prevalence – albeit exceptional position – of character evidence in that practice. Entitled "Character Evidence and the Literature of the Theophrastan Character: A Phenomenology of Testimony," Chapter 6 argues for the refractoriness of the human Other to any type of conclusive judgment.

The guarantees associated with *viva voce* testimony need to be understood, he argues, in a fundamentally different way to those of an evidentiary system organised around exposition, disclosure and demonstration. In order to assay such a different understanding, FitzGerald turns to Theophrastus and the character writers of 17th and 18th century England. This rhetorical and literary tradition understood both that its didactic project required it to faithfully represent types ("Virtue is not loved enough, because she is not seen"), and that any such representation was negated by the essentially atypical nature of human personhood ("It gives you the hint of discourse, but it discourses not"). As such, the proven is not so much that which is shown as that which withdraws from sight at the same time as it calls forth evidence (from *videre*, to see). Staging a dialogue with this literary-rhetorical tradition, FitzGerald reinvigorates an understanding of the Other as irony. To the extent that the legal tribunal claims to tell the literal truth then it will be plagued by the shadow of doubt. In this ordeal, character emerges as the trace, in the text of evidence, of the witness, the other voice.

FitzGerald reinscribes in law a theory of truth as irony and pursues its implications into questions of ethics and testimony, rather than morality and proof. By contrast, Chapter 7 takes up a distinction in narratological theories of law between correspondence and coherence theories of truth[21] in order to understand personal injury litigation. Adopting a coherence theory, Samantha Hardy uncovers a generic – or typical – legal injury narrative which articulates the self-image of the legal institution with a shared social discourse. Coherence is generic and the particular genre is melodrama. The genre of melodrama, Hardy suggests, provides the tacit framework of rules through which the legal institution makes sense of injuries and judges the character of the person claiming an injured status. Such a conclusive judgment works through mimetic identification: the plaintiff or protagonist is compelled to embody and communicate her or his virtue, in order to engage the sympathies of the audience (judge, jury or spectator). To be adjudged as virtuous, the plaintiff must demonstrate weakness, passivity and muteness. In short, the melodramatic narrative requires, according to Hardy, that the injured person conform himself or herself with a norm of femininity in order to show their injured status and be awarded compensation.

The final chapter in Part II juxtaposes law and art, rule and image, conclusive judgment and moments of blindness. In "Graven Images," Rebecca Scott Bray unfurls the ambiguities and ambivalences – FitzGerald would perhaps say irony – which attend the truth of the dead body. The specific cultural site that she investigates is commonly known as potter's field but officially listed as Hart Island, New York. Located in Long Island Sound, Hart Island is a graveyard for New York's poor, unclaimed or unknown dead. The burials are administered by The New York Department of Correction and the graveyard is inaccessible to the public except by

special request. In short, Hart Island has little carriage in cultural memory. Yet, the unmarked or anonymous grave is structured by blindness – by a refusal to see and accommodate the dead. It is this tense excursion between visibility and invisibility, home and the uncanny, which marks the photographic subject of the chapter: Melinda Hunt's *The Hart Island Project*. In Hunt's photographic project, there is a restless return to images of the island. Scott Bray argues that these images or visual texts construct looking "as a practice directed *beyond* the spaces of the text given to be seen, into the extended spaces of language and the image." The chapter engages with the themes of burial, substitution and commemoration to explore an allegorical investigation of death, law and culture. Moreover, Hunt's work helps us understand formative practices of memory, community and citizenship. Community is sutured around an unseen site, a dead body. As such, Chapter 8 can be understood as analysing what Blanchot has called the "unavowable" in community – namely, that community involves the risk of alterity and that, even in its most controlled practices, the trace and threat of singularity remains to destabilise coherence (1983, p. 57). In yet other words, the chapter by Scott Bray suggests that law is still learning to live with deathbound subjectivity, with an attachment to and reprisal of the bodies of many others.

(Post)Colonial Appropriations

Reflection on modern art practice – as well as the work of art – has repeatedly returned to death and dying as a question of the image and its persistence. Hunt's *Hart Island Project* discussed by Scott Bray (Chapter 8), the installations and photographs of Felix Gonzalez-Torres (Spector, 1995; Young, 2001), *Blue* by Derek Jarman (Jarman, 1995; Young, 2004), *The Nine Ricochets (Fall Down Blackfella, Jump Up White Fella)* of Gordon Bennett (McLean & Bennett, 1996, p. 92) or images from his *Home Decor* series (Bennett, 1998), are just a few examples that come to mind.[22] It would not be an exaggeration to suggest that contemporary art practice and criticism has responded to the struggle or dreaming of social life in terms of a dialectic between *nature morte* and still life. Such a dialectic responds to the task of transmitting culture where that task does not have the alibi of transcendence. To what extent is it still possible to represent a relation – whether disjunctive or continuous – between the living and the dead? The next two chapters address this question of transmission in the context of Australian legal politics – and specifically, the attempt to represent *from within law* the contemporary relation of law and culture to a history of genocide and dispossession. Chapter 9 explores this modal question of representation by juxtaposing a juridical and a literary historiography of legal violence, while

Chapter 10 turns to cartographic practices of representation that have become central in indigenous land claims in Australia. Together with chapter 11, Part III of this volume generates an account of the representation of the authority of law as a question of a fundamental appropriation or taking hold of life and land, as a question of the passage from colonial to postcolonial legal orders.

Chapter 9 by Lee Godden is entitled "Awash in a Tide of History: 'Responsibility' for Cultural Violence – A Comparative Analysis of *Nulyrimma* and *Voss*." Its exploration of judgment, history and racial violence takes as its point of departure Hannah Arendt's observation that a legendary explanation is required to "correct" history and prevent the attribution of responsibility for the "consequences" that history subsequently reveals (Arendt, 1958, p. 208). Two legendary explanations of Australian history and the racial violence which decimated aboriginal people are analysed in the chapter. The first is one which invokes a "tide of history" that extinguishes aboriginal rights; it announces that native title does not, in many instances, survive the settlement and assertion of sovereignty by the Imperial and subsequently (post)colonial governments of Australia. This allegorisation of history as a tidal wave was initially voiced by the High Court of Australia in *Mabo v Queensland [No. 2]* (1992) which, ironically, was the first judgment to overturn the doctrine of terra nullius and recognise the existence (and subsequent extinguishment) of native title in the extant Australian legal system. It is taken up again in the Federal Court case of *Nulyrimma* (1999). The specific claim made by the Aboriginal claimants was that a policy of cultural genocide was *again* being pursued through current federal government policies in relation to native title laws. The Federal Court held that genocide is not recognised as a crime in and by the common law tradition of Australia; and that in any event, the federal government policies do not evidence a genocidal intent. In the process of making this ruling – one which bears all the hallmarks of a "differend" – the Federal Court characterised colonisation as an inevitable "tide" of events, rather than being a process of violence for which particular individuals or institutions should be held accountable. In her chapter, Godden argues that these legal and metaphorical accounts of the history of Australian colonisation have many points of similarity with another legendary "history"; namely, the account of Australian exploration and settlement in *Voss*, a novel by Patrick White. Voss, the antihero, leads an expedition into the desert heart of Australia which "inevitably" results in racial violence precipitated by the desire to possess the land occupied by Aboriginal people. As Godden concludes, recalling Arendt's evocation of legendary histories, "in *Voss*, the imaginary of the meeting of white and black cultures in the interior of the Australian nation space is described in terms of an inevitability of violence that arises where two races with two very different conceptions of possession meet. These differences are germane to the failure to identify a point of common humanity and 'responsibility.' The consequences of this cultural contact in *Voss* cannot be

averted by European civilisation, intent as it is, upon its own redemption or material substantiation. Voss, the epitome of an individual afflicted with the limitations of 'humanity,' cannot foresee the consequences of this contact; brought about in part by his own attempt to possess, and be possessed by, the land."

The asymmetrical relation between a people and country marks the modern order of Australian law. Jurisdiction – understood as a self-representation of the court – is represented in terms of a conflation between sovereignty and territory, and it is within the terms of this conflation that the contemporary authoritative ordering of law precludes parallel and intersecting traditions of law (Dorsett & McVeigh, forthcoming). The generic and structural predicament of legendary explanations of history is that they foreclose – in both its legal and psychoanalytic acceptations – on the subject taking responsibility for the violence done in its name. The idea that legal speech attaches to plural bodies of law is lost and, as Mussawir suggested in Chapter 5, jurisprudence becomes despondent.

Where the site of foreclosure in Godden's chapter is the judgments on and of history, the site for Alexander Reilly emerges in and stratifies the representational practices of cartography. Yet this is not a question of disciplinary privilege, of historiography vs. cartography. As Reilly notes in Chapter 10, the concept of native title has challenged the legal institution to think outside its traditional categories of property for ways to accommodate a relationship to land otherwise foreign to it. Anthropology, historiography, sociology, psychology – all have at some point provided an expert source of knowledge (of different ideological persuasions) for the legal institution in land rights and native title claims. From the indigenous side, evidence has been presented in oral and documentary forms but more importantly as "bark paintings," at sacred sites where the bond of speech and corporeal gesture of the witness provides the very material of indigenous testimony, and as fine art paintings.[23] These scriptural – rather than documentary – practices indicate that the challenge is more fundamental than a disciplinary turf war. Rather what is at stake in the differences between these modalities of representation is an abstract knowledge that power needs for ordering the coordinates (space and time) of human existence. Cartography then is one representation of this knowledge and Chapter 10 indicates some of its limits internal to law. Entitled "Cartography, Property and the Aesthetics of Place: Mapping Native Title in Australia," Reilly argues that cartography is used in the native title claims process to translate Indigenous relationships to place into a spatial form which is more easily contained within law's jurisdiction. Moreover, the potential for the legal recognition of native title is limited by the requirements of its spatial representation. Hence, for example, from the very first native title claims post-*Mabo* lawyers for Indigenous plaintiffs were insisting that they were precluded from presenting the required evidence of native title because of the legal demand that the claimants use cadastral maps. Reilly thus begins the laborious process of reconstructing property – from the ground up, so to speak – in terms

of ontic and epistemic commitments to place that are not constrained by such representations.

The final essay in Part III also addresses the representational complex of power-knowledge that names the modern condition for us. The specific topic of interest for Chapter 11 – entitled "gods and humans" – is the changes in the mutually constitutive relation between religion, law and politics. The procedure of Nasser Hussain is to juxtapose the discourses of human rights and of Islamic Fundamentalism, so as to begin to unravel their assumptions and inner workings. In doing so, the task the chapter sets itself is to read in these discourses the effects of that which it most self-consciously seeks to disavow.

In 1981 at the International Islamic Conference in Paris, a group of prominent Muslim theologians and jurists drafted a document titled The Universal Islamic Declaration of Human Rights, which recalls and re-frames the famed 1948 United Nations Universal Declaration of Human Rights. In Chapter 11, Hussain argues that in the U. N. Declaration a reference to a divine absolute is invoked and discarded, and that the structural attributes of this absolute reference shift to the figure of the human. On the other side, he reconstructs the way in which a modern discourse of fundamentalism figures god's sovereignty in terms of a positivist conception of law, which facilitates an exercise of "biopower." The modern project of power is essentially normative and increasingly detailed in its operations. Although associated with the nation-state, it is a project that cannot be reduced to the claims of any particular state. In fact, the modern normativity of power disables the particular claims of a nation-state from ever remaining simply particular to that state; it entails that its value derive from its validity for all places. In short, modernity articulates the power and authority of law in terms of a join between the biopolitical and universalism, between the retail and wholesale operations of power-knowledge. As Hussain states, "God and human begin to reveal themselves as complicit in a philosophical orientation larger than either figure, as secret sharers in a modern history that both seek to disavow." The threshold that is invoked by Hussain is an imagining of another dynamic of the universal and contingent for which the relevant rhetorical figure and opening is catechresis. In so doing, Hussain's chapter contributes a way of rethinking the invocation of human rights in a range of contested sites of politics – not only muslim human rights, but also the human rights of women, of lesbians and gays, and of indigenous peoples.

Screen Culture: Sovereignty, Cinema and Law

The proliferation of human rights talk has been one of the signal features of contemporary legal and cultural formations. As Hussain's chapter draws to our attention,

understanding and reconstructing this talk requires an understanding of the work of rhetoric and its figures. Moreover, the reordering of gods and humans, of the universal and the contingent, is a question of sovereignty. Where Godden and Reilly addressed the territorial and historical representations of the assertion of sovereignty, Hussain's philosophical reading of the rhetoric of sovereignty is turned towards the practice of cinema in Part IV of this volume. Cinema here functions as a contemporary site of jurisprudence. Each of the three chapters in this final part can be read as traversing jurisprudential debates by working-through the contemporary cinematic representations of sovereignty and the absent or disappearing bodies of law.

The theme of death and dying has already been encountered as the central concern of several essays in this volume. Thomas Dumm provides another excursus in Chapter 12: it is entitled "Unworking Death in 'Unforgiven': law, ethos, violence." In a certain strand of contemporary philosophy – the names of Heidegger, Wittgenstein, Foucault, Blanchot and Cavell may be taken as the placemarkers in this chapter – death is understood as the sign of a relation of absolute alterity to the other, as a non-identity that gives birth to an ethical relationship to the other who is never to be known. Yet, Dumm argues, the legal culture of the United States emerges within and through innumerable evasions of this death and this non-cognitive ethics of alterity. Where then would law and its critical reflection go to confront this death, to obtain the lessons through which – as we noted in relation to Scott Bray's chapter – to learn to live with deathbound subjectivity? For Dumm, it is not the innumerable rules and regulations of death that every legal system formulates. Their reason is too certain, too uncaring. Instead, Dumm's chapter takes the chance that Clint Eastwood's 1992 film *Unforgiven* provides us with the lesson of unworking death, an experience "that repeatedly means reaching a point of conversion or turning away from the dead facts of what we think we know of ourselves, the fact of our death being but one fact among others, and realizing that death is a work that can be unworked." In short, the lesson is that of how we become human before the death of law.

A certain disavowal of death and contempt for community also provides the object and site of analysis in Chapter 13. For Peter Hutchings – in his chapter "Sovereign Contempt" – Australian and U.S. political responses to September 11 have highlighted two parallel, paradoxical tendencies of contemporary state sovereignty: an expansion of the reach of states beyond their borders, together with a shrinking of national borders. Similarly, the intensified surveillance of sources of foreign threat has been mirrored in an ever more intense internal scrutiny of these states' own citizenry (exemplary of such scrutiny is the digitised fingerprint scanning or "biopolitical tattooing" of U.S. visa applicants (Agamben, 2004b)). This conjunction of sovereignty and biopolitics can also be read in the cinema before and after September 11. The chapter by Hutchings takes up *Enemy of the*

State (dir. Tony Scott, 1998), *The Siege* (dir. Edward Zwick, 1998), *Behind Enemy Lines* (dir. John Moore, 2001), *Black Hawk Down* (dir. Ridley Scott, 2001), *Spy Game* (dir. Tony Scott, 2001), *Collateral Damage* (dir. Andrew Davis, 2002), *The Sum of All Fears* (dir. Phil Alden Robinson, 2002). The practice of cinema bodied forth in these films – like cinematic practice in general – delivers aesthetic gratification to a technologized sense perception. In so doing, Hutchings argues, it "screens, filters and constructs elements of the political and legal ideologies of contemporary state sovereignty." Ironically, none of these films were made after September 11 – although some were released in its aftermath. But at any rate, Hutchings suggests, all these films look different because of the event that many call September 11. Hutchings argues that the political and cinematic response to September 11 generates a renegotiation of sovereignty that is part of a larger refashioning of governance and the rule of law. But Hutchings displaces the representational problematic of much of the jurisprudence of "law and film" that has followed in the wake of the success of the "law and literature" movement. Instead, rather than representation, the mediating relation between cinema and jurisprudence, film and law, is a matter of screens. Hutchings concludes that "law's pre-eminence screens the dissolution of sovereignty rather than representing the final triumph of law over the king. That is if the new kind of king – a camera eye – doesn't render law's victory over that form of kingship rather moot." Sovereignty remains attached to an ocular and technological body of law.

Has the sovereign body had its day? The chapters by Hussain, Dumm, and Hutchings would variously suggest that he possesses an extremely veiled, affective and nocturnal force in the present. The final chapter would pursue the implications of this suggestion by way of a psychoanalytic reading of the relation between pathos and logos, desire and law, allegory and symbol. Entitled "One *Recht* to Rule them All! Law's Empire in the Age of *Empire*," the premise of the chapter by William MacNeil is that more than just coincidence links, and indeed accounts for the simultaneity of two distinct cultural phenomena: the current Tolkien revival that has taken world popular culture by storm, as evidenced in Peter Jackson's three blockbuster film translations of parts 1, 2 and 3 of *The Lord of the Rings*; and the runaway success, at least in academic circles of global high culture, of Antonio Negri and Michael Hardt's *Empire*. His argument is that both *The Lord of the Rings* and *Empire* tell similar, if not identical tales, and one particularly a propos to the "interesting times" in which we live: that of post- September 11, and all of its anxieties about globalisation, be it terrorism or Capitalism. For MacNeil, each of these forces finds its expression – both symbolically and allegorically – in the two texts under consideration here: Tolkien's Sauron can be read as a typological prefiguration of Osama bin Laden, the airborne Nazgul as al-Qaida, and the "two towers," the "Twin Towers"; while Hardt and Negri's "Empire," far

from being a metaphor, is literalised in the current hegemony of the ever-expanding free market. Linking both forces, binding them together is a glaring absence, one that prompts a relentless search for the "precious" *objét petit a* with which to fill it: in Sauron's case, for the Ring of Power; in *Empire's* case, for the grundnorm. Each search for the same thing – legitimacy, even legality. In short, and as MacNeil's title condenses, one *recht* to rule us all! But this thesis of the ring-as-the-law and the law-as-the-ring is complicated by the destruction of the ring, and the fall of Barad-dur and its dark lord. Does Sauron's spectacular combustion render *The Lord of the Rings* a kind of wish fulfillment of the anti-globalisation movement? Or, to the contrary, doesn't it rather confirm than refute Hardt and Negri's point that "Empire" is brought about by the dematerialisation of the law from a posited thing into a Kelsenian norm, presupposed in "juristic consciousness?" Seen from this light, Aragorn's restored Gondor is a blueprint for the emerging cartography of "Empire" – multicultural, peaceful, exchange-driven and totally oppressive. All of which suggests that if "Empire" – Gondor or Global Capital – is to be challenged, then perhaps the Ring of Power must be forged anew! Though not so that the One can rule the many, but rather that the many can rule through the One. This has implications for how the relation between law, literature and the political is conceived in contemporary scholarship. For MacNeil, literature (Tolkien) when read in conjunction with the political (Hardt & Negri) and as law (Kelsen) may provide – more than politics, more than sociology, more than critical theory – a way out of the impasses of the "post-modern condition." In short, as the aesthetics of symbolism folds into allegoresis, literature limns the void through which law comes to be – legal.

NOTES

1. The Dworkin-Fish debate provides the most iconic skirmish in the interdisciplinary battle (Dworkin, 1985; Fish, 1989). In this debate Dworkin is concerned with doctrinal stability and development. His anxiety is that singularities will subjectivise the source of meaning and processes of interpretation and hence destabilise community, understood as a form of being in common. Fish, on the other hand, analyses the law and criticises Dworkin under the paradigm of systemic consistency. He controls singularities by turning communities into machines for manufacturing meaning. In contrast to Dworkin, the state takes over the whole and community is the common being. The fundamental problem with Fish's critique is that he subjects a normative theory to functionalist imperatives and thereby domesticates rather than explains Dworkin's anxieties concerning the potential instability of the law. Beyond this, however, both are concerned with maintaining the integrity and meaning of the texts of law and of literature. For Dworkin, the text is a question of doctrinal "fit" and the "unity" of the work. For Fish, it is "strategy" which secures integrity and meaning.

2. We do not wish to suggest that this is a neologism on our part. See Gearey (2001) as a particularly English and Birkbeckian example of the concern. For an early contribution, see also Goodrich (1991). Douzinas and Nead (1999) provide a transatlantic and European collection. The various annual volumes of *Law, Text, Culture* provide exemplary Australian and international instances. Hutchings (2001) is both historical and theoretical in its readings of the aesthetic subject of law and crime. Young (1996) has provided the impetus for several of the contributors in the present volume, and many more. The rest are too numerous to list here.

3. See Legendre (1992) where he analyses the revolution of the interpreters in the 12th century as formative for contemporary symbolic and imaginary institutions such as law.

4. The phrase and the era's implications for aesthetic practice and reflection is extensively and persuasively adumbrated in Horowitz (2001). Formulating the contemporary condition as a question of transmissibility has been the hallmark of contemporary critical theory. See especially Irigaray (1993), Debray (2000), Agamben (1993, 1999), Papageorgiou-Legendre (1985). In legal theory, the question has been posed in the idiom of jurisdiction.

5. As Lord Harwick put it in 1742 in the St James Evening Post case: "There are three different sorts of contempt. One kind of contempt is, scandalising the court itself. There may be likewise a contempt of this court, in abusing parties who are concerned in causes here. There may also be contempt of this court, in prejudicing mankind against persons before the cause is heard. There cannot be any thing of greater consequence, than to keep the streams of justice clear and pure, that parties may proceed with safety both to themselves and their characters." *Roach v. Garvan* 2 Atk 469 at 471 [26 ER 683, 684-685].

6. Hereafter, all unattributed quotations will be from this judgment.

7. For one of us, the bulldozer enters stage right; for the other, it enters stage left, which might explain how we can write side by side. For both of us, the bulldozer enters from the son's property.

8. The attribution of onanism only appears once in the judgment (at para. 22), while the son's words are mentioned by Justice Cummins three times early in the judgment (at paras 8, 9 and 11).

9. See Paul Carter (1988, 1996) for the way in which the colonial imagination was inscribed on terra australis so the land became a territory to which the indigenous were fatally subjected. See also Mark Halsey (2002) for a reading of the lines of flight that mark and name the nature of the Strezlecki Ranges which provide Justice Cummins with his romantic idyll.

10. This coincidence of natural serenity and domestic bliss in the law of property is made in the iconic Australian film, *The Castle* (dir. Rob Sitch, 1997). The film is a representation, from the tradition of the Australian grotesque, of the juridical *bon-mot* that "a man's home is his castle" in *Semayne's Case* [1605] 5 Co Rep 91. The central character in the film repeatedly remarks "Can you feel the serenity?" as he sits with his family by the side of a manmade lake with the mosquitos buzzing and biting all around. The phrase entered popular culture as much as we would suggest providing a buried reference of Cummins' representation of natural serenity.

11. The third figure, Ziz, is a winged, griffin-like creature, associated with air.

12. Most recently, Agamben (2004a) has drawn attention to the mythopoetic element of the rabbinnic tradition in order to demonstrate the ambiguity that opens up between man and animal, the human and nature. In doing so, he returns the historical and political forms of law to their radically heterogenous opening onto an excess.

13. In his judgment, Justice Cummins decides that there has been no scandalising. We are, of course, suggesting otherwise. And the question that this would seem to pose is whether or not one is responsible for the Other. In concluding that there has been no contempt by the son, Justice Cummins suggests there is no responsibility for the Other, for the image of the father, and for the image of law.

14. One could be excused for thinking that the son was not literary enough for the judgment, in the sense that the literature appealed to by the law and literature movement was chosen for the edification of law.

15. Murphy (1997) argues that the common law tradition of experience has declined in the presence of a technological reason which has excluded experience itself from thought. Relatedly, the death of a primordial order has been framed as a loss of ethics and law. MacIntyre (1985) and Simmonds (1984) locate this loss as a historical matter. Rose (1984, Chapter 1) formulates the problem from within philosophy as the lapse of philosophy into jurisprudence and turns it in an ethico-political direction. From within jurisprudence, see Douzinas, Goodrich and Hachamovitch (1994, Chapter 1) for an overview.

16. Suggestions have been made by many authors about reforming the offence to bring it into line with modern expectations about the value to be accorded to reasoned criticism, in particular through clarifying and strengthening the available defences (see e.g. Miller, 2000, pp. 595–596).

17. The incident made its way into the daily newspapers in a comic guise: Ackland (2000) introduced this case as "the terrible case . . . of a solicitor charged with rupturing the blaze of glory.' He continued: "Fortunately, after consideration of all the authorities, Cummins rules that 'it is not a contempt of court for a person to describe a judge as a wanker.' Thank God that pressing legal principle has been established." In addition, the anecdote was retold as a joke at a dinner held by the Victorian legal profession to mark the retirement of Justice Beach from the bench in February 2003 (Gregory, 2003).

18. The intimate link between wanking and putting in question the honour of the advocate has a history. It is to be noted that from the mid to late 19th century, there raged what was then called the "battle of spermatorrhea." Spermatorrhea is the involuntary emission of semen – particularly at night – and its discoverer could not refrain from mentioning that it is particularly common amongst barristers (see Heath, 1982, pp. 18–25). It is perhaps the history of spermatorrhea which is being recalled when the Court of Appeal remarks that the solicitor "let his tongue run away with him" (*Saltalamacchia v. Parsons*, 2000, para. 10).

19. This is not only a matter of the structure of this text but also a historical matter. It will hardly have escaped notice by lawyers and legal academics that in 1318 the Court of King's Bench decided that it was a contempt or scandalising of the court to trample and urinate on (*urinam super ipsum*) a clerk of the King while that clerk was out walking in the street some miles from the Westminster courts (*William de Thorp v Mackerel and another* 1318 in 74 *Selden Society* 79). For discussion of the aesthetics of the judgment in terms of the character or persona of the court, see Goodrich (1991, pp. 238–246).

20. Drawing on affinities between Heidegger and Emerson, Cavell emphasises the relation between the practical reason of judgments (applying concepts) and a manual rhetoric of auto-erotocism (1989, pp. 86–87). For further development of Cavell's work here see Dumm's chapter in the present volume.

21. The theory of narrative coherence is initially presented in jurisprudence by Bernard Jackson (1988). It develops out of his structuralist semiotics or logical linguistics indebted to Greimas. See also Jackson (1990).

22. For an extended elaboration of this thesis and its implications for the current philosophy of art, see Horowitz (2001). A related concern to reconstruct philosophical aesthetics in terms of its inability or failure to address the transmissibility of art is taken up by Agamben (1999).

23. See for example the acrylic on canvas painting by Rosie and Alison Ferber called *Arrweketye Atherre (Two Women)*, which was presented in the Federal Court hearing in 1997 of the Alice Springs Arrernte Native Title application. The painting was subsequently exhibited as part of the *Native Title Business* exhibition (Winter, 2002).

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PART I.
CRIME SCENES: SEXUALITY AND REPRESENTATION

2. EXHIBITING THE HYMEN: THE BLANK PAGE BETWEEN LAW AND LITERATURE

Nina Philadelphoff-Puren

LAW, LITERATURE, STRATEGY

The feminist critique of rape has been a vast and impressive exercise of interpretative activity: it has gripped existing concepts, practices and discourses and subjected them to reinterpretation and transformation. It has been trenchant, assiduous and generative. It has created new legal definitions of rape and modified the evidentiary requirements that define its borders; it has developed new procedural mechanisms and codes of speech during trials; it has multiplied ethico-political interpretations of sexual violence and excavated previously unauthorised forms of social knowledge. Most specifically, it has created new evaluations of rape in the service of a particular form of life; that is, one which cultivates the capacity of women to maximise their own powers of speech and desire.

In the context of law, the chief target of feminist critique has been those legal tactics which construct female complainants as a particular class of subject: that is, as a subject who cannot produce trustworthy speech. Historically, these legal tactics have included the admission of evidence about a complainant's sexual history (generally to undermine her testimony) and the requirement that judges warn juries to be careful when convicting the accused on the uncorroborated evidence of a woman. Such matters have been the subject of substantial feminist reform at the level of both legislation and procedure. Recent research in Australia, however,

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shows that the force of these reforms is often vanquished by the practices of legal officers in the courts.[1] For example, legislation imposed to prevent the defence raising the sexual history of the complainant in cases where it is not relevant is often ignored by judges who are entitled to exercise their discretion when such matters arise (Heenan & McKelvie, 1996, p. 154).[2] There is other evidence that some legal officers remain attached to now discredited understandings of consent and its communication and persist in the belief that some women say "no" when they really mean "yes" (Heenan & McKelvie, 1996, p. 317). More generally, the notion that women as a class produce untruthful speech is cultivated by a continued defence predilection for constructing women as liars during cross-examination (Bargen, 1996, p. 51). Reflecting on this matter, one magistrate remarked that this was a particularly troubling aspect of rape trials. He noted that witnesses in other kinds of trials might be pressed about their recall, or told that they might be mistaken, but are not so vehemently and relentlessly told that they must be lying.

> That's an affront to continually have to reassert your honesty. I think people forget that it's not the type of thing you take lightly, when someone says you're lying (Heenan & McKelvie, 1996, p. 198).

Generally, the reasons offered to account for the failings of reform remain vague and undefined. Feminist legal scholarship tends to deploy terms like "stereotype," "judicial sexism" and "myths of female sexuality" which are presented as ubiquitous yet amorphous obstacles to the project of reform, located somewhere in "society" and more particularly in "attitudes."[3] When the problem is formulated in this manner, then the conventional response is to argue that we must redress and refute these mistaken representations with more adequate information. Programs in which judges are taken through a course of gender awareness in order to expand their frame of reference when writing judgments are an obvious example of such a move.

This mode of critique relies on a specific model of the law, the subject and power. That is, the law is understood as a potentially neutral institution that is capable of being responsive to the call of groups historically disenfranchised by the law, such as women. Legal officers such as barristers and judges will respond adequately to this call when presented with sufficient facts about the conditions of their lives.

This view evades addressing the desire that inheres in every interpretation – in this context, it evades the specifically legal desire to manage and control forms of life – such as sexual difference – in particular ways (Dumeresq, 1981). From this perspective, the legal production of a female subject who cannot produce legitimate testimony may not be the result of an error but rather the effect of a positive juridical activity. To understand this effect as correctable with the right

information (such as judicial education) is to miss the magnitude of the cultural investment in precisely this figure of woman.

There is a striking congruence between this model of law reform and that used by feminists in the law and literature movement. Sharing the view that the sexist errors of law can be corrected with the importation of carefully chosen information, these feminists often suggest that it is *literature* which can most effectively be freighted with the facts that will prompt the law to change.

This view is exemplified in a recent collection which represents the principal ways in which the specifically American branch of law, literature and feminism considers the relation between law and literature, particularly in the context of the curriculum in law schools, where law/literature subjects are increasingly taught (St Joan & McElhiney, 1997). First, it is politically valuable to bring literature into the ambit of the law school because it can highlight voices and experiences that "might otherwise be invisible or silent" (Heilbrun & Resnick, 1997, p. 11). For example, as Teree E. Foster (1997, p. 319) argues,

> literature can be used to focus on the poor, the aged, the handicapped, victims of racism, members of religious minorities, workers and the workplace, juveniles and criminals.

Here, literature performs a documentary function. It is to be the privileged genre that imports subjugated knowledges into the domain of law. This proposition, developed in a number of essays in this collection, raises a series of questions.

First, what model of literature is supposed by the notion that literature might be the bearer of socio-empirical facts about the lives of women? There are a range of non-literary texts, already circulating through the law, that might perform this function, including the genres of victim impact statement, crime-statistics, poverty indicators and other sociological narratives (Morrow, 1998). The law, in fact, is not short of this kind of information. Why then might literature be the preferred mode of transmitting it?

The answer proposed in this collection cites a specific model of literature which grounds many of the arguments in the American law and literature field. One clue to how this model works is shown by Foster (1997, p. 321) who writes that

> literature exposes us to alternative morals and values . . . it encourages empathy, taking us beyond our own experiences . . . it portrays different points of view and different reactions.

This moral-sympathetic model of literature-in-relation-to-law has its most striking precedent in the work of Martha Nussbaum (1995), who argues that the "literary judge" (a version of Adam Smith's judicious spectator) will function as a correctly empathetic arbiter of the complex and painful human events that come before the law. According to Nussbaum, the judge who reads literature will develop a range of attributes, including: a commitment to neutrality, a special concern

for the disadvantaged cultivated by careful reading of social-realist novels; an attentiveness to context; the ability to identify with others, particularly the less fortunate. For Nussbaum, novel reading will promote these qualities in the literary judge. According to Nussbaum then, literature is a kind of ethical material which produces a subject who will abide by a strict code of interpretative conduct. One might ask here, but which literature? Does all literature perform this function, or is there closed canon of texts which have such an effect? For Nussbaum, there is a clear canon of viable materials (predominantly including Dickens, but also a range of other writers). For Foster (1997) and other writers, "literature" appears to designate those texts – often critical-feminist texts – which reflect the conditions of women's lives, although the question of criteria here – and which women? – is worth asking. This engagement with literature precludes an investigation into the "literature" which might be *congruent* with, for example, the disqualification of women's experiences, such as romance, which is frequently used to discredit women's testimony in rape trials.

The proponents of this critical project also presume a specific kind of moral subject in their arguments about the edifying qualities of realist literature. That is, they presume a subject who, when faced with a text which depicts a certain set of social conditions will: (a) read the text in the same way that they do (which relies on the conduit metaphor); and (b) have a moral reaction that compels them to act in way which can be anticipated in advance (and not in any other way). Such a view of the subject is troubled by the law's continued resistance to precisely the kind of stories that Nussbaum (1995) and Foster (1997) would like to be told. Their model of the edifying nature of literature and their moral and sentimental view of the subject has no way to account for this resistance.

In my view, this way of understanding the function of literature attaches to it a political efficacy which is untenable. That is, introducing new stories into the law school and the courtroom cannot be the final move in a political strategy, because the problem for women who come before the law is not a lack of texts or stories but the direction of desire: that is, the specifically juridical will to power that animates some interpretations and not others, the juridical activity that captures some texts and not others (Foucault, 1977a).

From this perspective then, literature is not an inherently ethical material; rather, it is an energetic textual form which has particular effects depending on the strategy which captures it. On this view, the object of the feminist critic might be shifted from the moral subject who can be taught how to read literature correctly. Instead, we might focus on the way in which components of law-literature operate as charged elements in specific politico-legal strategies of sexual difference. The strategy that I want to examine here is one which is marked by the interminable production of the female subject as unreliable and unable to produce credible

testimony in the context of rape. An exemplary moment in this strategy is the legal production of virginity.

INTERPRETING THE HYMEN

In feminist theorisations about rape, the question of virginity is remarkable for no longer being a question. The conventional feminist view holds that "virginity" is an homogenous state, coded as a positive attribute by the law in the context of rape. For example, Catherine MacKinnon (1989, p. 179) includes being a "virgin" as one of the qualities which assists complainants in gaining convictions. Barbara Toner (1977, p. 85) argues that

> without certain aggravating features which provoke the horror and anger of the law, such as excessive brutality or the virgin victim, the seriousness of the crime becomes no crime at all.

The assumption that virginity is an unproblematic state here is almost certainly connected to feminism's concern with the fate of sexually active woman in rape trials (Ehrlich, 2001; Estrich, 1987; Smart, 1989, 1995). The law's ability to destroy the power of such women to testify to their suffering and injury – by literally suggesting that such women cannot *be* injured – has been an urgent target of feminist reform.[4] However, to assume that the disqualification of sexually active women leads to the idealisation of "the virgin" is a dangerous non-sequitur. On the contrary, the problem here is not the opposition between "virgins" and "whores" but rather, the contingent and plastic sets of tactics that the law deploys against the constellation of positions occupied by the complainant.

Recent sexual assault trials in Australia highlight the fact that we should be suspicious of accepting patriarchal platitudes about the various sexual modalities of the female body. Rather than being a self-evident state, female virginity is in fact a site of struggle and contest. I want to show here that "virginity" is not a stable referent, but rather a complex discursive formation, that includes expert testimony, anatomical illustration and description, medical commentary, legal concepts of probability, rules of evidence, diagnostic techniques, codes of common-sense and literary narratives. In this context, I am going to be looking particularly at the hymen, which in this formation functions to provide unambiguous knowledge about the sexual status of a woman; unambiguous, because the hymen is ostensibly a self-evident, material, physiological membrane, which provides incontrovertible evidence of a woman's sexual history.[5]

Paradoxically, however, despite the evidentiary force of its "obviousness," the hymen requires expert interpretation. In a rape trial, the subject charged with pronouncing on the state of the hymen is the examining doctor. Strikingly, in

the proliferation of statements that will circulate about the hymen during a rape trial, the woman who bears the hymen will be the only one whose statements are not considered authoritative. Indeed, the chief effect of this hymen-function is not only to control the circulation of women through the sexual economy and secure their status as undamaged property. More importantly, its role in the contemporary political organisation of sexual difference is to produce women as subjects incapable of producing legitimate speech in the context of rape, by materalising a sign which enables the law to circumvent that speech.

Importantly, however, we will discover here that "expert interpretation" does not succeed in uncovering "the" hymen, but rather multiplying it. In fact, the signifier "hymen" achieves its effects only through the force of a violent generalisation, a generalisation which subjugates and conceals a struggle between inscrutable and incalculable hymen texts. In this context, the meaningful object analysis is not the virgin body as a coherent amalgam (which we believe we understand in advance) but the complex relations between certain kinds of hymen and certain kinds of testimony.

FOLDS OF MEANING

In 1894, a strange gynaecological incident was described in *The Medical Press and Circular* by Howard MacNaughton Jones, an eminent doctor. It involved an alleged rape. A young girl claimed that a man had been assaulting her over a long period time, yet despite this claim, her examining doctor concluded that her hymen was "intact." The defence used this conclusion to argue that it would thus have been impossible for intercourse to have taken place, so the accused man must be innocent. It might have ended there, yet the girl in this case was aristocratic and had at her disposable considerable social power, so MacNaughton Jones himself was asked to examine her. He found that her hymen was indeed complete, yet exhibited extraordinary qualities:

> [O]n a digital examination being made the hymen completely yields and folds back. Ultimately, without any force or difficulty, a fair-sized conical speculum is passed and also a comparatively large glass vaginal dilator, without the least injury. The opinion given was that frequent intercourse, partial or incomplete, may have well have taken place, *but that the chastity of the girl was not impugned* [italics in the original].

What is the nature of the hymen that was observed here? MacNaugton Jones' own framing of this incident shows that he is conscious of contesting the prevailing medico-legal understanding of what the hymen can do. Before discussing this case and a number of others, he reflects on the gravity of medico-legal examination,

specifically in the context of rape. His concern here is not a proto-feminist one, unfurled in the service of the victim, but rather a deep anxiety about what effect mistaken interpretations of physiological evidence might have on the accused. "Is it not true," he asks,

> that the gravest issues, even those of life and death, liberty, loss of character and reputation, more serious to some than the forfeiture of life itself, frequently hang upon the evidence of the gynaecologist? And is it not equally true that this evidence is occasionally founded upon a most superficial knowledge and cursory examination, whether clinical or pathological?

It is in this spirit that he presents his discussion of what he likes to name "the folding hymen"; that is, in the spirit of providing the most adequate knowledge possible about what the hymen can do.

In the hegemonic model of virginity which clearly subtends the "observations" of the first doctor in this case, the hymen is a fragile ring of skin around the vagina which breaks the first time it is penetrated, leaving a bloody sign of its ordeal. A hymen that has suffered in this way will present as a torn, split and tattered membrane, easily identified by the doctor's expert eye. Historically, the hymen that breaks in this way has operated as an important check on the circulation of women through the sexual economy. A hymen that must break the first time means that there will always be a sign of a woman's sexual activity and thus impropriety. Importantly, however, the hymen understood in this way has another very important (and less remarked) function. That is, if it *must* break on first penetration, then an *unbroken* hymen is evidence that the woman in question has never been penetrated. This is particularly important in light of legal anxieties about the dangerous fantasies of young girls, who might falsely accuse men of assaulting them, when in truth they have never had intercourse. What connects these distinct functions of the hymen together is their role in securing the general disqualification of women's speech about sex.

In this context, the identification of a hymen that is able to endure penetration without breaking cannot simply be an addition to the existing body of medical knowledge, a neutral expansion of the domain of observable facts. Instead, MacNaughton Jones' "folding hymen" ruptures the patriarchal economy of virginity by disarticulating its conventional signifiers. Rather than the trackable, traceable, readable hegemonic hymen, (which transmits the truth of a woman's experience in spite of anything she herself might say about the matter), the folding hymen is remarkable for its mute durability, which in this context means a refusal to signify in the conventional manner. Certainly, the moral apparatus of virginity, which requires a physiological supplement to replace and extinguish a woman's speech about sex, is in mortal danger in the face of the folding hymen.

Strikingly, this account of the folding hymen is not simply an amusing quirk in the history of medicine, an unlikely and implausible segue taken by an otherwise respectable medical mind. On the contrary, these observations are supported contemporary medical knowledge. Today, the hymen is understood as possessing a complex and varied structure. For example, the hymen presents diverse shapes, sizes and appearances, which all depend on each hymen's particular structure and degree of oestrogenisation. Some women present with no hymen at all (Gray, 1997, p. 1026). Importantly, there is frequent discussion in the literature of the hymen's flexibility, with more than one commentator arguing that the hymen can on occasion be so flexible that it breaks for the first time in childbirth (Cunningham, 1968, p. 245).

In light of this variousness, what forensic value does the hymen have, from the perspective of contemporary medical opinion? One textbook puts it like this:

> A very flexible hymen will occasionally withstand intercourse. This, coupled with the fact that the hymen may be torn accidentally, makes the presence of the hymen unreliable as evidence for virginity (Katchadourian, 1977, p. 1027).

In this context, the hegemonic story of the hymen which imputes unitary qualities to it in advance and assumes that it must always break when penetrated has the status of a cultural fiction. It is a fiction, however, that plays a very important role in the political organisation of sexual difference, and has the force of a dominant interpretation- an interpretation which is able to subjugate alternative accounts despite the absence of a referent. In the case of the young girl described by MacNaughton-Jones, evidence of the ability of her hymen to withstand penetration without breaking had no force: the court ruled that such powers were impossible and that her unbroken hymen meant that she must never have been penetrated, so the accused man was acquitted, and she was left appearing as mistaken, a young girl subject to fantasies, or as a liar.

HYMEN-TEXTS

Tragically, this contest between the hegemonic hymen and the folding hymen is not a matter of mere historical interest. Despite the weight of contemporary medical opinion which argues that the hymen is an unreliable sign of virginity, it is still nonetheless deployed in precisely this way during rape trials, particularly those involving very young girls. One striking example of the *agon* between these two hymens – and thus two models of virginity – can be identified in a recent Australian High Court judgment, *M v. The Queen*.[6] This case involved the sexual assault of a 13 year old girl (called K in the judgment) by her father. His conviction

at trial was ultimately overturned by the High Court in 1994, principally because of the testimony of one of the doctors who examined the complainant. She claimed that because the girl's hymen appeared to be intact, it was unlikely she had been sexually assaulted. This observation was one of the grounds used in the majority judgment of the High Court to conclude that the accused man's conviction was "unsafe and unsatisfactory."

During the trial, this doctor described her observations in the following manner:

> Dr Holloway: [The hymen] appeared to be of normal character, a little redundant and intact . . . It was of a virginal nature.
> Defence: Would you agree with me that what you found was inconsistent with rape?
> Dr Holloway: It was inconsistent with rape.

Before commenting on Dr Holloway's remarks here, it is worth considering the rules which govern the presentation of expert medical evidence. The role of the examining doctor in the case of an alleged sexual assault is clearly defined. The doctor must gather data about the patient's history (about the incident in question, past medical events and so on); must conduct a clinical examination, collect relevant specimens of forensic evidence and correctly document these proceedings. The process of examination in particular is controlled by an important opposition. That is, the doctor's statement about such an examination must clearly distinguish between subjective and objective findings. According to this model, subjective findings are dependent on information provided by the patient (such as pain, nausea and headaches). Objective findings consist of "factual observations such as lacerations or fractures" (Freckleton & Selby, 1999, p. 526).

However, Dr. Holloway's description of the hymen instantly troubles the security of this opposition. She begins by listing what could be defined as the "objective" observations required by the discourse of clinical forensic medicine (such as noting the hymen's redundancy). However, her next statement reveals the eruption of a moral moment into the surface of her description of the hymen: that is, her ostensibly neutral "observation" that K's hymen "was of a virginal nature." In the context of current medical knowledge, this statement is not an observation but an interpretation, one which implies that there is a "general" nature which can be imputed to the hymen and deduced from its appearance – a view that we will see is unsupportable. In the context of a moral discourse about virginity, however, and one controlled by a hegemonic understanding of the hymen, such a statement is unremarkable, and here has the status of a straightforward description of an objective medical state. According to this understanding of virginity, there is a strict relation between signifier and signified. Here, the hymen is fragile, ephemeral and reactive, doomed to total destruction at the moment of first intercourse. Of course, on this view, the hymen that is "intact" is the

signifier of a body that has never been penetrated, since the hymen cannot survive this event.

What is edited out of the High Court judgment is the testimony of another doctor who examined the complainant and gave evidence at the trial, and who constructed a divergently different account of the hymen. In the passage below, she is asked to provide her own observations of the complainant's hymen:

> Dr Fleming: I assessed that there was no direct evidence of sexual abuse, but I felt that the examination findings would certainly be totally consistent with the history given to me, that is, consistent with a finger penetration of her vagina, and some degree of penile penetration.
>
> Crown: And when you say even with some degree of penile penetration, could you explain that a little more please?
>
> Dr Fleming: In an adolescent with this particular type of hymen, and that is a relatively stretchy hymen, it is possible to have a finger or even a penis pass through without there being any residual physical evidence of this.

This passage poses a direct challenge to the story of virginity proposed by Dr Holloway. First, by suggesting that "there was no direct evidence of sexual abuse," Dr Fleming appears to be in agreement with Dr Holloway about the appearance of the hymen. That is, neither doctor observed the tattered and torn remains of skin that characterise the injuries presented by a hymen that has split. However, Dr Fleming refrains from linking this appearance to a specific chain of moral signifieds, as Dr Holloway does when she argues that the complainant's hymen was "virginal" and "inconsistent with rape." Instead, Dr Fleming connects this appearance (which is itself a text) not to the closed economy of virginity but, to an open field of possibilities, some of which include penetration. This passage shows the extent to which this open field of possibilities is contingent upon the way we pose the hymen.

For Dr Fleming, the hymen in question is clearly Mc Naughton Jones' folding hymen. She describes it as "stretchy" and able to invisibly accommodate the passage of an object. This power of stretching is so important to an adequate evaluation of this hymen that Dr Fleming devises a special technique to assess it:

> The technique that I use to assess the stretchability of the hymen is to provide traction between the thumb and forefinger on the labia majora. What that does is gives [sic] an indirect clenching or pressure to the hymen and allows you to examine the hymen more accurately.

Here, the hymen is not reduced to its visual presentation, a process which reduces it to a two-dimensional textual surface which can then be "read" for its status. Instead, the hymen here is not a *page* but a *power*, the dimensions of which cannot be determined by simply looking. Indeed, the development of a technique which

can assess stretchability is contingent upon the assumption that the hymen is not a membrane which takes a stable and predictable form in the body of each woman, but rather is internally differentiated and unpredictable – a clear problem for the unifying forces that operate in the discourse of virginity.

Dr Fleming continues to develop this account of the folding hymen and its power to defy any final interpretation during her testimony. She refers the Court to the work of a famous gynaecologist, Sir Jack Dewhurst, who conducted an extensive investigation into the ability of doctors to accurately determine the sexual status of young girls from the appearance of their hymens. Dr Fleming tells the Court:

> The result was that in 50% of cases, they [the doctors] were wrong. They assessed young women who were virgins as having been previously sexually active and vice-versa. Physical examination is not a reliable way of assessing whether a young woman has engaged in sexual activity.

In this passage, Dr Fleming disrupts two central components in the discursive formation of virginity. First, she transforms its epistemological dimension: those rules which govern what can be known about the hymen and by whom (governed chiefly by rules of expert evidence and clinical forensic procedure). In the hegemonic formation, the doctor is figured as the master-reader of its status- the hymen offers itself up to the authoritative eye of medicine, which is accorded the privilege of truthfully deciphering it, and from which nothing escapes. Dr Fleming labors to disrupt this model. For her, the speaking position of the doctor is fatally undermined by the general illegibility of the hymen. A doctor cannot with certainty pronounce the hymen's status. The discourse of the folding hymen poses a different subject in the position of knower- not the subject who *sees* the hymen, but the subject who *bears* the hymen. After making these remarks, Dr Fleming engages in the following exchange with the defence:

> Defence: What is a reliable way [of assessing whether or not a young woman has engaged in physical sexual activity]?
> Dr Fleming: The history.
> Defence: But of course, if a child is telling a lie, it's not very reliable at all, is it? It relies entirely on the child, doesn't it?
> Dr Fleming: It relies on any person with regard to their history, whether it is the truth or otherwise.

Recall that the doctor's judgment must be deduced from the history of the complainant (their testimony), an examination and the collection of the forensic samples. For the defence, the testimony of the complainant (which alleges the rape) must for strategic purposes be dismissed in advance. Structurally then, it is the details of the examination which can be used to supplement and replace this testimony. But as Dr Fleming argues, the folding hymen does not emit the required

signs. That is, it does not incontrovertibly signify that penetration either took place or did not take place. A folding hymen does not indicate that *nothing* happened (as Dr Fleming argued). It indicates only that *anything* could have happened. In this context, the only point of reference that we have for the hymen's status is the testimony of the woman who bears it. In this way, the only referent for the folding hymen is a text. This is not to suggest that this text may not be contested or disproved by other components of the evidence. However, it is to say the discursive arrangement which positions the doctor as *knower* and the complainant as *known* is overturned, and must be, if the inscrutable nature of the hymen identified by medical research is to be taken seriously.

Second, she disrupts the mathematical relations that obtain in the hegemonic formation of virginity: in particular, relations of possibility and probability. One of the defence's chief prongs of attack is to assert that it is "highly probable" that the hymen in question should have broken during the assault. For example, he asks Dr Fleming "the examination of a girl's vagina would normally confirm a sexual assault, wouldn't it?" But this is precisely the proposition that her testimony seeks to overturn: expert medical opinion is *frequently* unable to determine whether or not a girl has had intercourse. The defence persists by saying

> everything is possible in medicine, but the probabilities are that she hadn't [had intercourse], right?

But of course, the only discourse in which this question could be meaningful is the discourse of the hegemonic hymen, which Dr Fleming refuses to concede to. The defence ignores this refusal and continues to impose the coordinates of the hegemonic hymen over her testimony. In a move which reveals the non-dialogic nature of this hymen's operation, his final question to her is rhetorical:

> And the strong probablities are, are they not, that no one had ever sexually penetrated K?

The power of the hegemonic hymen to subjugate alternative hymen-texts is most clearly identifiable in its function as a mechanism of normalisation (Foucault, 1977b). In *M*, this hymen establishes itself as the measure in a field of comparison. It is used to ascribe a truth value to the multiple appearances of the hymen, and requires that those who would claim to tell the truth must bear a hymen of a particular kind. Finally, it is used to abolish any possibility of a continuum of anatomical differences and instead institutes a binary of the normal/abnormal, with the abnormal being the repository of any hymen that does not bear the hegemonic insignia.

Consider the following staging of the hegemonic hymen, during the cross-examination of the complainant in *M*. In the passage that follows, the defence has just asked how many times her father had put his penis into her vagina and

she has replied that she doesn't know and that she wasn't counting. The exchange continues:

Defence: You know, don't you, that are *virgo intacta*, don't you?
Complainant: Pardon?
Defence: You know you've been medically examined, don't you?
Complainant: Yes.
Defence: And you know that your hymen is intact, don't you?
Complainant: Yes.
Defence: Is that why you were reluctant to say how many times he penetrated you?
Complainant: I don't know, I didn't count.
Defence: See what I am suggesting to you is that the whole story is a tissue of lies?
Complainant: It's not.
Defence: If it had in fact happened, you'd be far from virgo intacta now.

In this exchange, the defence evaluates the complainant's body according to the measure of the hegemonic hymen. Her body and her testimony must be able to map onto the coordinates of this hymen, or risk being catapulted from the domain of credible subjects. Because the relation between this girl's hymen and her testimony exceeds this conventional template, this is precisely what happens. Difference cannot be accommodated within this normalising framework- the only position for it to occupy is that of the abnormal, the improbable, the unlikely or the impossible, which in the context of a criminal trial means that the different body is the lying body.

This exchange also illuminates the Derridean moment that inheres within the hegemonic economy of virginity, particularly the last statement by the defence: "if it had in fact happened, you'd be far from virgo intacta now." As Derrida (1981, p. 162) argues in a complex discussion of mimesis, the hymen marks

> between the future and the present and the present and the past, only a series of temporal differences, without any central present.

Certainly, the questions put by the barrister here reveal that the loss of virginity can never take place in the present, but as an event is rather deferrable and divisible. In a legal context, penetration will not be deemed to have occurred until it can be verified institutionally. It is only *after* this institutional verification- the laying of an expert text across the body- that virginity can be formally deemed to be lost which gives it a location then in kind of vibratory present-past. It cannot take place until after this moment. In this context, the event of losing one's virginity only ostensibly refers to the moment of intercourse itself (a moment which instantly divides itself and throws forward to a future moment of verification); more precisely, it refers to the interpretation of a sign, a sign that may then authorise the losing of virginity in the past.In this way, the trace precedes the event that leaves it.

The excision of the text of the folding hymen continues most spectacularly at High Court level. In the majority judgment that overturned *M*'s conviction, Dr Fleming's evidence about the stretchiness of the hymen was not mentioned once – the judges note only the very last statement from her cross-examination in which she said that "the hymen presented no physical evidence one way or another" for sexual assault. The fact that Dr Fleming's evidence contradicts Dr Holloway's (who the majority judges quote approvingly) must be cause for consideration. But no – the folding hymen disappears without a trace in the High Court judgment; it is given no existence and thus no efficacy.

Not only does *M* mark the vanquishing of the folding hymen; more dangerously, it marks the now extraordinary ascendancy of the hegemonic hymen in the Australian legal system, in spite of expert medical opinion to the contrary. *M* is now available for citation as precedent in rape trials in which the hymen is at issue. For example, in *RMM v. The Queen*, the High Court's finding that the hymen of the complainant in *M must* have broken if her claims of sexual assault were true is referred to as one of the "clear," "factual" reasons that the court had at its disposal to overturn the accused man's conviction.[7] All struggle, conflict, contradiction and opposition in the case of *M* has been eliminated, and the power of the hegemonic hymen to assert itself as the victorious interpretation not only undiminished but consolidated.

THE BLANK PAGE

That the hymen supplements the text of a woman's speech is dramatically illustrated by the following event, which took place during the trial of *Glenn Roderick Holland v. R*.[8] In this case, the accused was charged with the digital penetration of a 13 year old girl. He had claimed to be a professional photographer, and was going to help the complainant break into modelling. At issue in this case was the fact that despite the girl's claims of sexual assault, her hymen appeared to be intact. A large portion of the proceedings were thus preoccupied with discussions about the measurements of the girl's hymen, and the width of the accused's fingers. The defence claimed that her hymen, which measured 7 mm, could not accommodate the 18 mm circumference of the accused's fingers without rupturing. This was demonstrated to the jury by the accused man in the following manner. He held up a piece of paper, in which he had made a hole with a circumference of 7 mm. He then tried to put his finger through the hole, and stopped. "Why have you stopped it there?" asked his barrister. "Well, if I go any further I will tear the paper," the accused replied. This piece of paper was then permitted to stand as exhibit one in the trial, without objection from the prosecution. Later, a judge

on the appellate court described this incident as "graphically demonstrating the obvious."

In what discourse is it possible to argue that the hymen has the qualities of paper? Under what conditions can one so effectively eliminate the powers of a living membrane, whose nature it is to stretch, as we have seen in *M*? I argue that the paper-hymen is the fetishised object of the hegemonic economy of virginity. It functions to metonymise the central relations of this discourse, by embodying a hymen which provides instant and verifiable proof of its own history. Strikingly, however, the paper-hymen contains the elements of its own undoing, because remarkably, *the only way in which one can find a hymen which provides such unambiguous knowledge is to make one out of paper*. That is, the exhibit which allegedly represents the essential qualities of the hymen must be, literally, a fabrication, a non-human structure of tree-pulp and water, rather than the inscrutable, incalculable, *human hymen* of non-signifying membrane, which in its muteness is able, tragically, to be wrested into the fabric of multiple interpretations, even those which contradict its own nature.

Unlike the exhibit constructed by the accused in this case, the hymen is not a blank page, a white, inflexible field surrounding a hole of stable dimensions: the hymen is instead a complex text, cross-hatched with relations and significances. The salient object of investigation at this point I think is not some putative real referent for the hymen (since that referent can only be another set of texts) but rather its tactical effectiveness within the political organisation of sexual difference. I would suggest that the text of the hegemonic hymen operates in an anachronistic strategy of sexual difference that nonetheless has overwhelming cultural efficacy. This strategy, which is specific to the juridical discourse on rape is used to supplement the testimony of injury: the blank page brandished against the mouth of the subject who is suffering, causing her to fall silent.

On the other hand, the complexity of the hymen-text means that it can activated in an opposing strategy, one in which its supplementary relation to women's testimony can be contested and overturned. In this context, we could connect the folding hymen to a strategy already established by feminist legal scholarship, in which women *as a class* are recognised as credible individuals in civic life, who in particular are able to produce trustworthy speech. If we reconsider the hymen in relation to this strategy, then the current connection between the hymen and the testimony that describes it needs to be disarticulated. I want to suggest here that an investigation of the hymen's literary (as opposed to medical or legal) surface might provide clues for how this could done. Here, I don't want to pose literature as a corrective to law-chiefly because I am not going to suggest that there is a documentary text of the hymen which resides in literature which can be imported back to law. The reason I don't want to say this is that in some ways, this text already

exists, in the form of the contestatory speech of doctors like Dr Fleming. Instead, I want to suggest that literature might offer not documentary facts but rather a reservoir of concepts about ways of reading the hymen that could be mobilised into a pragmatic critical-legal strategy.

In Isak Dinisen's (1955) short-story "The Blank Page," a story-teller who is 200 years old sits outside the gates of the city, selling strange tales for a living. During the time of the story, she relates the rules of ethical narration to an unseen audience. "Be loyal to the story," her grandmother had told her.

> Where the story-teller is loyal, eternally and unswervingly loyal to the story, there, in the end, silence will speak. Where the story has been betrayed, silence is but emptiness. But we, the faithful, when we have spoken the last word, will hear the voice of silence.

In this textual world, the deepest tale is found not "upon the perfectly printed page of the most precious book," but rather "upon the blank page" (1955, p. 101).

What story could be offered to illuminate the blank page of ethical narration in this text? Perhaps unsurprisingly "The Blank Page" is a tale about virginity. The central dramatic moment of this text takes place in a famous corridor inside a Carmelite convent in Portugal. The nuns there were charged with weaving the linen for the marriage-sheets of local princesses. As was the custom, the sheets would be hung over the balcony of the palace the morning after the wedding, with the proclamation "We declare her to have been a virgin" in that strange folding back of the tense of virginity, which can only appear when the moment of its own fatality has already been passed over.

As a reward for the fineness of their work- the purity of the sheets being the result of an endless and detailed labor of production – the nuns were permitted to display these sheets in heavy gold frames in the convent gallery, each with a silver plaque beneath bearing the name of an honourable princess. Each sheet in this strange gallery is written with a set of conventional patriarchal significations: the smear of blood that heralds the just-ended virginity of the young bride. The stained and bloody sheets provoke fabulous interpretations from passing visitors: some see the zodiac signs of the Scorpion and the Lion, others finds signs from the discourse of romance – the rose, the heart, the sword. But towards the end of the corridor is a sheet that draws all spectators to a stop: it is a frame with no name, "and the linen within the frame is snow-white from corner to corner, a blank page." Here, we are told, "the story-tellers themselves before it draw their veils over their faces and are dumb." Of course, the white sheet here is an essential component in the series-structure of virginity represented by this strange corridor, that winds its way from literature to law (because it is not only a *literary* space but a *juridical* one). The white sheet subtends the proper image of the present-past virginity which decorates the other pages in this line. The moment of their inscription entails an

instant citation of this other page, the blank one, which is simultaneously called up and negated in each sheet that is permitted to bear a proper name beneath it. These bloodied sheets gain their authority only by over-writing the white space of its blankness, which must nonetheless be present for the proper framing of their own legitimacy. We hang the sheets out the window precisely to show, *not* that they are bloodied, but that they are *not* blank (not, "I was virgin," but rather, "look, I was not a non-virgin").

Importantly, the story-teller refrains from offering any judgment about the blank page. In contrast, common-sense interpretations of this story have held that the blank page is the simultaneously voluble yet silent mark of a princess who has fallen outside the borders of morality. Susan Gubar (1982, p. 89) contests this conventional reading by noting that the lack of judgment about the blank page inside the narrative of this story permits other possible interpretations to circulate and remain in suspension:

> Was this anonymous royal princess not a virgin on her wedding night? Did she, perhaps, run away from the marriage bed and thereby maintain her virginity intact? Did she, like Scherezade, spend her time in bed telling stories so as to escape the fate of her predecessors? Or again, maybe the snow-white sheet above the nameless plate tells the story of a young woman who met up with an impotent husband, or a woman who learned other erotic arts, or a woman who consecrated herself to the nun's vow of chastity but within marriage. Indeed, the interpretation of this sheet seems as impenetrable as the anonymous princess herself.

Gubar here productively proliferates the possible "causes" of the white sheet, the blank page. However, her attempt to multiply the readings of this text nonetheless inscribe a specific model of the hymen: the hegemonic hymen, which breaks on first penetration. Within this economy, the hymen that leaves no trace is either *already* broken or has *never* been penetrated. What is illegible within this economy and excluded from Gubar's speculation (but not from Dinisen's story) is another kind of hymen altogether-the folding hymen, which can *endure* penetration without breaking and without leaving any sign of its ordeal. If we read the story of the blank page from the perspective of the folding hymen, then we could discover a story of a princess who could have done anything on her wedding night, but whose pleasures cannot finally be verified.

From this perspective, the blank page is not the white mark of a princess's shame, but rather an open field, inscibed by multiple texts and images, and defined by the suspension of judgment. Rather than imposing one reading and foreclosing the possibility of multiple connections between speech, actions and images, the blank page instead offers a white space in which the relation between bodies, events and discourses cannot disappear beneath the violence of generalisation.

Here, I would suggest that the blank page of literature provides a set of clues about the practices we might use to unfold the paper-hymen of law. If

the state of the hymen cannot offer verifiable proof of the first time, then in the context of sexual assault trial it must not be constructed as the incontrovertible sign of that time, thus disqualifying those women who do not bear the correct hegemonic form. That is, the hymen must be unhitched from the evidentiary apparatus.

How might this be done? There at least two options. One, the hymen could be eliminated altogether from the evidentiary paradigm (recalling the research which shows that doctors misread *both* broken and unbroken hymens). This move would rescue those women who currently bear folding hymens but also disadvantage those young women who have conventional hymens (by prohibiting the evidence of such damage from being relevant). Alternatively, legislation could ensure that evidence about the hymen is accompanied by a judicial direction about its complex nature and its unreliability as evidence. This move could take the form of a definition of the hymen.

Without these changes, the law will continue to enact an extraordinary violence on those women who bear the folding hymen, with the *unjust* legal fiction that the hegemonic hymen is the only hymen, rather than being only one of its many modalities. Instead, these moves might provoke a change in the political organisation of sexual difference, and enable the power-complex of the folding hymen to control the interpretative field, precisely by removing the hymen from consideration altogether. And from here, we can speculate about one final effect that the folding hymen might produce.

The folding hymen potentially inaugurates an entirely new strategy in the history of virginity. As Derrida (1981) writes "because the value of virginity is always overlaid with its opposite, it must ceaselessly be subjected to the operation of the hymen." What does the folding hymen do to this proposition? Let us say that virginity can be described as the threshold before the first time. Within the political organisation of the patriarchal system, the first time for a woman is required to be intelligible. That is, the first time can only function in this strategy if it produces a sign- extraneous to a woman's own testimony- that might be wrested into an interpretation. To problematise the first time and its relation to women's bodies, to suggest that as an event it might be imperceptible, it to divest virginity of the limit which makes it meaningful. Without the wound of the hegemonic hymen to mark off one time from another, the virgin body from the non-virgin body, the apparatus of virginity cannot function. This binary opposition is only possible if an unequivocal differentiation between bodies can be made. Without the hegemonic hymen, which constitutes this mark, this differentiation, virginity is evacuated of classificatory efficacy. Instead, the folding hymen produces an economy in which the only verifiable sign of a woman's sexual status is the text of her own speech. The folding hymen ushers in the virgin's disappearance.

NOTES

1. Recent figures show that rape convictions have dropped by nearly half in Victoria, Australia, since 1989. Currently, the rate of conviction for sexual assault is around 24% (down from nearly 48% at the end of the 1980s). Some tentative reasons have been offered for the decline, which include the increase in the number of acquaintance rape cases being brought before the courts. See Farant (2001).
2. In the cases examined for this report, almost 40% of complainants were questioned about their sexual history during the trial with the court's leave. The researchers remarked that permission was "almost routinely granted, often without there being any discussion about the relevance of the questions or the scope of the inquiry."
3. For an example of a recent collection which considers the problem of the legal representation of sexual assault chiefly through these coordinates, see Patricia Easteal (1998).
4. For a detailed discussion of the narrative and semiotic techniques used to perform such disqualification, see Alison Young (1998).
5. For a fascinating discussion of the 18th century preoccupation with simulated virginity, see Tassie Gwilliam (1996).
6. *M. v. The Queen* (1994) 181 CLR 487. My discussion of this case will focus primarily on the transcript of the trial proceedings in the District Court of New South Wales. (April 6-8, 1992, 91/11/0925 Gallen J.).
7. *R.M.M. v. The Queen*, S23/1998 (19 June 1998) High Court of Australia.
8. *Glenn Roderick Holland v. R.* (1993) 117 A.L.R. 193. This event is taken from the transcript of the proceedings in the District Court of New South Wales (August 26, September 3, 1991: 89/11/1518, Downs J.).

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3. "IT FORCED ME TO OPEN MORE THAN I COULD BEAR": H.A.D., PAEDOPHILIA, AND THE DISCURSIVE LIMITS OF THE MALE HETEROSEXUAL BODY

Ben Golder

> We must conceive discourse as a violence that we do to things, or, at all events, as a practice we impose upon them (Foucault, 1971, p. 22).

INTRODUCTION

In this paper I want to look at just one of the many contemporary legal narratives of homophobia – the phenomenon of the "Homosexual Advance Defence" (H.A.D.). While I agree with the analysis of one American commentator, who indicts the H.A.D. as a "judicial institutionalization of homophobia" (Mison, 1992, p. 136), I maintain that it is important to extend analyses which take as their main target the entrenchment of bigoted judicial views or which employ as their main critical tool a liberal framework of equality and discrimination (for example, see Potter, 2001). Just as Eve Kosofsky Sedgwick urges us not to view homophobia as simple ignorance or bigotry (see Howe, 2000, pp. 85–87), I argue that there is much more at stake with the H.A.D., and consequently much more required of us, than mere questions of ignorance, discrimination and (re-)education. While it is important to

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identify and condemn at every turn the various legal and social manifestations of homophobia, of which the H.A.D. is clearly one, it is just as important (if not more so) to interrogate the discursive and epistemological foundations, or legitimations, of these very beliefs.

To this end, I want to situate the H.A.D. within a general economy of the body in order to uncover what legal inscriptions of the male heterosexual body subtend its narratives, and how these inscriptions legitimise, produce and reproduce violence against homosexual men. I shall perform a reading of recent Australian and New Zealand case law on the subject of the H.A.D., with the aim of demonstrating how a particular social understanding of the male heterosexual body as bounded and impermeable engenders the twin (and interchangeable) figures of the penetratory/predatory homosexual and the child sexual abuser. Specifically, I want to argue here that we must understand the frequently invoked child sexual abuse factor in H.A.D. narratives, not as a discrete or unrelated issue, but rather as a functional element in the H.A.D. matrix of *male heterosexual body-penetratory/predatory homosexual-child sexual abuser*. Once we have a clearer understanding of the arrangement and interplay of these figures as a discursive matrix, then we will be in a better position to formulate textual strategies of resistance to the legal violence of the H.A.D. through composing new metaphors of the body.

DEFINITIONS, HISTORY, MACABRE METHODOLOGY

I should perhaps begin by outlining how I propose to limit my discussion and also how I define the term H.A.D. I use H.A.D. in contradistinction to a very similar term of much earlier provenance, "Homosexual Panic Defence" (HPD). The concept of the HPD was originally employed by American scholars to refer to cases in which a defendant would plead insanity, or diminished responsibility, in answer to the charge of murdering a homosexual victim (Bagnall et al., 1984, pp. 498–515). The plea rested on the rather dubious clinical basis of a psychological disorder entitled "acute homosexual panic," a condition first identified by the psychiatrist Edward J. Kempf in 1920. According to the psychological material, a patient suffering from "acute homosexual panic" is actually a "latent homosexual" who experiences feelings of revulsion and self-loathing. The legal defence is based on the idea that a person suffering from this condition undergoes a "violent psychotic reaction" and lethal loss of self-control consequent upon his receiving an unsolicited homosexual advance. Assuming that the legal criteria for insanity, diminished responsibility or substantial impairment (in New South Wales) are established, then, depending on the plea, this loss of self-control serves either to absolve the defendant from

criminal liability, or to mitigate that liability (Howe, 1997, p. 339). The legal defence of the HPD has been criticised trenchantly by a number of academic commentators both for its potential for misuse by legal practitioners and for its disarticulation from the specious medical condition upon which its tenuous claims to validity rest (Comstock, 1992; Suffredini, 2001). The ensemble of medical, psychological and legal discourses supporting the HPD are in fact susceptible of a much more thoroughgoing epistemological critique than these approaches admit (Howe, 1997, p. 340), but, at any rate, my target here is the more recent incarnation of the homophobic legal defence, the H.A.D.

The H.A.D. is a *de facto* defence available to a defendant in Australia, and in other common law jurisdictions (see Howe, 1998, pp. 466–467; Oliver, 1999), as part of a plea of provocation or self-defence in cases where a heterosexual defendant alleges that he only acted violently in response to an unwanted homosexual advance from his victim.[1] The H.A.D. is perhaps technically not best described as a defence at all, but rather as a "scenario." In this respect, and possibly in this respect only, it is akin to the concept of "Battered Woman Syndrome" (BWS) in that the court will allow evidence of the relevant "scenario" to be led in order to support a substantive legal defence such as provocation or self-defence. As such, depending on the way in which it is strategically deployed, the H.A.D. can act as a plea in mitigation or exculpation of lethal homophobic violence. It is important to note that the H.A.D. is by no means an isolated or an uncommon phenomenon. However, I am concerned here not so much with the thousands of unrecorded narratives in the courts that employ, through innuendo and implication (and in tacit appeal to raised judicial eyebrows or juror prejudice), less explicit versions of this script in the context of bar-room brawls, back-alley punch-ups, or other paradigmatic instances of male-to-male violence. Rather, as with most of the critical commentary on the topic, I am focusing on cases where the H.A.D. is used explicitly in support of a plea of provocation to a charge of murder.[2]

This was the case in *Green v. R.*,[3] the leading Australian authority on the H.A.D. In that case, the appellant, Malcolm Green, was a close personal friend of the deceased, Don Gillies. Both lived in the New South Wales country town of Mudgee, Gillies with his mother. On the night of the murder, Gillies had invited Green over for dinner. After having watched television, Gillies invited Green to stay the night, his mother having travelled to Sydney on family business. According to Green, he had just gone to sleep when Gillies climbed into his bed naked and began caressing him. After repeated attempts to brush Gillies off, Green then resorted to (fatal) physical violence. His appeal against his murder conviction to the New South Wales Court of Criminal Appeal was unsuccessful but his appeal to the High Court was upheld by a 3:2 majority. In the mid-1990s, before *Green* cemented the position of the defence in Australian law in 1997, there was a series of

much-publicised H.A.D. cases which drew the ire of the local gay press, the activist and the academic communities (see Hodge, 1998; Kiley, 1994). Although the H.A.D. is not legislatively enshrined – and indeed in *Green* the majority of the High Court was loath even to refer explicitly to the defence by the name it had by that time come to assume – this homophobic defence that dare not speak its name has now become a prominent feature of the Australian legal landscape. Predictably, *Green* has provided the focal point for most of the academic commentary on the phenomenon of the H.A.D. In my discussion below I focus in most depth on *Green* and on *R. v. Campbell*,[4] a three-judge decision of the New Zealand Court of Appeal. However, I also refer in passing to aspects of some New South Wales and Victorian case law.

One final methodological point before I move on. H.A.D. cases are distinguished by their incommensurate, egregious violence. In *Green*, Malcolm Green repeatedly punched Don Gillies in the face, banged his head against a wall, and stabbed him numerous times with a pair of gourmet chicken spears (see Marr, 1999, pp. 51–71). In *R. v. X.*, an unreported New South Wales Supreme Court case, the defendant slew his victim with a garden gnome door stopper and then proceeded to stab him repeatedly with a knife.[5] In *R. v. M.*, an unreported Victorian Supreme Court case, the defendant stabbed his victim seventeen times with a breadknife, hit him with a chair, covered his head with a tea-towel and slit his throat, before eventually setting fire to his flat.[6] Sadly, this level of violence is not a phenomenon peculiar to Antipodean jurisdictions. The American case of *Commonwealth v. Shelley*, in which the defendant hit his victim with a meat cleaver, stabbed him with a roasting fork, choked him and jumped on his head, represents a fairly typical portrait of the frenzied homophobic rage and murderous violence that H.A.D. cases have come to signify.[7] This violence is a characteristic routinely emphasised by academic commentators but consistently elided in the judgments of appellate courts. While Peter Johnston discusses how, in the case of *R. v. M.*, the victim's subjectivity was cleverly erased (and predictably reinscribed as "sexually voracious predator") (Johnston, 1996, p. 1166), in other H.A.D. cases the very body of the victim is judicially erased. This process enacts and completes a double erasure of the homosexual body – once at the level of the physical and then at the level of the discursive. As Bronwyn Statham observes, "there is something at stake, discursively and doctrinally, in effacing this violence" (Statham, 1999, p. 304). This is what makes the logic of Kirby J's dissenting judgment in *Green* – where he recounts at some length the events leading up to Don Gillies' death, the gratuitous violence of his murder and the macabre details of the post-mortem – such an unusual, important and admirable textual strategy. I have hence recounted these details, and others, not out of a morbid desire to harp on the details of dead bodies, but rather out of a recognition that what is at play in these narratives is in fact a

contest over the representation of the body. This is just one of the many points in these narratives where the constitutive link between text and body is rendered manifest. If discursive, textual constructions of the body actually (re)produce material corporeal violence, then judicial silences and elisions function politically both to mask the corporeal violence of the narratives *and* to define the homosexual body as invisible, and hence worthless. Symbolically, it is important to write the body of the homosexual victim back into the text (to perform a kind of *écriture homosexuelle*) before embarking on the task of rewriting our metaphors of the body.

THE LOGIC OF THE BOUNDED BODY

To return then to the body, or rather, the male heterosexual body, which is where so many of our problems often seem to begin. My main purpose in this paper is to demonstrate how discourses of predatory homosexuality and paedophilia are articulated together in H.A.D. narratives. I argue that both of these discourses form part of the same matrix of *male heterosexual body-penetratory/predatory homosexual-child sexual abuser*, but it is the first, and functionally most important, element in this matrix – the male heterosexual body – that engenders (and permits the interchangeability of) the second two elements. This is the relationship that I want to trace. To be more exact, I am addressing a specific inscription of the male heterosexual body in law as bounded and impermeable. This inscription compels us to view female bodies as somehow less than human and male homosexual practices as not just liminal, but dangerous. As will become evident, this understanding of the body is not restricted to legal discourses, nor are its metaphors of integrity and autonomy restricted to the body itself – they also structure our thinking about social factors such as race, class, nationality and ethnicity.

Through a reading of liberal philosophers such as Immanuel Kant and John Stuart Mill, feminist theorist Ngaire Naffine exposes how the body contemplated by liberal political theory – and indeed that contemplated by contemporary legal discourse whose "understanding of the body," she argues, "is still essentially Kantian" – is bounded, autonomous and impermeable (Naffine, 1997, p. 84). This inscription of the body in legal discourse informs legal notions of consent, harm and assault. It almost goes without saying, of course, that legal and liberal theory's understanding of the body is implicitly (hetero)sexed – it is the male heterosexual body which structures the legal and liberal imaginary. The female body, on the other hand, is characterised by its apertures, its permeability and its susceptibility of penetration. Drucilla Cornell observes, in a similar vein, that

> [t]he *man* is the one who penetrates, not the one who is penetrated. That's what . . . makes him a man (Cornell, 1993, p. 102).

For a man to be fucked makes him less of a man, reduces him to the "fluid bodily status of woman" (Naffine, 1997, p. 87). The homosexual man is another figure excluded from, and devalued by, this bodily regime. His sexual practices challenge the integrity of the paradigmatic body of law, the bounded male heterosexual body. Naffine reminds us of the spectre of a liminal and dangerous homosexuality when she writes that "loving penetration of a man by a man is highly corrosive to bodily sovereignty" (Naffine, 1997, p. 91). The man of law, then, is a hermetically sealed subject.

It is this same construction of the paradigmatic body of law – the bounded male heterosexual body – that structures the narratives of the H.A.D. Metaphors of sovereignty, integrity and autonomy are used to map the male body, and, as we shall see, to construct two very potent outlaw figures – the penetratory/predatory homosexual and the child sexual abuser. To draw on the insights of Catharine MacKinnon, the H.A.D. narratives present a very apposite example of masculine epistemology masquerading as universal ontology (see MacKinnon, 1989, pp. 237–238). Furthermore, the transcripts and judgments from these cases demonstrate just how powerful the (constructed) ontology of the impregnable male heterosexual body is.

For example, defence counsel in *R. v. M.* invoked the bounded male body to calibrate his conception of differential bodily harms:

> [This attack] was not the usual case of an attack where he's going to be killed; it's an attack where he's going to be sodomised, which is almost as grave (quoted in Johnston, 1996, p. 1174).

This assertion of bodily penetration as a fate (almost) worse than death is echoed, if in a somewhat cruder fashion, by the now-infamous statement of Malcolm Green: "Yeah, I killed him, but he did worse to me . . . he tried to root me" (quoted in *Green*, p. 391). Both statements attest to the singular importance in these H.A.D. cases of keeping one's body intact, one's self-unbreached.

The rhetoric of integrity and autonomy, violation and intrusion, also animates the judgments in these cases. Smart J, of the New South Wales Court of Criminal Appeal, observed in his judgment that "some ordinary men" would regard an advance of the kind which the defendant had to endure in that case as a "serious and gross violation of their body and their person" (quoted in *Green*, p. 346), whilst Brennan CJ wrote tellingly of the despicable "attempt to violate the sexual integrity of a man" (*Green*, p. 345). This particular conception of the male body in *Green* structures the understanding not just of the majority judges, but of the dissentients as well. While it would be reductive (and unfair) to bracket Kirby J's measured, yet impassioned, dissent with the judgments of Smart J and Brennan CJ, his language does disclose some conceptual attachment to the bounded body. For example, he writes in *Green* of how Don Gillies "intruded" into Malcolm Green's

privacy, and more generally of how advances (be they homosexual or heterosexual) have the potential to "intrude on sexual integrity in an objectionable way" (*Green*, pp. 414, 416). Perhaps Malcolm Green put it best, this time more eloquently, when he said that the events of that night "forced [him] to open more than [he] could bear" (quoted in *Green*, p. 348).

Everywhere in these cases, from the standard assertions of interference to the more emotive invocations of bounded rhetoric, from the frantic ejaculations of suspects in police interviews to the more considered pronouncements of judges and academic commentators, lurks the figure of the bounded male heterosexual whose physical and discursive limits have been transgressed. This discursive understanding of the male heterosexual body compels lethal violence at the level of the everyday and excuses it at the level of the courtroom, where judges are seemingly pleased to encourage

> a form of self-policing by perpetrators of their own masculine and public sexual identities (Tomsen, 1998, p. 49).

This is only one of the many instances where the liberal apparatus is content to allow its subjects, qua sexual vigilantes, to take the law into their own hands. Just as the "masculinist ethos of physical integrity" (Vaughan & Scott, 1997, p. 20) compels both a vicious physical judgment and a recuperative, second order legal judgment, so too does the law – as a discourse which is not only constituted by social relations but is itself constitutive of them – inscribe the social actors of H.A.D. narratives in particular ways. Obviously, as we have seen, the body of the male heterosexual "victim" is inscribed as impermeable. Furthermore, the ordinary (heterosexual) man – that nebulous but highly tendentious legal fiction – is "judicially inscribed as a violent homophobe" (Howe, 1997, p. 364). For his part, the homosexual man is inscribed simultaneously as penetrator/predator and as fair game for the enraged homophobe. It is to the former construction that I shall now turn.

Many commentators on the H.A.D. stress how in both the transcripts and the judgments of these cases the distinction between a sexual advance and a sexual assault is often blurred (New South Wales Attorney General's Working Party on the Review of the Homosexual Advance Defence, 1998: [4.10], [4.16]; George, 1995, p. 50). Nathan Hodge observes that this very blurring is functional to the shifting of blame in these trials (Hodge, 1998, p. 32). As we have seen, the real crime inheres not in the homicidal retaliation but in the purported act of penetration, which it seeks to pre-empt. In this respect, the trope of *victim as villain* is analogous to that which is often mobilised in female sexual assault cases (see Johnston, 1996, p. 1178; Mison, 1992, pp. 170–174; Vaughan & Scott, 1997, p. 20). Just as in cases of sexual assault where the deployment of discourses about unruly and illegitimate feminine

heterosexuality permits the installation of the masculine aggressor as, alternately, genuine seeker of consent and aggrieved victim of feminine caprice, so too does the deployment of discourses about predatory and lascivious homosexuality facilitate the installation of the homicidal heterosexual as hero. Santo de Pasquale writes of how one result of the High Court's decision in *Green* is that

> courts will continue to distinguish a non-violent homosexual advance from a non-violent heterosexual advance (de Pasquale, 2002, p. 118).

True. I would go one step further and argue that under conditions of hegemonic and compulsory heterosexuality, not only is the phrase "non-violent heterosexual advance" tautologous (*she asked for it, didn't she?*), but its sexual opposite is unknowable. A homosexual *advance* is by its very penetratory nature an *attack* upon the sanctified and impenetrable male body. There is no such thing as a "non-violent homosexual advance" within the narratives of the H.A.D.

So much is clear from even a cursory reading of the High Court majority judgments in *Green*. While Priestley JA, writing for the majority of the New South Wales Court of Criminal Appeal, commendably found Don Gillies' overtures to be "amorous, not forceful" (quoted in *Green*, p. 345), Brennan CJ soon set about rewriting the heteronormative script.[8] Priestley JA's more sensitive treatment of the facts is not allowed to stand for long within the High Court's legal and epistemological framework of homosexuality as abuse. Gillies' actions are reinterpreted as "persistent", even "terrifying", and he is triumphantly reinscribed as "the sexual aggressor of the appellant" (*Green*, pp. 341, 346). Similarly, McHugh J described Gillies' behaviour as "quite rough and aggressive" (*Green*, p. 369). In another case, *R. v. McKinnon*, despite there being no evidence of the victim, Maurice, touching McKinnon's genitals or even attempting to have sex with him, the defence case was conducted on the premise that what occurred was in actual fact an attack.[9] The defence succeeded for a very simple reason. Because of the inscription of the male heterosexual body as bounded, any *advance* upon the body, however amorous or gentle, automatically represents an *attack*. Hence, we can see how the particular inscription of the male heterosexual body I have been delineating gives rise to (erects, even) the figure of the penetratory/predatory male homosexual, for he who seeks to penetrate the male body is instantly inscribed as dangerous, threatening and predatory.

The image of the penetrator/predator commands such discursive force in contemporary legal narratives (and, indeed, in wider social and cultural fora) that it is easily able to trump physiological improbabilities, gloss over the obvious power imbalances in H.A.D. fact scenarios, and, finally, supersede the self-assertions of a murderer. This is why, to echo Dean Kiley, "the defensive fictions of apocalyptic poofs work so well" (Kiley, 1994, p. 89). They work so well that a jury is enjoined

to believe in the case of *R. v. X.* (and readily does) that the victim, after having been pushed over, punched a number of times, and hit repeatedly over the head with a door stopper, still needed finishing off with a knife. They work so well that in the case of *Green*, a jury and a majority of the High Court apparently accepted the near physical impossibility of Malcolm Green's account that after he had hit his victim in the head over and over again until, by his own admission, "he didn't look like Don to me" (quoted in *Green*, p. 348), Don Gillies was seemingly still so persistent, so forceful in his attentions that Green had no choice but to stab him with a pair of chicken spears in order to immobilise him. They work so well that in the case of *R. v. M.* the defendant was able to take the stand and relate the following, apparently without irony:

> Well, we started struggling because he caught up to me again, because I stopped, and I thought, 'Well, I've just stabbed a man a couple of times in the back and I better stop and say, 'Listen are you allright [*sic*]? I am not like that. Let's sit down', but he come towards me again (quoted in Johnston, 1996, pp. 1171–1172).

In all the above cases the murderers were younger, fitter and stronger than their victims. As Kirby J observed in *Green*, this much is evident simply from the disastrous course that events soon took in that case (*Green*, p. 414). His observation applies with equal force to the fact situations of *R. v. M.* and *R. v. X.* The immense cultural power of the penetrator/predator construction is hence able, not only to account for the near physical impossibility of a half-dead man (libido intact) continuing his unwanted sexual advances in a physically threatening manner, but also to contradict the obvious indication that the heterosexual victims (the *real* victims in these cases) were far superior physically to their homosexual tormentors. Here the forensic verges on the cinematic, as the defence projects figures of the undead homosexual villain as phantom, zombie and vampire, in appeal to cultural understandings of homosexuality as a (literally) monstrous aberration. Even when there is a clear statement from the accused, such as there was in *Green*, that the advance was non-threatening ("I suppose it was gently") (quoted in *Green*, p. 360), the figure of the penetrator/predator ultimately reasserts itself in the minds of the judge and jurors. As Adrian Howe observes of the High Court decision in *Green*, "[r]eality gets turned on its head in the judgments which found for the appellant" (Howe, 1998, p. 486).

To recap, the inscription of the male heterosexual body in legal discourse requires that any advance is automatically (and anatomically) constituted as an attack, as an intrusion, as a penetration. The figure of the penetrator is thus known as a predator, as a liminal and dangerous spectre, as a man who has the capacity to breach another man – a threatening *Übermensch*, to borrow Dean Kiley's term (Kiley, 1994, p. 82). Perhaps the real indignity in these cases is the loss of masculinity inherent in being

breached by another man, in ceding some of your bodily sovereignty to (an)other man.[10]

INTEGRATING CHILD SEX ABUSE INTO THE H.A.D. BODY MATRIX

Most accounts of the H.A.D. acknowledge the figure of the penetratory/predatory homosexual as the Super/Otherman. However, there is another element that often recurs in H.A.D. cases – the figure of the child sexual abuser. This figure is generally mobilised in two ways. First, the homosexual victim can be explicitly cast in the role not only of penetrator/predator but also of child sexual abuser. Allen George writes of how "Old Kev," the victim in *R. v. X.*, was "constructed as a boy-chasing paedophile" (George, 1997, p. 55), while Peter Johnston observes how Joe Godfrey, the victim in *R. v. M.*, was "produced as a 'dirty old man' " (Johnston, 1996, p. 1182). There are also frequent references in the majority judgments in *Green* to Don Gillies' extra crime of abusing a younger man who respected him as a "father figure" (see *Green*, pp. 345, 370). Secondly, a defendant may sometimes plead that he was provoked, not only by the indignity of having his masculinity impugned, but also that this provocation related to, or evoked, past episodes of child sexual abuse. This was the case in both *Green* and *Campbell*. These two specific manifestations of the child sexual abuse element in H.A.D. narratives both participate in the same regime, and are often mobilised together for maximum discursive effect. In the first, the homosexual victim is literally cast as a child abuser; in the second, he is figuratively cast as such. I focus in this last section of my paper on the latter instance – where it is claimed that a homosexual advance relates to, or evokes, past episodes of child sexual abuse. I want to uncover the figurative, discursive relationship between the child abuser and the penetratory/predatory homosexual.

Like those critiques that recognise the power of the penetrator/predator stereotype, my point of departure is the structural connection between the (constructed) ontology of the bounded male heterosexual body and the penetratory/predatory homosexual outcast. I want, however, to account for the figure of the child sexual abuser and to isolate the specific function that it performs within the H.A.D. body matrix. This is something that previous critiques of the H.A.D. have not addressed in detail. For example, David Marr simply reads the element of child sexual abuse in *Green* as "something extra" (Marr, 1999, p. 61), or as part of a tactical response to changes in criminal trial procedure.[11] Bronwyn Statham and Rebecca Bradfield argue, respectively, that the decision in *Green* owed a lot to the "unusual factual circumstances" of Malcolm Green's past and that it was not a "classic" instance of the H.A.D. (Bradfield, 1998, p. 303; 2001,

p. 83; Statham, 1999, p. 309). Finally, Tom Molomby, a barrister involved in the *Green* appeal to the High Court, predictably disputes that the case "ha[d] anything to do with homophobia" (Molomby, 1998, p. 116). The readings of child sexual abuse in these H.A.D. narratives hence constitute a continuum. They range from regarding the element as a conceptually discrete issue that is separate from the central narrative of the H.A.D., through to statements that the presence of claims of child sexual abuse somehow mitigate the standard homophobic equation of the H.A.D., right through to Tom Molomby's position that the presence of child sexual abuse fundamentally alters the (homophobic) nature of the case. I want to contest the view that the element of child sexual abuse is unrelated to the central narrative of the H.A.D. In fact, it is intimately related, both thematically and structurally.

Of course, the conflation (be it wantonly or tendentiously) of homosexuality and paedophilia is neither new nor confined to the narratives of the H.A.D. Contemporary Australian political discourse furnishes us with several apposite examples of the (mis)identification of homosexuality with paedophilia: the Franca Arena parliamentary privilege affair both represented and engendered an elision of homosexuality with an illicit and dangerous intergenerational desire, while Senator Bill Heffernan's more cynical attack on Justice Michael Kirby presented a new low in the false nexus between the two discourses (see Morgan, 2002). The connection was, until most recently, further institutionalised in legislation such as the discriminatory New South Wales provisions relating to the male homosexual age of consent.[12]

Clearly, homosexuality has long been (mis)identified with paedophilia in the heterosexual imaginary. Indeed, as Nathan Hodge observes, writing of the narratives of the H.A.D., the transgressive sexuality of paedophilia is frequently subsumed by a dangerous and monolithic homosexuality in order to buttress the regulatory fiction of the homo/hetero binary (Hodge, 1998, p. 31). I am focusing here specifically on how inscriptions of the body in legal discourse permit, indeed even require, this coupling.

My particular concern is to triangulate the relationship between the male heterosexual body, the penetratory/predatory homosexual, and the child sexual abuser. My point is that the last element should be understood, not as a discrete element, but rather as an integral component of the H.A.D. body matrix. We must ask the question why a gentle homosexual advance is either literally interpreted as child abuse, or is somehow reminiscent of it? The answer, I suggest, lies with the bounded male heterosexual body. As we have seen, the inscription of the male heterosexual body in H.A.D. narratives gives to gentle, consensual homosexual sex its status of abusive penetration, and the homosexual – defined solely by this sexual act of penetration – his character of penetrator/predator. The next gesture, as a reading of *Green* and *Campbell* demonstrates, is to replace the predator figure

with the child abuser. The two are functionally interchangeable – a logical step given that the breaching of a man's borders deprives him of his manhood, his status as an autonomous bounded being. Penetration renders the male agent powerless, even childlike. In these cases, the man who has his borders breached stands in relation to the predatory homosexual just as the child does to the sexual abuser. Both have had their innocence stolen, their selves assaulted. This also goes some way to explaining the retaliatory violence of these H.A.D. cases – the violence in which the offending *Übermensch* is effaced represents a last-ditch effort to reassert one's manhood and retain control (see Tomsen, 1994, 1998). At any rate, the figure of the child sexual abuser functions as both *disavowal* (in that it permits us to read *Green*, and other cases, as not being about homosexuality but rather about child sexual abuse, or, more narrowly, about the relevance and admission of evidence) and as *structural manifestation* of homophobia (in that it presents homosexuality as commensurate with abuse).

A closer reading of two particular cases will, I hope, make my point clearer. In *Green*, Malcolm Green claimed that when Gillies made a pass at him, this evoked memories of past child sexual abuse. As disclosed by Green's record of interview, Gillies' gentle homosexual attentions were strongly reminiscent of his father's aggressive heterosexual sexual assault of his four sisters and physical abuse of his mother:

> In relation to what had happened this night I tried to take it as a funny joke but in relation to what my father had done to four of my sisters it forced me to open more than I could bear. It hasn't changed the fact to [*sic*] what had happened to my family but I couldn't stop myself or control what went through me (quoted in *Green*, p. 348).

At trial, Green elaborated on these comments:

> Well, it's just that when I tried to push Don away and that and I started hitting him it's just – I saw the image of my father over two of my sisters, Cherie and Michelle, and they were crying and I just lost it (quoted in *Green*, p. 348).

The bare legal question on appeal to the High Court was whether the trial judge had erred in not admitting evidence of Green's special sensitivity to child abuse (i.e. his family history). This entailed a consideration of the objective test for provocation as set out in s. 23(2)(b) of the *Crimes Act* 1900 (NSW) and an interpretation of recent High Court decisions on the topic, in *Stingel v. R.* and *Masciantonio v. R.*[13] The majority judges held that, in the words of Brennan CJ:

> The sexual abuse factor was relevant to those questions because it tended to make it more likely that the appellant was more severely provoked by the deceased's unwanted homosexual advances than he would otherwise have been and thus more likely that he had been induced thereby to lose self-control and inflict the fatal blows and more likely that the appellant was so incensed by the deceased's conduct that, had an ordinary person been provoked to the same

> extent, that person could have formed an intention to kill the deceased or to inflict grievous bodily harm upon him (*Green*, p. 342).

Gummow J in dissent vainly argued that:

> The accused's evidence as to the deep impression made upon him by episodes in his family history, so that, in the appellant's words, he hated his father and wanted to kill him, were insufficiently related to the provocation presented by the conduct of the accused (*Green*, pp. 385–386).

Kirby J's dissent, like Gummow J's, focused on the desirability of an objective standard in provocation law (purged of the particularities of the defendant's history) in order to ensure legal equality and safeguard the rule of law (*Green*, pp. 409–416). Not only do the black-letter, legalist judgments of both the majority *and* the minority elide the fact that the objective standard is *always already* gendered and the aperspectivity of the rule of law a dangerous fiction (see MacKinnon, 1989, pp. 237–249), but they fail to interrogate the discursive grounds for equating a gentle (homo)sexual advance with a violent (hetero)sexual assault. Adrian Howe observes that in permitting the defence to lead evidence of past child sexual abuse

> the majority judges in *Green* reconfigured a murderously violent aggressor as a victim of the sexual assaults experienced by his sisters at the hands of his father (Howe, 1998, p. 490).

Not only are the victims of child sexual assault, as Howe protests, shamelessly appropriated *but* they are also pressed discursively into the service of a homophobic legal defence. The trial transcript and the judgment in *Green* disclose that Malcolm Green had in fact never witnessed the sexual abuse of his sisters. That the High Court was prepared to sanction the admission of evidence relating to a third party assault, of a different sexual nature, not witnessed by the accused, demonstrates clearly the link between the figure of the penetratory/predatory homosexual and the child abuser (bridged by the bounded male heterosexual body). The child abuse element functions as *disavowal* both within the text of the judgment and outside it. It permits McHugh J to argue that "the fact that the advance was of a homosexual nature was only one factor in the case" and that what was more important was the particular history of the accused (*Green*, p. 370), while it allows Tom Molomby, as we have seen, to argue that *Green* had nothing to do with homophobia and everything to do with child sexual abuse. The element of child sexual abuse here functions insidiously as a means of displacing concerns about homophobia and (disturbingly) as an analogue of homosexuality.

The facts in *Campbell*, where the child sexual abuse in question was actually perpetrated on the accused and was of a homosexual character, required an even defter sleight of discursive hand. In that case, the twenty-two-year-old appellant was convicted of the murder of a family friend whom he had met through his

parents. When he was a child of about seven or eight years of age, the appellant had been severely disciplined by his father for stealing some money. He had subsequently been sent to live with a family friend, V., in a caravan. During this time, it was alleged that V. had sexually abused him repeatedly. Independent evidence was led at the trial that V. was a paedophile. Immediately before the events forming the substance of the charge, the appellant had broken up with his girlfriend and decided to leave his parents' home at Hawkes Bay, where he was then living, and move to Rotorua. One night, while returning to his parents' home to collect some belongings, he had stopped at the deceased's house for a coffee and a lift home. When the deceased placed his hand on the appellant's thigh, the appellant experienced a "flashback" to when he was being abused by V. The appellant then lost control of his actions, taking to the deceased with a poker and an axe, believing that the deceased was V. and that "someone else was doing the hitting" (*Campbell*, p. 19). The appellant was convicted of murder.

The grounds of appeal in *Campbell* related to the direction that the trial judge gave to the jury on the concept of proportionality, the way in which the trial judge dealt with the expert evidence, and finally, the adequacy of the trial judge's summing up on the issue of the appellant's good character. Eichelbaum CJ delivered the judgment of the Court of Appeal. Doctrinally, the bulk of his judgment is taken up with an analysis of the common law doctrine of provocation and s. 169 of the *Crimes Act* 1961 (NZ) (the provocation section). As Santo de Pasquale points out,

> the Court seemed concerned to redress the crippling effect that the trial judge's direction on proportionality had on the defence case (de Pasquale, 2002, p. 138).

As in *Green*, what the court did not seem concerned to do was question the discursive link between a man smilingly putting his hand on another man's leg and a paedophile systematically tying up a seven- or eight-year-old child and sexually assaulting him. This aporia is seamlessly bridged in *Campbell* with the aid of psychiatric discourses. Miraculously, the condition of "flashback", which the appellant underwent when a family friend dared to put his hand on his leg, effected an instantaneous "transposition of reality" (*Campbell*, p. 23). The predatory homosexual was here transmogrified into the figure of the abusive paedophile. That this fantastic, metaphoric gesture went unchallenged, and was in fact reproduced, by the court is testament to the power of the link between the child sexual abuser and the homosexual (bridged, again, by the inscription of the male heterosexual body). We can see a number of familiar tropes employed by the court in *Campbell*. Obviously, the legalist nature of the judgment obscures the power relations at play – doctrine overlays discourse quite effectively. Similarly, the element of child abuse, this time with a specious psychiatric hue, functions again as *disavowal*. As de Pasquale remarks,

> [a] generous reading of *Campbell* suggests that in New Zealand H.A.D. is condemned (de Pasquale, 2002, p. 138).

Indeed, Eichelbaum CJ stated:

> Provocation is not lightly taken away from the jury, but had there been no evidence of the flashback concept, the advance of which the appellant spoke would not have been a sufficient foundation for leaving provocation in the case. It would not have been open to the jury to find that the hypothetical ordinary New Zealander, without any special characteristics, could have reacted in the same way (*Campbell*, p. 23).

Eichelbaum CJ's disavowal of homophobia functions in a similar way to McHugh J's in *Green* – although arguably McHugh J would have entertained the idea of the reasonable homophobe *sans* child abuse. On a cursory, or generous, reading of the judgment, liberal-minded New Zealanders could be forgiven for thinking that their legal system did not condone or inscribe homophobic violence – it is simply where a defendant can lead evidence of past child sexual abuse that such violence is understandable. However, just as in *Green*, the child sexual abuse element (here with a particular psychiatric imprimatur) does not function as a separate element – its very presence is indicative of homophobia. Indeed, it is the particular (homophobic) inscription of the bounded male heterosexual body in law (and the ensuing body matrix) which permits the very linkage of child sexual abuser and predatory homosexual in the first place, and not the presence of child sexual abuse which permits the pleading of provocation. It is this linkage, this interchangeability of the penetratory/predatory homosexual and the child sexual abuser, that makes evidence going to past child sexual abuse appear relevant. As we can see, the child sexual abuse element functions in *Campbell* in much the same way as it does in *Green*.

CONTINGENT BODIES: TOWARDS A POETICS OF LAW REFORM

To conclude, then, I have argued that a useful way to read the narratives of the H.A.D. is to address the particular inscriptions of the male heterosexual body in legal discourse. The bounded nature of this body, its impermeable and unbreachable status, leads to the parallel inscription of the homosexual as penetrator/predator. In H.A.D. narratives, this liminal and dangerous figure is often interchanged with the figure of the child sexual abuser. Rebecca Bradfield urges us not to miss the subtlety of the distinction drawn in *Green* between homosexual advance and child sexual abuse (Bradfield, 2001, p. 84). I would argue that the subtlety of the matter lies in reading the politics of *Green*, *Campbell* and like cases as being informed by

a particular discursive matrix of the body – the matrix of *male heterosexual body-penetratory/predatory homosexual-child sexual abuser*. We must understand the last element in this matrix as performing a vital functional and discursive role within the matrix, and not as a tangential or incongruous element in these narratives. It is central to the homophobia and the violence that produces the H.A.D. and which the H.A.D. itself reproduces. We must understand it, and condemn it, as such.

From what I have been arguing, it follows that the most effective way to end this legal violence is to reimagine our metaphors of the body. This gesture involves rethinking the conventional liberal schema of law and violence. There is a fundamental difference between reading the H.A.D. as *legally sanctioned violence* and reading it as *legal violence*. The former presupposes the inherently social nature of violence and the transparency and objectivity of the law in combating it; the latter points to the implication of, even the constitutive role performed by, the law in producing violence. The former necessarily entails as its normative program a project of law reform; the latter a poetics of law reform. While substantive efforts have been, and are continually being, made in the area of law reform – such as reforms to trial judges' directions, the institution of police and judicial education programs, proposals for statutory reform of provocation provisions to exclude the H.A.D., and so forth – the male heterosexual body will ultimately reassert itself in discourse, as it does in daily practice, if these agendas are not pursued in tandem with a more radical epistemological program of rewriting the body. As Peter Johnston remarks of Joe Godfrey's production as a "dirty old man" in *R. v. M.*, "[n]o amount of law reform can, of itself, change this" (Johnston, 1996, p. 1182). A poetics of law reform promises an opening of the body and of (the body of) law.

It is therefore incumbent upon us to begin to rethink the body as other than closed – as open, contingent, permeable, interactive, plural – and to reinscribe legal bodies accordingly. The task is mammoth – notions of borders structure not only our understanding of bodily sovereignty but, as recent Australian examples demonstrate, our concepts of national and ethnic sovereignty are also predicated on borders and boundaries. "Boat People," "queue jumpers" and "ethnic gang rapists" are all produced by this same construct which seeks to map a divisive and "imaginative geography" onto a fluid and open reality (Said, 1995, p. 57). Corporeally or geo-politically; be it the body of the individual or the body politic; borders and boundaries literally and figuratively set the limits of our understanding. Jennifer Nedelsky writes of how the idea of the boundary serves as a "central metaphor in the legal rhetoric of freedom" (Nedelsky, 1990, p. 162). It may indeed be a central metaphor in the language of the law and the liberal apparatus – as it undoubtedly is in the language of the nation, ethnicity and capitalism – but, as Drucilla Cornell has observed, we commit a far worse tactical error by failing to

recognise its status as what she, echoing James Joyce, calls "fici-fact" (Cornell, 1993, p. 97). A poetics of law reform must be committed to uncovering the fictional status of material boundaries and to remetaphorising them. This process of poetic law reform raises its own interesting questions of methodology that it is not within the scope of this paper to answer. Suffice it to say, however, that the process of remetaphorisation cannot occur solely within the discourse of the "Law" and must also be enacted within those discourses with which it necessarily intersects – medicine, psychiatry, psychology, literature, art, and so forth. Neither can the poetics of law reform be a closed or closing process. Like the images of the body it seeks to open, it must represent a constantly evolving process of renegotiation and renewal.

In closing, I would like to return, Joyce-like, to the beginning. I began with a quotation from Foucault about discourse and violence. In stressing that the corporeal violence of these narratives is inextricably linked to the discursive practices of the H.A.D. and of the law itself, I have argued for a metaphoric and utopian challenge to the logic of the bounded body. It is a challenge in which we are all implicated, and whose pressing call none of us can ignore.

NOTES

1. Unlike some theorists, I have chosen not to place the terms heterosexual and homosexual in quotation marks. This is not to assert that the two categories are coherent, stable and mutually exclusive, rather, I believe the opposite is true. I have chosen to leave the terms unmarked simply because my aim is not to contest the two categories of sexuality, but to interrogate constructions of the body in legal discourse. However, I should point out some common ground with theorists who do suspend the two terms. First, as Dressler (1995, p. 726) points out, "it is likely that most persons are neither exclusively heterosexual nor homosexual." Secondly, following on from the above point, I acknowledge the socially constructed nature of human sexuality and the regulatory fictions of man/woman, hetero/homo. Thirdly, I agree that the conflation of homosexual/heterosexual *acts* with the assumption of homosexual/heterosexual *identity* must be interrogated. On this point, see Johnston (1996, p. 1166). Finally, it must be acknowledged that in the context of H.A.D. cases the sexuality of both the victim and the defendant is often contested, constituting a "trial within a trial," or a "mini-trial." Obviously, we must also be aware that the H.A.D. may be cynically deployed where the victim (who obviously cannot contest the assertions) did *not* identify as homosexual.

2. Other limits to my discussion are the question of male-to-female homophobic violence, and the question of the intersection of race and sexuality in these and other provocation cases. For a discussion of the former aspect, see Howe (1997, pp. 357–359).

3. *Green v. R.* (1997) 191 CLR 334 (hereinafter *Green*).

4. *R. v. Campbell* [1997] 1 NZLR 16 (hereinafter *Campbell*).

5. *R. v. X.* (Unreported, New South Wales Supreme Court, Grove J, 6–11 April 1994) (hereinafter *R. v. X.*), details quoted in George (1997, p. 49).

6. *R. v. M.* (Unreported, Supreme Court of Victoria, Teague J, 28 May 1992) (hereinafter *R. v. M.*), details quoted in Johnston (1996, pp. 1153, 1165).

7. *Commonwealth v. Shelley* 373 N.E.2d 951, 953 (Mass. 1978).

8. David Marr relates a revealing moment in the transcript of proceedings before the High Court, where Brennan CJ interrupted an exchange between McHugh J and Keith Mason QC, Counsel for the Crown. Brennan CJ interrupted Mason's reconstruction of the facts thus: "When you say 'amorous,' you mean sexual?" Mason stated that he was merely employing the words of Priestley JA of the New South Wales Court of Criminal Appeal, but accepted Brennan CJ's reproach. This exchange is illustrative of how in H.A.D. cases stereotypes about lascivious and depraved homosexuality (i.e. merely "physical" as opposed to "emotional" love) often attend the more powerful inscriptions of the male heterosexual body. See Marr (1999, p. 68).

9. *R. v. McKinnon* (Unreported, New South Wales Supreme Court, Studdert J, 15–19 November 1993), details quoted in George (1995, p. 50).

10. It seems almost trite to assert that the H.A.D. narratives are a contest over masculinity. Interestingly, one commentator suggests that the difference between America and Australia is that the predominant use of the HPD in the criminal jurisdictions of the former country represents "the American tendency to overcome deficiencies in the law of self-defence and provocation by invoking mental illness or incapacity." See Leader-Elliott (1993, p. 406). Writing of the difference between the two terms HPD and H.A.D., Anthony Bendall and Tim Leach observe that "the term homosexual panic defence is misleading. It suggests real irrationality or a pathological defect on the part of the accused, rather than a common, 'garden variety' straight masculinity and a reliance on codes of 'male honour.' " See Bendall and Leach (1995, p. 7). It seems that in Australia we prefer our homophobia "straight up" (pun intended). Strategically, for those defendants seeking to preserve their sense of masculinity and successfully deploy homophobic discourses in the courtroom, the H.A.D. quite clearly represents the better option. See de Pasquale (2002, pp. 141–142) and Johnston (1996, p. 1168).

11. The procedural reform Marr is adverting to here is the abolition of the unsworn dock statement, which was effected in New South Wales in 1994. As many critics of the H.A.D. have observed, the unsworn dock statement was quite frequently employed by defendants to criminate the dead victim in these kinds of cases, who, of course, was not present to contest allegations of criminality or sexuality (frequently confused).

12. The *Crimes Amendment (Sexual Offences) Act* 2003 amended the relevant provisions in the *Crimes Act* 1900 (NSW) to equalise the age of consent at age sixteen in New South Wales (for homosexual and heterosexual males and females alike). Previously the age of consent for homosexual males was eighteen.

13. *Stingel v. R.* (1990) 171 CLR 312; *Masciantonio v. R.* (1995) 183 CLR 58.

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4. ARRESTING IMAGES/FUGITIVE TESTIMONY: THE RESISTANT PHOTOGRAPHY OF EVERGON☆

Derek Dalton

> I photograph the landscape like it is a man and I am a sexual outlaw[1] (Evergon, 1997, p. 52).
>
> History is made and preserved by and for particular classes of people. A camera in some hands can preserve an alternative history (Wojnarowicz, 1991, p. 144).

The American photographer Diane Arbus once remarked that "[a] photograph is a secret about a secret" (cited in Sontag, 1977, p. 111). Evergon's photographic works speak to Arbus's observation. Secret desires, secret locations, secret assignations and secret identities are attested to in Evergon's photographic oeuvre, particularly the body of work that has come to be known as *Manscapes, Truck Stops and Lover's Lanes*.[2] These photographs of cruising grounds and beats[3] (spaces where men seek other men for sexual contact) are laden with traces of desire. I wish to elucidate how these photographs, in their address to the viewer, can be read as testimonials to the enactment of forbidden desires. The *Manscapes* contain evidence that gay men resist the regulation of their desire in public. As West argues:

> [t]he walls and landscapes of beats function as psychic canvas for our policed homo-desires (1999, p. 15).

By canvassing these landscapes with the photographic lens, Evergon captures the essence of gay resistance.

☆Barthes, writing in "Camera Lucida" argues that the photograph can be defined as "a certain but fugitive testimony" (1981, p. 93).

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Young argues that the event of crime is:

> always already textual as are the outlaws symbolically expelled from the community (1996, p. 16).

Following Young's example, I intend to read Evergon's photographic texts to elucidate the ways that gay men defy their outlaw status by occupying public spaces and leaving traces of their occupation behind that mark the space as queer territory. My contention is that the photographs I will subsequently examine speak to criminology and law's obsession with notions of gay visibility and invisibility.

Tagg argues that we should not privilege one particular site as the proper place of cultural action. The gallery and the streets, he insists, are equally important sites of struggle and resistance (1988, p. 31). It is fitting, then, that this chapter takes in both the space of the city and the space of the gallery in mapping the grounds where cultural struggle is enacted.

My discussion draws upon various *Manscapes* that Evergon took in Sydney and its locales when he visited Australia as part of a short residency organised by the Australian Centre for Photography (ACP). These images were made during the summer of 1998 in the beats and cruising grounds of Sydney and formed part of the exhibition "Evergon: An Aesthetic of the Perverse"[4] that the ACP staged in conjunction with the 1999 Sydney Gay and Lesbian Mardi Gras.[5] However, a few *Manscapes* taken in other cities will also be examined, for to examine these Sydney *Manscapes* in isolation would be to deny that the power of the images is inherently metynomic.

THE EVERYDAY AND TESTIMONY

Evergon's *Manscapes*, accompanied by titles that do not provide exact locations of the places he photographs, accord respect to these spaces and in doing so preserve their status as commonplace images. In documenting those locales where gay desire is enacted on a daily basis, the *Manscapes* speak to the theme of "the everyday." These everyday photographs provide testimony, not, obviously, in the formal and legal sense of the term, but rather in fidelity to the archaic meaning of the word as indicating: "a solemn protest or declaration."[6] To gaze at these images is to be drawn into spaces of gay resistance, to vicariously inhabit beat and cruising ground space, to behold signs of resistance. For the *Manscapes* are profoundly allegorical. Upon viewing these images for the first time they appear unremarkable, almost mundane in their depiction of common scenes (parks, foreshores, secluded hinterlands and other public spaces). As the clues in the photographs are identified,

the viewer imbues the photographs with an aura of desire.[7] In their totality, the *Manscapes* testify to the existence of those everyday places that are subject to processions of desiring male bodies.

I wish to expand on the notion of testimony by emphasising that photography, due to its uncanny affinity with realism, is valorised for its quality of being able to summon the essence of people and places. In exploring the power of the photograph to summon, Kozloff draws attention to the critical distinction between the art forms of painting and photography. A painting, he observes:

> alludes to its content, whereas the photograph summons it, from wherever and whenever, to us (1987, p. 236).

This notion of summoning accounts for much of the intrinsic power that photographs possess to connect with viewers in deeply emotive ways. It should be stressed that the testimonial power of the photograph does not preclude that the subject of a photograph has altered or changed or ceased to exist. As Barthes argues:

> [t]he photograph does not necessarily say *what is no longer*, but only for certain *what has been* (original emphasis, 1981, p. 85).

This distinction is important in relation to the photographs that will subsequently be discussed. Evergon's *Manscapes* do not necessarily document spaces and places that no longer exist. Indeed many of the places he documents are still "*there*," still offering the sanctuary of a space where desire can be pursued.

Testimony is also important to this chapter because the desires of gay men take place in spaces that exist at the border or threshold of visibility. That is, despite the relative openness of cruising grounds and beats, these spaces have rarely been represented through visual media. In photographing cruising grounds Evergon is depicting spaces/places which have largely been quarantined from the cultural imagination.[8] These spaces have always existed, yet proscriptions of silence have long prevailed, rendering these places to that which is largely whispered about among "knowing" groups. They are spaces of twilight,[9] marked by obscurity and danger.[10] Indeed, the existence of twilight spaces ruptures those comforting assumptions that the "public" can neatly be delineated from the "private." Young engages with the relationship between the public and the private, noting that a paradox exists:

> The fabled boundary between the public and the private sphere exists in late modernity as a paradox: each sphere is comprehensible only by means of reference to the other; each is not the other, nor is each the separate realm it pretends (1996, p. 13).

Similarly, the spaces depicted in *Manscapes* confuse and confound accepted uses of so-called "public" space. In the 1996 series of "London" *Manscapes* a cemetery is featured. In one particular photograph, "London, 1996,"[11] a mausoleum surrounded by a tall brick wall suggests to the viewer that this secluded place is privy to male sexual encounters. In a *Manscape* entitled "London, 1996" (taken at the same cemetery),[12] chalk arrows drawn upon the ground draw the viewer's attention towards the enclosed corner portico (which lies outside the frame of the photograph).[13] Thus the sacred and the profane clash. These *Manscapes* offer proof that places where the dead rest also serve as venues where desire is enacted. Sontag has argued that "the photographer both loots and preserves, denounces and consecrates" (1977, p. 64). In documenting cruising spaces, Evergon consecrates these spaces as worthy of respect and worthy of being contemplated.

"London 1996"[14] (another *Manscape* taken in an unnamed cemetery)[15] features a derelict section of the graveyard. A weathered stone funerary monument signifies that the ground depicted in the photograph is consecrated, a place where dead bodies lie. In the foreground of the photograph the viewer sees a sheet that has been carefully placed on the ground. It is difficult to view this image and deny its narrative content – that bodies have lain on this sheet. Is this an image that narrates the desecration of consecrated space? Testifying as it does to the enactment of desire in a place set aside for death, the image is profoundly elegiac; offering those who view it an opportunity to question the pathos of fugitive desire finding such a place of expression, a place to lie. In this sense the photograph performs a kind of mourning that is in harmony with its subjective content (a grave space).

PHOTOGRAPHY, LAW AND CRIMINALITY

Since the nineteenth century, photography has proliferated as a practice implicated in the determining of guilt and the apportioning of the status of criminal. Photography can be understood as a technological extension of the gaze of the law.[16] Tagg argues that "[l]ike the state, the camera is never neutral" (1988, p. 63). Aligning photography with Foucault's strategy of power-knowledge, he points out that those places where photography was practiced (the police cell, the hospital, the asylum, the barracks and the school) correspond to those institutions where bodies were subjected to discipline. Thus the practice of exposing bodies to the gaze of the camera produced photographs which Tagg characterises as a "trace of wordless power" (1988, p. 64). Part of the power of the *Manscapes* is that they are visually reminiscent of a past photographic tradition linked to the locating and positing of criminality.[17] Critical receptions of Evergon's work have emphasised that the *Manscapes* evoke a crime scene aesthetic.[18] That the images

are devoid of corporeal figures yet laden with clues contributes to the forging of such comparisons.

Douzinas and Nead observe that:

> law is the combination of reason and necessity; for law, art is the combination of sensuality and freedom (1999, p. 2).

They argue that photographs:

> support our imaginary identifications; their importance and effects are too great for law to stay uninterested in them (1995, p. 5).

In considering photographs, this chapter speaks to the very tension of what is invested in culture as a legitimate object of scrutiny for "legal" meaning. Photographs are important because they supplement traditional legal texts (trial reports, newspaper accounts of trials, etcetera) by offering *insights* into gay resistance to law. *Manscapes* represent the *mise-en-scene* of beat (and cruising ground) encounters where gay desire is enacted. In capturing scenes or spaces that many people would consider abject and unworthy of documentation, the *Manscapes* prompt a re-evaluation of the idea that these spaces are necessarily squalid and unsightly.

EVERGON: A PHOTOGRAPHIC FLÂNEUR

Photography, as a practice, can be traced back to the art of flânerie. As Sontag has observed

> photography first comes into its own as an extension of the eye of the middle class flâneur (1977, p. 55).

Gay men who cruise and photographers both seek out pleasurable sights:

> The photographer is an armed version of the solitary walker reconnoitering, stalking, cruising the urban inferno, the voyeuristic stroller who discovers the city as a landscape of voluptuous extremes (Sontag, 1977, p. 55).

Smee, in reviewing the Evergon exhibition "An Aesthetics of the Perverse," imagines Evergon as embodying Sontag's vision of a photographic stalker as he "slings his camera over his shoulder, gets down and dirty and brings us the results."[19] However, Evergon is no cultural interloper, he does not intrude on these spaces or colonise them as an outsider.[20] Like a flâneur whose senses are attuned to clues as he strolls through the arcades of Paris, Evergon's photographic forays follow in this grand tradition:[21]

> Sometimes just walking around, you know you are in the right spot . . . This past summer, I was walking with a friend about 45 minutes from my home. We were approaching a train viaduct when I began to 'twitch'. We were beside a 'tree hidden' space that was fenced off from the new town houses and the train track. Sure enough, there were the markings of male-to-male lust – condoms and their wrappers with two men on them, an abundance of soggy Kleenex and a silk tie still knotted at one end dangling from a pine tree.[22]

Evergon's first flâneric escapades took place when he revisited the sites of his childhood "dens" near his family home in Niagara Falls, Ontario. To date, Evergon has photographed cruising grounds all over the world.[23] A diverse range of cities have been explored and photographed, including London, Bradford, Leeds, Manchester, Buenos Aires, Vancouver, Ontario, Helsinki and Sydney. The work is thus international in scope and comprises several thousand images. Evergon says of these manscapes:

> These are the enchanted forests of homo folklore – transient locales identified through word-of-mouth and maps drawn on little scraps of paper. These are not badlands, but are territories with behavioural codes which survive as long as there is relative security and guaranteed anonymity. Government and police forces are constantly trying to close down these areas

Fig. 1. The Spit, 1998 © (Photographer: Evergon).

> through intimidation, limitation of access, and more recently, by gentrification. In this sense they are landscapes under siege – cultural battlegrounds. They are history (1997, p. 52).

Evergon's photograph "The Spit, 1998" (see Fig. 1) speaks to this idea that beat landscapes are laid siege to.

In the image, the "male" side of a toilet block is partly concealed by a large sign announcing the imminent demolition of the facility. This "manscape" captures the precarious nature of many beat spaces, alluding to the fact that the architecture and geographic features[24] of these spaces are impermanent.[25] Attesting to the many facilities that have been demolished in the past, the dark, shadowy tonal properties of this photograph evokes the demise of space conducive to gay desirous flows.

LANDSCAPES OF PREDILECTION

Landscape photography evolved in the nineteenth century as a way of idealising public spaces as places of intrinsic harmony and beauty.[26] Evergon's photographs are situated both within and outside of this tradition. For example "Tamarama

Fig. 2. Tamarama, 1998 © (Photographer: Evergon).

1998" (see Fig. 2) is deeply evocative of the traditions of landscape photography. It depicts a cluster of trees that part in the center of the image to reveal a secluded pathway that lures the viewer to proceed through to the horizon that lies beyond the trees. The photograph's tonal properties are broodingly dark, its romantic and sentimental qualities reinforced by the guiding light that delineates a path for the eye to follow.

Evergon says of his landscapes:

> I photograph the landscape not like a woman's body. There are no rolling hills, no valleys, no clouds, no expanse of water, no horizon, no illusions, no romance (1997, p. 57).

Many of the manscapes are found or located by gay men seeking out a constructed landmark. Whether that landmark is a concrete bunker, a toilet block, a lifesaving clubhouse, a cemetery wall, the underside of a bridge or an abandoned factory,[27] they all serve as a means of aiding men to discover, return and guide others to these places. This is not to say that all cruising spaces' landmarks are enduring or solid. Many of the manscapes documented by Evergon are marked only by the presence of trees and foliage. They account for some of his most disquieting

Fig. 3. Seaforth, 1998 © (Photographer: Evergon).

images because they suggest that desire is present on the ground, in the dirt. For example a photograph entitled "Seaforth, 1998" (see Fig. 3) depicts a close-up of the ground. Native Australian fern leaves lie crushed underfoot, gesturing to the bodies that pass through and pause in this terrain.

PHOTOGRAPHY AS A TRACE OF DESIRE: GRAFFITI

Graffiti is often encountered in beat spaces, its existence testifying that beats are spaces where desire is enacted. Beat graffiti incites desirous behaviour. Names, dates, phone numbers and bodily descriptions are inscribed on the walls, often accompanied by lewd pictures. Graffiti facilitates the utilisation of beat space for erotic encounters. Its presence can offend and disgust those men who do not approve of desirous exchanges taking place in these spaces. Graffiti of this nature is often painted over or removed with chemicals. Its endless return testifies to the fact that gay desire resists regulatory attempts to quash both the enacted behaviour and the inscribing of messages that help bring this desire to pass. Offering the possibility

Fig. 4. Central Sydney, 1998 © (Photographer: Evergon).

of libidinal transactions, graffiti flaunts the notion that the cubicle is a space where the only behaviours sanctioned are the removal of bodily waste. And flaunting those commonly accepted notions of appropriate places to solicit contact,[28] gay graffiti is a trace of gay resistance that is both confronting and enticing.

I wish to juxtapose four Sydney *Manscapes* that depict graffiti. The first is titled "Central Sydney, 1998" (see Fig. 4).

It is a close-up depiction of graffiti scribbled on a wall in a toilet cubicle. The periphery of the image is out-of-focus, the text centered and (mostly) legible:

SYDNEY
AUSTRALIA
NATION

I AM DESPERATE
28–2–98 to 28–6–98
10AM -
12–30 AM + 9M
I WANT TO
SUCK
YOUR COCK
ARE YOU
INTERESTED
I LOVE SUCKING
COCKS
COME ON GUYS
ANY AGE
↓
I AM 18 + 6″er
I GIVE DEEP
THROAT JOBS
ALWAYS, TRULY[a]

STATE
YOUR AGE
& YOUR COCK SIZE
ERECT
PLEASE

I WANT ALL
OF YOUR
CUM NOW,

↓ IN MY
MOUTH

[a]This text has been transposed from Evergon's photograph "Central Sydney, 1998."

This photograph, with its textual focus, can be interpreted both as *inscribing* and *describing* sexual disorder. Evergon captures texts that offer irrefutable proof that gay men are engaged in acts of resistance. For these texts mark the space as territories where desirous acts are conjured through writing. Turner says of beat graffiti:

> Grammatically incorrigible, the messages are a mixture of plea bargaining, desperate remedies, cocksure requests and rendezvous itineraries, an unofficial history of size, date, e-mail number and heady consequence (1997, p. 8).

Graffiti has an affinity with gay desire in public. Both are perceived as failing to respect boundaries (of public and private, and of what can be legitimately used as a surface on which to write) and both are variously constructed as problems

that require legal regulation.[29] That beat spaces contain graffiti marks these spaces with "evidence" that desires are transacted. The existence of solicitous graffiti in beat space carries with it tremendous risk and danger. It can be read as extremely antagonistic and provoke violence.[30]

Sometimes the graffiti present is pictorial rather than textual. Evergon's "Central Sydney, 1998" (see Fig. 5) captures a drawing that occupies the entire frame of the image.

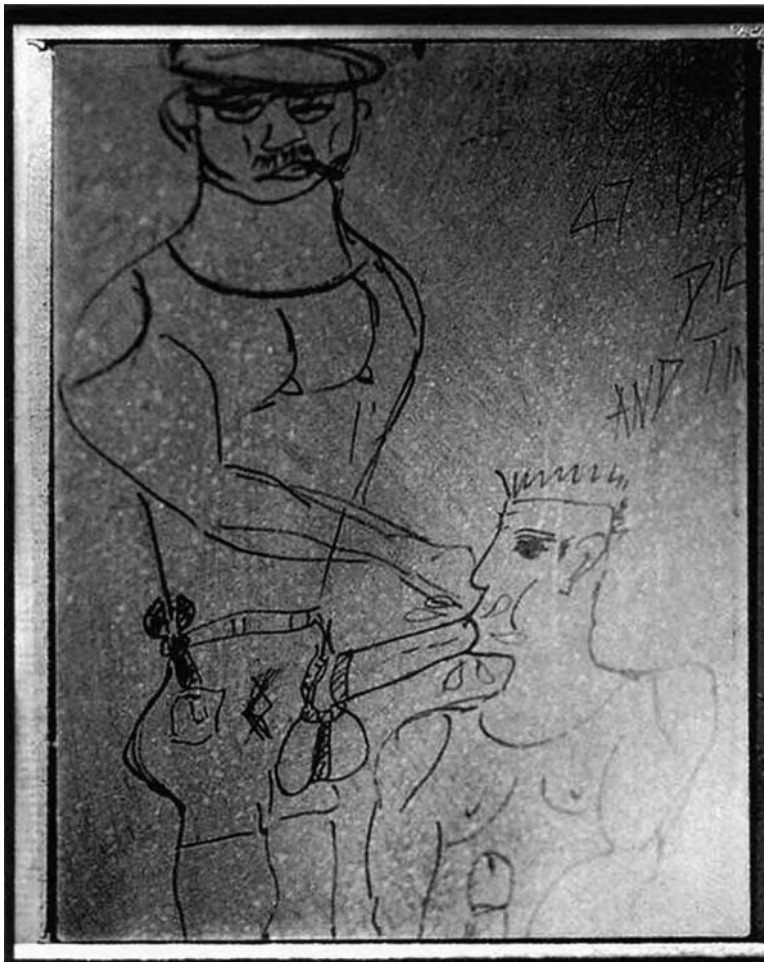

Fig. 5. Central Sydney, 1998 © (Photographer: Evergon).

In the photograph a young man with a crew cut and well-defined muscles is drawn sucking the erect penis of an older man who is smoking a cigarette. The image, which appears to adorn the wall of a toilet cubicle, is highly animated and the black outlines of these male bodies that occupy the frame are as close as Evergon gets to including male desiring figures in the *Manscape* series.[31] By way of substitution, these drawings testify to the sorts of acts that take place in these spaces of illicit desire. Encountered in beat spaces, drawings like this serve as unambiguous signs that beat space is a *place* of desire. In the *Manscape* "Tile Toilet with Big Dick Drawing, 1998" (see Fig. 6), a drawing of an erect penis

Fig. 6. Tile Toilet with Big Dick Drawing, 1998 © (Photographer: Evergon).

Fig. 7. Narrabeen, 1998 © (Photographer: Evergon).

dominates the wall of a cubicle, its presence insisting that this space of disposal is also marked by flows of desire.

Softening the clinical and austere aura of this space, the drawing is a marker of queer territory – its black outline a trace that speaks of the tumescence of flesh that these walls have harboured.

"Narrabeen, 1998" (see Fig. 7) shows a close-up of graffiti, the text of which dominates the frame.

Some twenty lines of neat cursive script are assiduously inscribed on a wall. The text is illegible due to its minute size and the fact that it is weathered in such a way that the script has bled, causing the words to appear to seep off the wall. Rust and dampness, visible in the form of "runs" contribute to this effect. The text resists the imposition of meaning. Is it an elegy to past desirous conquests, an explicit tale of sexual acts enacted within the space of the beat or some sort of narrative that entreats the reader to respond? The power of this image is deeply symbolic. For the bleeding text is not, paradoxically, unreadable. This particular photograph attests to the fact that gay desire (in public) exists in a state of fluidity and flux. The blurred text speaks to the multiplicity of ways that gay desire in public is expressed

and enacted. Bodies merge and then part, blurring the distinction between public and private and illicit and licit forms of contact. The text resists classification as *certainly* being perverse or offensive. That this work of art (a photograph of blurred graffiti) playfully offers the reader a myriad of interpretive possibilities runs counter to those notions (cherished by law) that texts can only offer one literal interpretation. Policing the meanings offered by this image would prove futile. For the photograph literally "licenses pleasures" (Douzinas & Nead, 1999, p. 5). I use this term to denote that this image supports (indeed fuels) the imaginary identifications of gay men who contemplate the photograph and, to use West's term, "read the writing on the wall" (1999, p. 14).

PHOTOGRAPHY AS A TRACE OF DESIRE: EVIDENCE

Returning to the theme of photography and criminality, I wish to examine how the *Manscapes* contain subtle signs that can be read as evidence of gay resistance in beat spaces. That Evergon's images provoke comparisons with crime scene photographs is well documented. However, it is not simply because Evergon's photographs *resemble* crime scene photographs that I seek to classify these images as intrinsically valuable to the project of examining how gay desire in public is imagined and represented.[32] For the photographs depict spaces where crimes have *taken* place. Whilst not seeking to argue that the photographs incriminate (they are not connected to the practice of policing the law), the places depicted are, by their very nature as beats and cruising grounds, sites where people engage in sexual acts in public. An attentive viewer can see the detritus of sexual acts evinced in the images – discarded tissues, condom wrappers, items of clothing and other signs of desire. The photographs evoke powerful impressions of illicit desires pursued in public. That is, they are suffused with evidence of desire that is transient, "on the run."[33]

I wish to discuss various *Manscapes* to elucidate how they encourage the viewer to invest the photographs with narrative potential.

"Central Sydney, 1998" (see Fig. 8) depicts a row of some nine or ten white porcelain urinals.

Light floods through a bank of three windows, augmenting the camera's flash and lending the image an eerie quality. Devoid of inhabitants, this *Manscape* still manages to hauntingly evoke a strong aura of *unseen* bodily presence. Evergon remarks that this *Manscape* conveys "a fabulous moment of fiction,"[34] the absent bodies belying the queer truth of this space.[35] Several objects lay discarded on the floor including what appears to be a tissue.[36] Whilst the tissue should not be read as proving that desire has transpired, it is nevertheless a clue. Laden with erotic potential, this photograph testifies that gay men occupy public spaces.

Fig. 8. Central Sydney, 1998 © (Photographer: Evergon).

"Erskineville, 1998" (see Fig. 9) is a photograph that is less subtle in its provision of clues.

A pair of trousers lie entangled in thick hinterland. Snapped tree branches speak of the passage of human bodies through what appears to be dense, uninviting terrain. This photograph tells of a hasty departure. Does this copse conceal a hidden platform where bodies have lain? Dark black tonal properties predominate and lend a sense of mystery and alienation to this photograph.

In a *Manscape* entitled "Georges Heights 1998" (see Fig. 10) a concrete bunker is depicted in the centre of the image surrounded by trees and scrub.

Christened with the title "House of Chanel" (painted on the wall), the famous Chanel sign of interconnecting Cs provides a clue to the uses this bunker is put to. Suggestive of gay affluence and pink dollars spent on luxury goods and fashionable accoutrements, the symbol operates as a synecdoche. Borrowing West's phrase, this beat space literally "houses and articulates homo-desire" (1999, p. 13). Dominating the center of the frame, the bunker entrance is shrouded in darkness. This photograph is remarkably insinuative. Just what desirous acts are transacted in this hidden shop of pleasures? Who "shops" here? Read as one of the many

Fig. 9. Erskineville, 1998 © (Photographer: Evergon).

photographs in the *Manscapes* series, this photograph provides evidence of gay defiance and resistance.

Five *Manscapes* that contain cues to the gay use of space are so subtle as to at first glance evade observation. The first is a photograph entitled "The Spit, 1998" (see Fig. 11).

It depicts three small boats upturned and resting on top of a fence. Masts of small yachts can be glimpsed through the foliage. This is unmistakably a beachside location as sand is visible on the ground. Read in the context of both the exhibition and Evergon's oeuvre, the image reveals its hidden connotations. The boats provide a temporary sanctuary for bodies to enjoin; the darkness that dominates this photograph evokes a sense of privacy. This photograph testifies to the diversity and multiplicity of beat spaces, a fact best expressed by West: "beats are silent, dusky, libidinal spaces where men have sex with men" (1999, p. 13).

Foster argues that:

> Evergon's images construct a visual equivalent of the liminal and libidinal psychic spaces that beats become (1999, p. 22).

Fig. 10. Georges Heights, 1998 © (Photographer: Evergon).

He elaborates, emphasising the transcendent quality of beat spaces, which he characterises as being:

> conjured momentarily between two men, transforming the drab reality of toilet or bushes into a mythic territory of liberated desires and sexual warmth (1999, p. 22).

This emphasis on conjuring, of the desire enacted in the beat space being ephemeral,[37] is evinced in the *Manscapes*. "The Spit, 1998" (see Fig. 11) testifies to the multiplicitous uses that public space is put to. By day this space is used for the storage of boats, but at night this space is transformed into a sheltered space that facilitates the expression of gay desire. Indeed, any sheltering space in Evergon's *Manscapes* is a potential site for gay sex. In "Bondi, 1998" (see Fig. 12) sunlight passing through a colonnade casts shadows, lending the portico a temporary veil of privacy.[38]

Gay desire might find sanctuary in such a sheltered corner,[39] away from the gaze of public traffic. Similarly, the saturating darkness of "Central Park, 1998" (see Fig. 13) suggests a space of refuge for bodies to desire.

A *Manscape* that is particularly evocative of this notion of sheltering space is "Erskineville, 1998" (see Fig. 14).

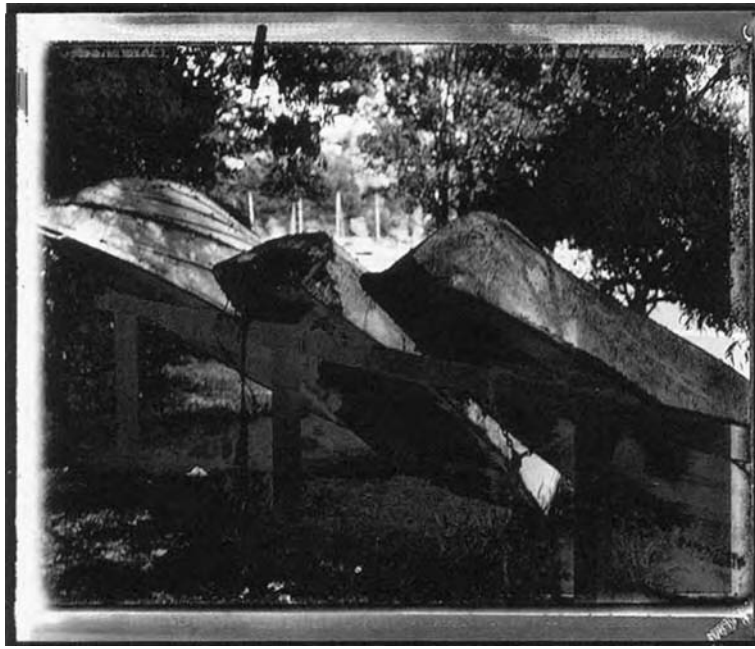

Fig. 11. The Spit, 1998 © (Photographer: Evergon).

Two steel gates lie ajar, the darkness permeating the foreground offset by a square of light at the other gated end of a passageway. This *Manscape* is suffused with irony, for the unbolted gates allow entry into this space. As such they do not lock bodies out, rather they provide access to a darkened haven where bodies can linger in the shadows. This is not a space of internment, it is a space for the release of captive desires.

The fifth Evergon *Manscape* that appears to be devoid of explicit referents of desire is entitled "Bondi, 1998" (see Fig. 15).

In this image, a canopy of trees and bushes dominate the entire frame. In the center of the image the figure of a man stands pensively with his hands on his hips. His chest is bare and his expression is neutral. His presence is the frame is fixed, not just by the photographer, but by the simple fact this male figure is painted on wall. As such this male figure is caught in a permanent state of loitering. This figure (along with the graffiti drawings) is one of a few male bodies ever featured in a *Manscape*. As such, this body carries great synecdochal power. For the *painted* body lingers as a reminder of all those men who have entered the space of the

Fig. 12. Bondi, 1998 © (Photographer: Evergon).

beat (not just *this* beat) and emulated this figure by standing and waiting for an approach.

MANSCAPES: SPECTRES, DISORDER, WOUNDS

Gay men share an affinity with the twin notions of haunting and spectrality. Gay desire is imagined as inherently nomadic and formless, a ghost-like desire that

Fig. 13. Central Park, 1998 © (Photographer: Evergon).

haunts and disturbs the everyday.[40] Haunting and the practice of photography share an affinity. Sontag likens photographs to "paper phantoms, transistorized landscapes" and "those ghostly traces" that testify to the dispersal of bodies (1977, pp. 68 and 67 respectively). Similarly, Barthes notes that that the photograph is literally an emanation of the referent (1981, p. 81).[41] Various *Manscapes* speak to this theme of haunting, supporting Hocquenghem's belief that homosexual desire is inherently musical in form and appearance; existing in rhythms, intervals, pauses and dramatic movements. Thus to Hocquenghem, gay desire:

> conjugates invisibility and visibility in this rhythm of emergence and disappearance (1978, p. 73).

In refusing to fix or capture the gay body *in situ* (in the space of the beat), the *Manscapes* testify to the inherent musicality and spectral quality of gay desire, for they capture gay desire in the elusive form of the wraith. The *Manscapes* are hauntingly evocative because they offer traces of desire – the graffiti, discarded paraphernalia associated with public sex (condom packets, tissues) and other clues that lurk in the photographic frame. Smee describes these traces as "residues of

Fig. 14. Erskineville, 1998 © (Photographer: Evergon).

the perverse and erotic," a description that attests to the desirous uses the spaces in the *Manscapes* are put to (1999).

Beat spaces diminish the social imperative to identify, classify, place in a hierarchy. As West observes:

> Beats as architectural or geographical spaces are temporal zones where private/public histories and identities collapse into a silent void of intuitive, erotic and emotional responses (1999, p. 13).

Thus beats are inherently chaotic and disorderly spaces. As decidedly queer spaces they do not: "tell a simple story of order" (Betsky, 1997, p. 22). They are spaces where formal laws are not accorded respect. Rules and conventions are thwarted when gay men pursue their resistant desires in public spaces. As West has observed:

> [g]aps in doors, glory holes and broken locks serve to blur, actually and symbolically, relations of power (1999, p. 13).

Thus beats and cruising spaces are places where notions of order are problematised. Gay desire is chaotic, unpredictable and disobedient; it looks to identify and exploit opportunities that reside in such seemingly insignificant environmental conditions

Fig. 15. Bondi, 1998 © (Photographer: Evergon).

as gaps, holes and breaks. They are tactically exploited to permit illicit sights and illicit forms of touch. In short, they enable desire to take flight.

The *Manscapes* attest to the wounding inherent in gay sexual expression. Beats and cruising grounds exist as "fault lines" in the social landscape where the relative dominance of male heterosexuality is displaced, giving way to predominantly gay sexual expressions and desires. In rupturing the social terrain, gay men disturb the peace – imagined as the stability and predictability inherent in heterosexual public displays.[42] Evergon's photographs capture the essence of this rupture. As West observes "the existence of beats reveals the wounds, the agape, the desire to puncture" (1999, p. 16). He elaborates on this theme of the wound:

> [M]en are not meant to be punctured by other men, not meant to be "wounded", like women. But they are . . . Beats are a vehicle for this erotic, illicit, epistemological wound (West, 1999, p. 14).

The *Manscapes* expose this wound, not as a pathological sign of shame (something to be concealed, covered over, kept unseen) but rather as a celebration of the fact that gay men penetrate and puncture each other's bodies and derive pleasure from

doing so. The *Manscapes* evince seismographic qualities in that they measure the rupturing and record its occurrence. Similarly, the aesthetic properties of photographs present the wound of gay sexuality as something that will not heal.[43] The camera will not close the gap or suture the wound. It presents gay sexuality as something that will not go away. Gay sexuality at large may well be read as a fault line or a wound, but the photographs reveal the beauty of these traits; beguiling and expressed in the "texture of dusk" inherent in the images (West, 1999, p. 14). For as West observes, having contemplated the *Manscapes*:

> there is a gift inherent in this wounding that is an intimate, sensual understanding of Other (1999, p. 14).

In documenting how gay desire disturbs the *imagined* tranquility of an idealised social landscape,[44] the *Manscapes* celebrate this wounding and rupturing as a queer potential to reconfigure. how social spaces are represented. The *Manscapes* evince a second type of rupturing. By documenting feats of gay resistance, they rupture those proscriptions of silence that have long been attached to the taboo subject of beats. Photographed, exhibited (and catalogued) as works of art, Evergon's *Manscapes* make beat and cruising spaces visible and conspicuous. In doing so, Evergon's photography resists the marginalisation of these spaces and the corresponding denial of their importance as sights of resistance.

COHERING BODIES OF LAW/LORE

To view Evergon's photographs precludes the viewer from taking a passive stance. The photographs enjoin the viewer to *look*, to *read*, to *follow* and to *inhabit* (however vicariously) these spaces of illicit desire. In this sense the photographs encourage complicity in the viewer who is made privy to the uses these spaces have been put to. Looking at the images and deciphering the clues they contain, the viewer is made, to subvert a formal legal term, an "*accessory after the fact*." For to view Evergon's photographs is to enter the space of the beat or cruising ground, to be made familiar with what takes place within these spaces and to leave the space (looking away from the photographs) with a sense of *knowing*. In gazing at the image, the viewer comes to learn something about gay resistance, becomes initiated.

The *Manscapes* evince a profoundly queer sensibility. They do not assist in capturing the gay form or body within the frame, rather they tease us with signs that gay desire has been present. In this sense they mock law's reliance and faith in the photographic apparatus as a tool to capture and discipline bodies. *Manscapes* thus encapsulate a resistant counter practice of photography.

Sontag has argued that the act of photographing is more than passive observing, it is:

> like sexual voyeurism, it is a way of at least tacitly, often explicitly, encouraging whatever is going on to keep on happening (1977, p. 12).

Evergon's landscapes of predilection would seem to support Sontag's credo that photography functions as a form of encouragement; playing a minor though important role in the incitement of desire.[45] Evergon touches on this idea, insisting that the *Manscapes* "are not only about documentation,"[46] for the negated spaces offer a wealth of fictive and imaginative possibilities:

> I find these "manscape" spaces beautiful, titillating, exhilarating, frightening and the source for erotic flights of fantasy and fiction. I mistreat the Polaroid film in development to create a solarization of the negative. These grayed out spaces or negated spaces are where the fiction and fantasy abide.[47]

And in inciting desire, photography encourages gay men to transcend their outlaw status by seeking out their own space to enact desire. Men will continue to meet in beat spaces and leave traces of their presence behind. These traces of gay bodies in Evergon's work/world allude to a permanence that law can rupture, displace or even relocate, but never quash. Evergon's *Manscapes* are works of refusal. His mysteriously brooding photographs accomplish many feats of resistance. They document the space of the beat, not as an abject zone of deviance, but as veritable enchanted forests of homo folklore. Tantalizing in their failure to arrest the figure (or form) of gay men at large, but nonetheless suffused with evidence of gay occupation (*traces* of passion), they attest to gay desire's inherent liminality (neither wholly visible nor wholly invisible). They also attest to the manner in which gay men reorganise the boundaries of the public and the private and how this is deeply troubling. West remarks that the space of the beat is profoundly democratic. Beats and cruising grounds become temporal zones where private/public histories and identities collapse, giving way to what he terms a silent void of intuitive, erotic and emotional responses:

> Professional successes or failures are left at the cubicle door, at the foot of the urinal. QC's will fuck with plumbers, accountants with surfies, computer programmers with gardeners (West, 1999, p. 13).[48]

Gazing into the dusky, libidinal spaces of Evergon's photographs, the egalitarian nature of these aberrant sights/sites is evoked by the sense of possibility and opportunity that lingers after the viewer has turned away. Like the most potent crime scene photographs laden with enigmatic signs and clues, these photographs are resistant to closure. Walter Benjamin proposed that "no matter what trail the flâneur may follow, every one will lead him to a crime" (cited in Sekula, 1986,

p. 41). Evergon's flaneric escapades have provided photographs that viewers might follow in a similar manner. For the photographs lure us to decipher the surreptitious clues they contain that lead not to *crime* (in the sense of a shameful or deplorable action), but rather to the liberation of gay desire from those forces that would suppress its expression and its right to be represented. Evergon's photographs, distilled into their purest essence, are images of gay resistance and governance.

The desires they evoke are not wholly obedient to "*bodies of law*" (statutory and common law proscriptions), but rather acquiesce to those "*lores of the body*" that also govern the deportment of male desiring bodies in the space of the beat or cruising ground. These *lores* (written on the wall in the form of graffiti which aids the choreographing of desire and *enacted* through bodily gesture) are different to those formal laws that apply to public spaces. They do not follow precedent or rules pertaining to the certainty of precisely what types of behaviour are allowed or disallowed. Whereas *bodies of law* seek to instill and maintain order and to regulate the deportment of bodies, those *lores of the body* that govern gay desire are decidedly chaotic and disorderly. Their disorderly state is related to their sensual nature. The distinction between *laws* and *lores* warrants further elaboration as they derive from antithetical jurisdictional positions.

Lores of the body belong to the realm of the senses and emanate from within. They are discovered through the mingling of feelings, intuition and the gradual escalation of passion. Gay men learn these *lores* by surrendering to their senses; related, as they are to touch, sight, taste and sound. In the space of beat, gay men will rely on tactile gestures to gain consent to enact their desires with other male bodies. This is a process of negotiation, of reading and responding to signs of desire. A glance from another man is held, precipitating the holding of bodies. *Lores of the body* are mysterious and disrespectful of precedent. Each beat or cruising ground encounter sees these intuitive *lores* rehearsed in ways that honour the spirit of the moment. The *body of law* is antithetical to those *lores of the body* that prevail in the spaces of the city. *Bodies of law* come to bear on the bodies of gay men through the imposition of formal rules, regulations and prohibitive measures. Handed down from above (*soverain)*, they are inscribed and operate proscriptively. Denying the sensuous or the tactile, they harness fear (of arrest and punishment) as a powerful incentive to obey that which is written or "entombed" in case law.[49] Obedience to these *bodies of law* effectively operate as a force of petrifaction; inhibiting the expression of gay desire at large.

Lores are implemented by gay men to resist and oppose those *laws* operating to regulate aspects of gay desires. As such *lores* are anchored to the praxis of gay resistance – they work to choreograph the enjoining of bodies and are not aligned with notions of denial and disavowal that are associated with law {"*It is an offence to*"}. *Lores* enable and assist, rather than delimit or restrict, and are governed only

by desire. That they compete with laws in the same jurisdiction (the streets where gay men cruise, the space of the beat) confounds the simplistic ideal that *laws* seek to control human behaviour in isolation to other sovereignties. *Lores* are not found bound in leather volumes, nor are they located and dispensed in majestic court buildings. Yet gay men seeking to enact their desires will defer to these *lores*, interpreting signs of desire in those "summary matters" (moments) that manifest when two men find themselves meeting on the street; exchanging glances, seeking to mediate their desires. A final distinction between *laws* and *lores* is that the latter is not beholden to the concept of a judgment. *Lores* do not lead to sentences, rather, they award pleasure to those bodies that defer to their street sovereignty.

In this sense I seek to queer the notion of *law reports*, by arguing that Evergon's photographs are *lore reports*. They are visual representations that mimic law reports be narrating stories of gay men expressing their desires in accord with the rule of *lore* – those negotiated rules that govern gay sexual intimacy in the space of the beat or cruising ground. They do not displace the authority and power of *law reports* to regulate gay bodily desire in public, but they exist as resistant assemblages – disseminated through the binding of bodies at large rather than the binding of pages in volumes of *law reports*. *Laws* reside in archives, whereas *lores* reside in the street, in those who engage in the practice of everyday life. In short, *lores* govern gay resistance, their enactment is reported through photography.

THE FUGITIVE IN THE FRAME: A FINAL PHOTOGRAPHIC OFFERING

Barthes writes that the "photograph is a certain but fugitive testimony" (1981, p. 93). The *Manscapes* exemplify this notion of fugitive testimony. The traces of desire they contain are signs of victory, and the works are political in that they attest to "the political nature of the outlaws of society" (Cooper, 1997, p. 61). In concluding, I wish to offer a final photograph, "Ramboy Offering Polaroid of Self Exposed in Hiding,"[50] (see Fig. 16) for consideration.

This photograph comes from a second series of Evergon photographs hitherto unexplored in this chapter – "Ramboys: A Bookless Novel."[51] In this image, a partially attired young male figure whose head is adorned by a ram horn helmet is depicted crouching in what appears to be the space of a cruising ground. His hand is outstretched, offering a polaroid photograph to the viewer which bears a striking resemblance to a *Manscape*. The look in his eyes is decidedly louche, seductive. The title of the photograph is significant, for he is surrendering the image of *self exposed in hiding*. This photograph is visually analogous with many of the themes explored in this chapter. Refusing to disguise his presence in the cruising space,

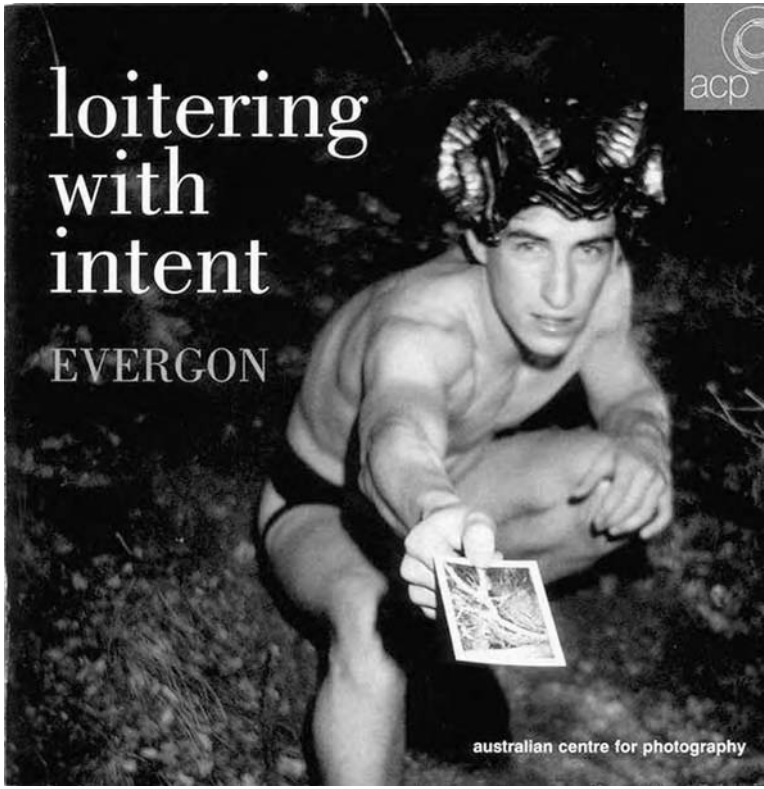

Fig. 16. Ramboy Offering Polaroid of Self Exposed in Hiding © (Photographer: Evergon).

the young man defiantly renders himself conspicuous and visible as a desiring subject. Exposing himself to both the gaze of the camera, the gaze of the viewer and, potentially, the gaze of the law, the Ramboy is the epitome of the gay subject who defiantly occupies public space.

Barthes uses the Latin term *punctum* to describe that which can be understood as a wound, sting, cut or mark. The term describes the way that a photograph punctures each individual viewer like a prick or a cut that leaves an impression Barthes likens to a bruise. In "Ramboy Offering Polaroid of Self in Hiding," the *punctum* that so poignantly resonates in this image is that of audacious resistance. Resisting the possibility of being invisible (a benign and inoffensive state), the Ramboy proclaims that gay desire exists, the *proof* of which resides in the image he offers to the viewer. For "Ramboy Offering Polaroid of Self in Hiding" is

reminiscent of the sorts of photographs produced by law and used as evidence of deviance.[52] This photograph possesses a profoundly queer sensibility; producing a sense of complicity in the spectator who, in gazing at the image, reaches out to accept the proffered polaroid.[53]

CRUISING, PHOTOGRAPHY AND THE CONTINUUM OF GAY RESISTANCE

I conclude by observing that at the time of writing Evergon's *Manscape* series is still very much a work in progress. Evergon's oeuvre is still being amassed as he continues to explore new cities as a photographic flâneur; his camera devoted to capturing new sites of cruising grounds to add to this substantial body of work. These new, as yet "unseen" images will supplement those that came before them and thus testify that gay desire is both resistant and resisting to regulatory practices. As an intrinsically synecdochal art form, the photographs will continue to attest to the *part* (the "local" captured in each photograph taken in a specific place in and time) that speaks to the *whole* (gay cultural resistance that takes place in cities all over the world). In reviewing an exhibition of Evergon's *Manscapes* in Canada, Griffin touches upon the connectedness and synecdochal properties of each photograph:

> But as your eyes linger and as you begin to connect them [each photograph] together, your queer senses begin to tingle as you realize these places are not exotic, not remote, not abandoned. They are as familiar as the local cruising spot in your town or city.[54]

Gay men will also continue to cruise the spaces of the city, attuned to their own *lores*, framing the moment as an opportunity to pursue desire, their continual wanderings providing the impetus that impels Evergon's photographic practice. For whilst existing beats might be closed through regulatory initiatives, new beats and cruising grounds will be *founded* through gay men exploring the city and finding each other. They will mark the terrain of the city with new signs of desire in the form of graffiti, recently discarded detritus (condom packets and the like) and those subtle signs that indicate that the landscape has been disturbed by the presence of passing bodies (flattened earth, snapped tree branches, trodden pathways).

Evergon's *Manscapes* are important to notions of gay resistance. As documents of gay territories that are under siege, the very act of capturing these spaces with the photographic apparatus is itself an act of testimony. As West argues, the photographs: "queer notions that the landscape of the city is decidedly heterosexual" (1999, p. 14).

Turner writes that Evergon's photographs pay homage: "to the classical ideal of the frontier landscape as a metaphor of hope" (Turner, 1999, p. 7).[55] Beats and cruising grounds exist beyond the mainstream as landscapes inhabited by nomadic queer outlaws. In these fringe territories that are, paradoxically unbounded,[56] gay desire exists in a state of hopeful stasis or suspension. Released when bodies meet and enjoin, gay desire returns to its outlaw form – suspended again, hopeful and vigilant to new expressive opportunities.

Douzinas and Nead argue:

> Law pretends that it can close itself off from other discourses and practices, attain a condition of total self-presence and purity, and keep outside its domain the nonlegal, the extraneous, the other – in particular the aesthetic, the beautiful and the image (1999, p. 4).

In decreeing that the *Manscapes* are *lore reports* that offer resistant sights, I concur with Douzinas and Nead's belief that law cannot continue to deny the power of photographic practice or keep the image at bay. By exploring Evergon's *Manscapes*, I hope I have contributed to eroding the pretence of law's purity and belief in its own separation from the aesthetic.

NOTES

1. Evergon notes that photography entails a need to loiter to wait for the right photographic conditions. He remarked "When Ansel Adams would wait all day for the right lighting; he too was 'loitering with intent.' It is the same for myself as a *manscape* photographer" (Personal correspondence with the artist, 8 February 2002).
2. I will henceforth refer to this body of work as *manscapes*.
3. The Australian term "beat" refers to public toilets, parks, beaches and other secluded places where men meet for sexual purposes. Other countries use different terms for beats. In the United Kingdom such places are traditionally called "cottages" and in the United States they are sometimes referred to as "tearooms." It should also be stressed that beats can be ephemeral in the sense that two men might encounter each other in a public place that is not strictly designated or "known" as a beat. In this sense beats are about potential sites of male sexual expression that can arise somewhat spontaneously.
4. This exhibition is Evergon's 100th solo exhibition.
5. An exhibition catalogue entitled "Loitering with Intent" accompanied this exhibition. It features many of the photographs discussed in this chapter. A second valuable source reproducing Evergon's *manscapes* is the exhibition catalogue "Evergon, 1987–1997." At the time of publication of chapter this catalogue was still available from the National Museum of Photography, Film and Television, Bradford, United Kingdom.
6. Concise Oxford Dictionary definition (1999).
7. It is imperative to stress that this aura is enhanced through what can be termed an accumulation of evidence. That is, as each photograph is divested of its desirous meaning, the viewer forms an inventory of these signs of desire (discarded tissues and condom foils, graffiti strewn walls, abandoned article of clothing and visual signs that the ground has

been disturbed). These signs work singularly (that is, in each image) and cumulatively (the successive viewing of each exhibited photograph) to convey this aura.

8. In conjunction with this prevailing silence, these places have largely been figured as beyond representation. This may relate to perceptions that cruising grounds and outdoor meeting places are, aesthetically speaking, ugly and abject and therefore not worthy of artistic representation.

9. West describes the landscapes as having the texture of dusk, a time when "the absolutes of night and day fold in upon their edges" (1999, p. 14). That the images evoke the dusk or twilight – that time which is neither night nor day time, is significant. It symbolises yet another boundary that gay desire traverses. Additionally, the twilight has long held currency as a time of mystery and romance – a time of becoming. It would seem that in being so suggestive of the twilight, Evergon is gesturing to the time when gay desire is conjured into being in the landscape of the city.

10. Evergon's experiences reveal that gay men moving through beat and cruising spaces are likely to encounter danger in the form of queer bashers or thieves. In personal correspondence Evergon recounted that on two occasions (in the cities of Chicago and Bradford) he was menaced by gangs of youths who attempted to rob him of his camera and wallet. Despite thwarting both robbery attempts, his experiences attest to the danger inherent in queer spaces. In a *Manscape* taken in St Catherine's, Ontario, an abandoned chair is inscribed with the text "If we ever catch you skids here again we will kill you" ("Evergon 1987–1997" 1997, p. 54, Fig. 10). This text recalls similar violent sentiments that are often scrawled on the walls in beat spaces the world over. I once saw a message printed on a wall in Melbourne that read "If we catch you fucking faggots in here you are dead").

11. See photograph in "Evergon 1987–1997" (1997, p. 46).

12. See photograph in "Evergon 1987–1997" (1997, p. 49).

13. Betsky attests to the fact that a portico can function as a queer space. He documents the cruising grounds include stoops, porticos, windows, and doorways of buildings (1997, p. 148).

14. See photograph in "Evergon 1987–1997" (1997, p. 32).

15. Evergon is scrupulous in his efforts to ensure that the places he photographs remain anonymous to protect the habitats he visits from being precisely identified and located. In depriving us of a tourist's guide to the cruising grounds that he documents, Evergon ensures that the photographs imaginary potential is not delimited.

16. Maynard has documented how the Toronto police have, in the past, gone to elaborate lengths to photograph men engaged in same sex acts of genital intimacy in public lavatories as part of their drive to convict men of public sex charges. Some of these incriminating photographs are reproduced in his article. See Maynard (1994, p. 228).

17. For a discussion of the idea that photography has a "past" see Rosler (1989, p. 304).

18. In reviewing the Sydney exhibition' "Evergon: An Aesthetic of the Perverse," Smee remarked that Evergon's photographs stylistically hark back to Eugene Atget's photographs of unpopulated bourgeois Parisian landscapes, which Walter Benjamin famously likened to crime scenes (1999).

19. Smee (1999) "Toilet Training" in *The Sydney Morning Herald* "Metro" supplement, February 19–25.

20. Evergon respects the fact that in moving through beat spaces he may disturb proceedings or intrude upon intimate exchanges. His concern is reflected in his remark

"when I enter a populated area I set off the camera flash a few times to announce my presence." In Sydney he returned to the toilet depicted in the *Manscape* "Central Sydney" (see Fig. 8) three times and "each time I felt that I would be interrupting the activity if I made an image" (correspondence with the artist 8 February 2002).

21. Like Evergon, David Wojnarowicz was very much a photographic *flâneur* who recognised the power of being able to wander and document the streets with his camera. His first photographs (taken with a stolen camera when he was in his teens) capture the drug-sex-and-hunger-haunted-streets' "of Manhattan" (Lippard, 1994, p. 8).

22. Personal correspondence with the artist, 8 February 2002. Evergon also remarked that he uses guides like "Spartacus," friends, e-mail and gossip to locate areas that might be suitable to photograph. In Sydney, some members of the "Sisters of Perpetual Indulgence" conducted tours of beats and cruising areas to help familiarize Evergon with Sydney and its environs. Once on site, he "sniffs out" the locality for *manscape* photographic opportunities.

23. Evergon's travels have seen him visit cruising grounds in Europe, North and South America, Canada, Britain, Finland, India and Australia.

24. Beat terrain is often modified by councils de-vegetating heavily wooded areas, installing arc lights to flood the space with light (making night time approaches to the space conspicuous) and generally taking other measures (locking gates, deploying security patrols) to deter gay men from pursuing their desires.

25. This is not to suggest that gay men will not use newly constructed facilities in beat spaces. However many new facilities are designed and constructed to delimit the potential for illicit uses of the space (public sex or drug use). Many councils in Australia are now replacing toilet blocks with EXELOO™ single occupant, automated facilities that open directly onto the street. That is, the traditional concealed entry that ensures privacy is dispensed with. Combined with a "fixed duration of time for use" feature, these modern toilets discourage two occupants seeking to enter the space.

26. These qualities were perceived as a natural component of the pastoral realm, as typified within the British tradition of landscape photography. Photographers like Roger Fenton were seen as exponents of the myth that nature was ordered and in unity with the ideal of social order. The keynote of this aesthetic was harmony with images of peaceful villages, unassuming churches and gnarled oaks featured in pastoral landscapes as icons of social harmony.

27. All of these landmarks feature in various *manscapes*.

28. The "personal" columns in newspapers are sanctioned as legitimate means of communication. Similarly, offers to meet like-minded people for sexual encounters (and relationships) are a prominent feature of the queer press.

29. Accordingly, metaphoric terms like "clean-up" operations have been used to describe regulatory drives to ward gay men and graffiti artists away from public places.

30. In a 1990 New South Wales murder trial, Justice Badgery-Parker implied in his charge to the jury that by leaving his phone number on the wall at a public toilet, a deceased gay man: "had motivated eight co-accused schoolboys to lure him to the scene and assault him not for a desire for violence for its own sake but related to anger at the conduct of homosexuals in the toilet" (Supreme Court of New South Wales Criminal Division, Nos 70372–70377 of 1990, 15.4, p. 21). For a particularly original analysis of strategic stories told *to*, *by* and *of* the courts in relation to acts of violence directed at gay men see Kiley (1996). On the perils of solicitous gay graffiti that can lead to violence and murder see

Young's summary of the New South Wales Supreme Court case *Andrew and Kane* (2001, pp. 309–311).

31. This is not to say that Evergon does not photograph male figures in desiring tableaus. In a smaller body of work entitled "Dick Flashers," Evergon has photographed men in beat and cruising spaces with their genitals exposed.

32. That Evergon's *manscapes* resemble crime scene photographs is evident if one compares his photographs to documented crime scene images. For example, in Sante's "Evidence" (1992, p. 79), photograph number 43, entitled "Park where Paul Richard 15 Lawn Ave was shot, Christensen # 5291/17/16 file 966" bears a striking resemblance to Evergon's *Manscapes* oeuvre.

33. For a discussion of the idea that desire is inherently nomadic and migrant see Deleuze and Guattari (1983).

34. Personal correspondence with the artist, 8 February 2002.

35. Evergon's account of composing this image partly elucidates why this *manscape* so potently evokes a sense of presence. For when Evergon returned to this toilet to photograph the space it was full of men. When he stood in the space and announced that he was going to photograph the urinals, he advised the men present that if they "did not want to be in the photograph, they should stand behind me. I have never had that many testosterone pumped men line up behind me in my life." Thus whilst there are no bodies *in* the frame, their presence emanates from *within* the image (personal correspondence with the artist, 8 February 2002).

36. It also resembles a handkerchief, napkin or paper towel. The ambiguity of the item is part of the lure of the image.

37. Betsky (1997, p. 43) argues that the creation of momentary spaces of union that disappear almost as soon as desire is consummated is an identifying characteristic of queer space. His emphasis on the transience of queer space is important, for it reminds us that space is continually invested and divested of queer qualities as desire flows through the city.

38. Betsky (1997, p. 141) argues that shadowy spaces "dark alleys, unlit corners" account for the first queer spaces of the modern era. Evergon's *Manscapes* document that the use of these spaces continues in contemporary times.

39. On the "corner" or "doorway" as a historical location for the gay body see Bartlett (1988, p. 216).

40. This idea that gay desire is spectral is sedimented in representations of gay men as visually duplicitous, able to appear and disappear at will.

41. The emergence of the photographic image shares an affinity with the apparition of spectres. Photographic prints gradually reveal their form (and content) when paper that has been exposed to light is bathed in developing solution. Bathing the paper in a "fixing" solution will arrest the image and fix the tonal properties of the print. The process is inherently spectral – the photographic form literally appears out of nowhere.

42. The discontinuity of heterosexuality is evinced in all the signs present in the beat and cruising ground spaces that gay desire is being enacted.

43. The luscious, silver tonal properties of many of Evergon's "duratrans" *Manscapes* resemble X-ray images. This aesthetic effect encourages the viewer to diagnose the *Manscape* to decipher its meaning. Much in the same way that X-ray images reveal cracked or broken bones, or the presence of tumors, Evergon's "duratrans" *Manscapes* reveal ruptures in the form of trampled terrain or space that has been appropriated in the

pursuit of desire. For examples of "duratrans" *Manscapes* see "Evergon 1987–1997" 1997, p. 22 ("Bradford 1996"), 25 ("Blackpool 1997"), 26 ("Leeds 1996").

44. That the social landscape is idealised as primarily heterosexual space is supported by Evergon's remarks. He notes that at the end of the twentieth century we are still harnessed with the Victorian concept that parks should be used only in the day time and solely for the pleasure of the nuclear family (1997, p. 145).

45. On the idea that photographs are "incitements to reverie" see Sontag (1977, p. 16). Similarly, Barthes argues that photographs provoke "tiny jubilations" in the viewer (1984, p. 16).

46. Personal correspondence with the artist, 8 February 2002.

47. Personal correspondence with the artist, 8 February 2002.

48. Giorno (1994, p. 71) also attests to the democratic nature of anonymous sex, writing that participants "don't bring their private or personal world to anonymous sex" and that such interactions are not governed by "inhibiting rules, closed rules or fixed responses."

49. For a semiotic reading of law as dead, an "entombed law, no more than detritus, remains" see Goodrich (1990, p. 254).

50. A "detail" (enlarged version) of this photograph adorns the cover of the exhibition catalogue "Loitering with Intent" that accompanied the A.C.P exhibition "Evergon: An Aesthetic of the Perverse."

51. Before summarising this other major body of work produced by Evergon, I wish to emphasise that the "Ramboy" photographs, despite their stylistic and formal differences, are connected to the *manscapes* photographs. As Justin Wonnacott puts it "the *manscapes* give the Ramboys a *context*. This is where they live" (cited in Evergon Educational Notes, Bradford museum). The Ramboys series of photographs date back to 1989. Numbering some one hundred colour photographs, the images are richly coloured, lush, baroque and theatrical. The photographs are presented as tableau vivants. Produced in the space of the studio, they mostly feature semi-naked male models adorned in fetish ware (jock straps and heavy boots). The Ramboys are likened to a promiscuous boy tribe, they are the symbolic occupants of cruising ground spaces. In the photographs, references to the classical mythology of Pan, Dionysus and the Satyrs abound, as do references to the Shakespearean tradition of the prankster. The images draw reference from art history and pay homage to painters such as Poussin, Michaelangelo and Caravaggio.

52. I am specifically referring here to the precursor of the mug shot, Alphonse Bertillon's "judicial photograph" (Hutchings, 2001, p. 142). The framing of the head of the young man depicted in "Ramboy exposed in hiding" is particularly reminiscent of Bertillonage, whereby the "full face" was photographed at relatively close range. A profile shot made up the second kind of standard photograph that was taken.

53. This acceptance is bound up in gazing at the image and metaphorically taking hold of the photograph, that is, taking the *memory* of this image away as a souvenir.

54. See Griffin's article "Endangered Habitat: Evergon's Homage to Gay Cruising Spots" at http://www.capitalextra.aa.psiweb.com/queercapital/cx/CX92/CX92_Arts_Evergon.htm.

55. Evergon alludes to the frontier nature of his *manscapes* when he observes that they are "spaces where civilization ends and the wilderness begins." Evergon remarks that the "call-of-the-wild" draws him to seek out and photograph these frontiers of queer desire (personal correspondence with artist 8 February 2002).

56. I use the term unbounded in the sense that two male bodies meeting in any space can imbue this space with desirous meaning. In this sense policing space is a exercise in futility because desire can spring forth at any time and in any place.

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PART II.
SITES UNSAID:
TESTIMONY, IMAGE, GENRE

5. *THE TRIAL*: ELEMENTS OF A LEGAL ASSEMBLAGE OF DESIRE

Edward Mussawir

MACHINES OF LAW

If it has become possible in recent times to talk of a jurisprudence of Franz Kafka,[1] it should be realised firstly that two things dear or indispensable to the writer will have long been disfigured in the study of law: desire and its assemblage. "For spiritual nourishment," he writes of his legal education

> I have nothing but sawdust, which, to crown it all, has been chewed over already by thousands of mouths before me (Kafka, 1966, p. 94, as cited in Legendre, 1997, p. 101).

Jurisprudence, after all, would be a very specialised field in which one must speak a very specialised and sober language; a particular form of expression inseparable from a particular investment of desire. But Kafka's problem with legal studies, if it can be viewed as a problem of sawdust, would not be for example what else one can chew, but simply this: how else to put one's mouth to use? In other words, how to invent a mode of expression as the only real way to desire, or alternatively how to desire as the only real way to express oneself. For this, one always finds a machine – literature, letters, childhood or animal machines perhaps, as Kafka discovers for himself. And of course the various juridical machines through which desire is assembled and organised according to strict formalisations of content and enunciation. Jurisprudence would still not have come close to laying its hands (or its mouth) upon this assemblage in which it, as a small or even marginal component, discovers its functionality: a legal assemblage of desire.

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So what are the machines of law and how are they assembled? How do they produce desire? How are enunciations made possible? These are all questions the answers to which seem self-explanatory to jurisprudence for the simple fact that they form its condition of possibility. In other words they always seem to be pre-given. But Kafka answers them in a peculiarly practical way: enter the police-station for yourself, the courtroom, the lawyer's office, the cathedral, the family home; have yourself thrown in a prison perhaps and invent a way out.[2] *The Trial*, it should be noted at the outset, does not and cannot proceed without particular machines capable of formalising enunciation and content and thus instituting life as a matter of jurisdiction – a processing of the various spaces through which legal desire passes. The justice-machine of "In the Penal Colony" for example, which takes up both a body and a script into its gears and which continues to function at the same time as it is dismantled simultaneously in the story itself as in Kafka's novel,[3] a particular letter-machine with Felice Bauer, an oppressive bureaucratic-machine or an equally oppressive family-machine, a judicial- or litigatory-machine. Kafka must have had an intuition for these kinds of mechanics which concern themselves not with truth or originality but with the simple possibility (indeed, necessity) of expression and desire. The apparatus of "In the Penal Colony," to take the most obvious example, is described in meticulous detail, as if these physical dimensions were as important as the jurisprudential debate which surrounds its cruel operation. Certainly, most readers of this story will identify themselves with the traveller, at least to the extent that they must also learn, in a perplexed way, the workings of this machine while being horrified by its unmistakable inhumanity. "And yet Kafka," writes Heinz Politzer,

> can be identified as little – and as much – with this Explorer as he is with his antagonist, the officer; he hides behind them and gains many an ironical twist from the distance which still separates him from both figures (Politzer, 1974, p. 69).

As a writer, Kafka could only really identify with the one thing that happens to write in this text, namely the machine; the apparatus which inscribes upon the body of the accused (himself inseparable in a way from the machine) the commandment he has disobeyed. The machine itself, of course, has no discourse of its own – it functions irrespective of any justification, or rather "is its own justification" (Kafka, 1981, p. 164) above all, because it *grants* discourse – and those who, upon coming to witness it in action, happen to discuss the intricacies of justice or law, simply find themselves caught up in the phenomenon. It is a discursive machine in the sense that the discourse of justice, which is equally something felt as something expressed, is a question only of formalising commandments and the experience of pleasure or pain – enunciations and their embodiments – all in the one process. It is little surprise that the machine "short-circuits" one might say under the unlearnable

commandment "be just," for the only way to put this commandment into effect would be itself an impossible transgression – the officer feels nothing and is instead disposed of by an apparatus that disintegrates.

In fact, it is in a similar process of formalisation and eccentricity that Kafka writes to Felice, as if through a kind of machine that threatens to fall apart at any second. It creaks and groans, stalls and starts up again, producing as it goes a particular unmistakable expression and a particular irreplaceable desire. "When will I receive your next letter?" Kafka seems to ask, almost pathologically, and therefore: "when will I be able to write once more?" Writing becomes all the more machine-like or automatic and all the more necessary. Of course, the point to be made about the letters to Felice is that the passion and the love all revolve around a life of receiving and sending letters. It is not that Kafka feels the need to express a love developed elsewhere than in his letters, a pre-existent love that needs to be corresponded or put into suitable words (heartache – love-letter), but that the letters are part of a machine that produces this intensity of emotion through its very functioning (letter-passion). Kafka invents a machine in which writing, love and life merge into the one process. One doesn't say "I love you" for example, to convey some pre-existent feeling that needs to be expressed any more than the expression itself is a way of inventing a particular passion for Felice, or a way to make life itself possible.

> You are right Felice; recently I have sometimes had to force myself to write to you; but writing to you and living have drawn very near to each other, and I also have to force myself to live. Shouldn't I? Moreover, hardly a word comes to me from the fundamental source, but is seized upon fortuitously and with great difficulty somewhere along the way. When I was in the swing of writing and living, I once wrote to you that no true feeling need search for corresponding words, but is confronted or even impelled by them. Perhaps this is not quite true, after all (Kafka, 1992b, p. 253).

Kafka searches for a particular mode of expression, but at the same time he is searching for a particular mode of living. In a certain sense, he is both ruler and ruled at the same time, for he sees that one cannot master expression without being servile to desire and one cannot master one's desires without being servile to language and expression. Desire cannot be separated from its expression, nor expression from its desire. The machine however – precisely like the machine of "In the Penal Colony" – brings together on the one hand a pre-given script, a handed-down language indecipherable on its own, with a particular passion, a particular pain. Language becomes decipherable only by having it felt upon one's body, and outside this process nothing would be possible – only asignifying texts and senseless feelings. If anything happens in *The Trial* therefore, as a novel drawn together through different assemblages, it only happens by virtue of having been incorporated into the machine which makes possible both discourse and desire. A

machine which adequately processes or formalises a plane of bodies with a plane of enunciation.

> If there is a Kafkaesque world, it is certainly not that of the strange or the absurd, but a world in which the most extreme juridical formalisation of utterances (questions and answers, objections, pleading, summing up, reasoned judgment, verdict), coexists with the most intense machinic formalisation, the machinisation of states of things and bodies (ship-machine, hotel-machine, circus-machine, castle-machine, lawsuit-machine). One and the same K-function, with its collective agents and bodily passions. Desire (Deleuze & Parnet, 1987, p. 71).

We can already see that Kafka's jurisprudence (if we can call it that) is not a theory but a pragmatics. It is a coming-up-against the language of law; confronting the material and psychological forces in the plurality of its jurisdiction. In short, it is a matter of orders and obedience as the two formalisations of expression and desire respectively that would confine the object of jurisprudence to the authoritative play of discourse. Kafka can't speak about law from a distance because it is already something personal and singular, something mediating in his speech, something tackled head-on as soon as one begins to desire. The law itself, nevertheless, would remain lifeless if not for certain social machines to effectuate the possibility of judicious statements and moral desires: orders and obedience. A court-machine, a police-machine, a legislative-machine, a bureaucratic-machine, a church-machine, a family-machine, and so on. Each have their own realm of rules and enunciations – Kafka knows about them all too well – that would have as a common dogmatic element an image of law through which it would become solely possible to obey and to command and to be incorporated as a responsible subject. Statements are impelled by desires which already presuppose their form of expression. But the question of a machine, in any case, is never "how to express x?" or "how to be y?" for the words and the desires take care of themselves, but rather "how to make it work?" Each scene in *The Trial* is another machine which functions only in relation to another (the bureaucratic discourse of the law court offices in connection with the discourse of advocacy taking place in the lawyer's room for example); an entire assemblage that gives discourse to law and law to discourse – producing at the same time a "you must" which is simultaneously an order and an obedience; a social enunciation and a social obligation.

How can we finally define this legal assemblage of desire? Kafka discovers it only in the very necessity of writing *The Trial*. But one can define it neither in terms of the bodies nor the expressions which may comprise it, in so far as these are precisely the elements acted upon or formalised by a particular machine. Instead, it is only in relation to various potentials or thresholds that a legal assemblage, as the condition of statements and visibilities, can be described. If *The Trial* always appears to get nowhere – if nothing seems to happen in these proceedings – this is above all, because the law can be lived only in the form of a potential. A potential

higher command and a potential disobedience. Why do Kafka's characters so readily discount the possibility of revolution?[4] Either because their very being is tied to the laws which rule over them, or else the revolution is always happening where no-one can see. K learns quickly to submit to the rules of the court (*das Gericht*), as everyone else appears able to do intuitively. The law, after all, is not primarily that which a ruling class would wield against the ruled classes (at most it will be *entrusted* to the ruling class); but it is rather that image for which both the rulers and the ruled alike are bound to observe in their very incorporation into the machine. The "you must" of the law does not travel from one group to another, it cannot be attributed, it is not an enunciation for which someone would be *responsible* but, on the contrary, it is *the enunciation of responsibility itself*. The responsible subject is swept up in this machine which takes form the moment one encounters it.

A legal assemblage in *The Trial* is defined by two potentialities: transgression and authorisation. The possibility of "breaking" the law and the threshold of a superior court. Statements and desires will be produced across this space, in the machines of law, and if certain political options make themselves apparent, it will never be by way of the authorised channels or even through a collective counter-violence waged against the powers that be, but by retreating and being distracted by certain inexplicable figures: women or children. The nurse Leni, for example, draws K away from the lawyer's room and from the inane discourse which goes on there, while the children in Titorelli's building whisper enticingly from behind the door as the painter and K seriously discuss matters to do with the trial. The numerous places of the law, which share only a particular discourse, are cut across by certain potentials of entry and escape – the machine being definable only in terms of these potentials. If law is to be played out that is, and if everyone is to be caught up in a life indistinguishable from orders and obedience, these would come to function only in relation to the territorialising threshold of a higher command and the deterritorialising threshold of an ethereal disobedience. There are only two ways out of Titorelli's stuffy room, a door which leads into further law court offices and the door behind which the girls make taunting jokes and admonishable remarks.

IMAGE OF LAW: DETERRITORIALISATION

In fact, if there is an image of law in *The Trial*, it would be an image that continually loses its place, that appears elsewhere (in the next room, behind the next door), an image that wanders or that must always find a new site at which to take place. Fräulein Bürstner's room serves as the site for a commission of inquiry; law court

offices, we find, are situated in almost every attic, and K's initial formal inquiry takes place in a hall adjoining the room of a washerwoman which transforms back into a living-room the following week. The law is inhabiting certain places, or rather more appropriately, these places are swept over by juridical images. Indeed, one can never say where the place of the law is, or the site where life would encounter the law. In fact, as we have seen in Kafka's letters, it is life itself that must be produced in a particular machine; a law-machine or legal assemblage in which statements and desires are formalised according to a particular image. But what is this image of law in *The Trial* and where is its place? A law that, in fact, never appears to take place in the same location twice, that passes only summary judgments, that operates upon the presumption of crime and whose texts are prohibited but nonetheless filled with but indecent drawings.

Writing about Kafka, Deleuze and Guattari note that in minor literature, "language is affected by a high coefficient of deterritorialisation" (Deleuze & Guattari, 1986, p. 16). This is not simply the case however of a Czech Jew writing in German, a foreign language itself attached in a way to a kind of bureaucratic machine, but of a particular use of the language of bureaucracy or legality itself. Managing to produce new statements, in other words, not by inventing another language, but by putting the old one to a completely new use.[5] To deterritorialise a language of law – which is itself a particular capacity for thought or speech and a particular capacity for animation or passion – would not simply be the possibility of a new mode of enunciation but also a new way of giving life. What of the law does Kafka need in order for it to be lived, and what is superfluous? In *The Trial* an image of law would find itself foreign to the very presuppositions which constitute it.

> For him [Kafka], it is less a question of presenting this image of a transcendental and unknowable law than of *dissecting the mechanism* of an entirely different sort of machine, which needs this image of the law only to align its gears and make them function together with "a perfect synchronicity" (as soon as this image-photo disappears, the pieces of the machine disperse as in "The Penal Colony") (Deleuze & Guattari, 1986, p. 43).

It is an image which already operates as a machine; beyond borders and dialects, but which in itself is also highly territorialised in the sense that none of its terms or postulates can operate without effectively codifying all the others in the construction of a common ground. This is why one rarely encounters any one aspect of the image of law outside of the territory which gives it substance. No language without representation, no judgment without jurisdiction, no crime without a pre-existent responsible subject. Kafka, as the refugee on the other hand, manages to have the territory subtracted while leaving all the terms lost to their own devices: there are people with no homeland, speech without a true language

or a "mother tongue," jurisdiction without reference, guilt without crime. Nothing is left in this law-machine but desire and enunciation, which do not so much impose themselves upon a certain scene as simply inhere in those lives that are acted out and incorporate themselves into a particular legal assemblage. As Walter Benjamin writes of Kafka's other novel *Amerika*:

> Kafka's world is a world theatre. For him, man is on the stage from the very beginning. The proof of the pudding is the fact that everyone is accepted by the Nature Theatre of Oklahoma. What the standards for admission are cannot be determined . . .[A]ll that is expected of the applicants is the ability to play themselves . . . With their roles these people look for a position in the Nature Theatre just as Pirandello's six characters sought an author (Benjamin, 1968, pp. 124–125).

It is like the court which

> . . . wants nothing from you. It receives you when you come and dismisses you when you go (Kafka, 1968, p. 248).

producing in the meantime the enactment of a surreal (an absolutely real) legal drama. In *The Trial* however, the stage upon which this law might be performed never allows itself to be coordinated or territorialised. The question of *topos* or place no longer co-ordinates itself in terms of the images which give it meaning or memory. Is this a courtroom or an apartment building? How can one be arrested in bed? Why is there flogging going on in the junk room? And where, after all, is the scene of the crime? K is continually finding that the images of the law are not quite where they should be. Yet what is happening to this detached element; this deterritorisalised image? The curious thing about *The Trial*, is that while everyone can and must become part of the law (and indeed everyone does), no-one is able to encounter this law other than as an indefinable limit, a force without substance, a process without product or an image without place.[6] The law that makes itself an object of thought no longer has its own ground to stand on. It is in this sense that the novel deterritorialises an image of law, and therefore a particular language of "you must." Three aspects of juridical deterritorialisation will thus be taken up in this section as elements of Kafka's jurisprudential, political and critical (man)oeuvre. These are: (1) crime; (2) jurisdiction; and (3) advocacy.

Crime

From the very first paragraph of *The Trial*, we are confronted with the signs of a most intriguing effacement or disfiguration of crime since "without having done anything wrong," (Kafka, 1968, p. 7) Josef K is arrested. In fact, K comes to be accused of a crime that can neither be recalled nor presented to him; a crime that

can't be represented because it has no existence outside of the trial, and can't be recollected because one is always yet to learn or experience it. More precisely, it is a crime that has no face or *no memory* and has therefore lost its territory. It would be no surprise, except to the law itself, that K claims to have done nothing wrong. As one of the guards says to the other:

> See, Willem, he admits that he doesn't know the Law and yet he claims he's innocent (Kafka, 1968, p. 13).

The law, as K must discover, is always liable to presuppose a certain offence – and this is the point – even if this crime itself is without history, without any substance or co-ordinates: in other words, nothing but the presupposition or *fiction* of crime.

The trial is a particular staging of the potentiality of crime or transgression. What is at issue for the law? It is a matter of instituting life in the structure or image of obligation, in other words by maintaining the possibility of an ordering of desire. The law is a particular invention of guilt; the presupposition of a crime. The structural necessity of this illusion of legality would become evident through Kafka: the law returns everything to a crime that in actuality does not happen, but without which in fact, nothing would return *as law*. The prohibition which, in a social sense comes to constitute an order of desire as obedience, is simply that which appears at the moment it is transgressed and is given only in this transgressibility, this violability.[7] To this extent – in other words that law is aroused and maintained in the *potentiality* of transgression – the original crime does not happen. It is as Derrida suggests an

> Event without event, pure event where nothing happens, the eventiality of an event which both demands and annuls the relation in its fiction. Nothing new happens and yet this nothing new would instate the law (Derrida, 1992, p. 199).

K's crime is the fiction, the non-event, upon which his reality becomes based. If there is any crime at all, it would only be as a figment of the bureaucratic or institutional imagination. Nothing is left of this event in *The Trial*, in fact, no trace or image of the crime really remains except for the very presupposition that it is there or that it has been committed.[8] But if this literary move appears to frighten or disconcert the reader, it would not be so much because of an empathy felt for the innocent man wrongly accused; rather it would be because a certain empathy for the State becomes interrupted: the reader himself is territorialised upon an image of law that – to the extent that this very image institutes the "responsible" subject – ordinarily tends to give one a sense of submission or even satisfaction in the face of legally-imposed violence. K on the other hand, is never informed – in any terms whatsoever – of the wrongdoing for which he is accused and thus can only presume his innocence.

> 'And, if it comes to that, how can any man be called guilty? We're all simply men here, one as much as the other.' 'That is true,' said the priest, 'but that's how all guilty men talk' (Kafka, 1968, p. 235).

This is how the law would respond, by returning the compliment so to speak, by returning every gesture back to a law-machine riddled with the possibility of guilt. No aspect of this machine functions without a potential or fictional crime to form the basis of a command. In this respect, punishment would not be the question of a necessary response to guilt or crime, but rather crime and guilt are made necessary to a machine which deals only in punishment and interdiction. In the words of Benjamin:

> Laws and definite norms remain unwritten in the prehistoric world. A man can transgress them without suspecting it and thus become subject to atonement. But no matter how hard it may hit the unsuspecting, the transgression in the sense of the law is not accidental but fated, a destiny which appears here in all its ambiguity (Benjamin, 1968, p. 114).

The point of this destiny is made clear by the priest who states quite succinctly that:

> The verdict is not suddenly arrived at, the proceedings only gradually merge into the verdict (Kafka, 1968, p. 236).

The moral unconscious is not given at the outset, in other words, but must be produced, and the proceedings themselves – being unprejudiced in the most fundamental sense – coalesce into an image of law according to which one would be capable of simply encountering morality and witnessing crime.

Jurisdiction

The question of jurisdiction is also the question of how a legal assemblage or law-machine manages to function, in the sense that what is at issue in both cases is the capacity for bodies to be attached to texts or enunciations. Jurisdiction, as the mechanism by which matters become tied to the law as territoriality is always a matter of codification, that is, of maintaining the graphic link between bodies (matters) and an order of textual inscription. It is thus also the precondition of guilt; where one's desires become subjected to a particular system of their proper operation. But the question is always especially juridical: how would any matter or instance fall under the authority of some law? Kafka answers this territorial problem in the most aterritorial manner: it is only by being incorporated into a *process*, which is simultaneously a legal assemblage, that both "matters" (in the sense of bodies or events potentially subject to law) and their relevant authorities

or authorising forces, come to exist or to encounter each other. Witness the exemplary machine of "In the Penal Colony": jurisdiction staged as the process of giving the body notice of its textual authority; making the script readable in flesh. The machine does not belong to any territory precisely because it constructs it.

In *The Trial*, this machine would operate all the more immanently: the authority presenting itself only the moment one accepts it. It is no longer even the case that a court may be invested with any presupposed power in a particular case, but rather that there is only the appearance of power to the extent that one submits to it and makes of it the law of one's actions or enunciations. The machine at the same time formalises these submissive desires and their authoritative enunciations – jurisdiction being only a matter of having oneself incorporated into a legal assemblage for which orders and obedience; matters and the relevant authorities, are indistinguishable from one another. If it becomes a point of confusion in *The Trial* for example, who the relevant authorities are in terms of K's trial, it would only be because the jurisdiction is not given but is always in the process of being constructed. In search of the commission of inquiry, K wanders through an apartment building managing to look in each of the rooms by asking the occupants whether a carpenter named Lanz lives there. It is in response to this unrelated question that a woman bizarrely happens to show him to the interrogation chamber. K, in this scene, seems to find the relevant authority almost by accident, although it is perhaps more like fate or destiny, having all but given up on the task.

One might say that the legal action seeks out an authority, just as K searches for a court to preside over his case, but one needn't search for too long; the matter and the authority presuppose each other or arrive upon each other by chance, and in this process a jurisdiction is mapped out. It may appear that K's trial is peculiar to himself, but this wouldn't be because of any interiorisation of guilt, rather because the law and its subject are given in the one process. There is law only to the extent that K or some subject recognises it, but K also only discovers some existence, some degree of subjectivity, by giving himself over to the authorities. In fact K would even appear to have grasped at the initial hearing this paradox of jurisdiction, for he notes to the assembly:

> You may object that it is not a trial at all; you are quite right, for it is only a trial if I recognize it as such (Kafka, 1968, p. 50).

Really it is the case that one recognises the other: by both being swept up in a legal assemblage which formalises what is possible to say and do. The chamber that forms the setting for this scene strikingly resembles a theatre with its raised gallery filled with men who cheer, laugh and shout "bravo!" (Kafka, 1968, p. 52)

and it is indeed here, upon this stage, that everyone takes on certain roles; life and law being played simultaneously in a jurisdiction that is not already there but, one might say, simply emerges from the events.

The legal subject then, discovers him or herself in the law, not so much because the law would be a reflection of life or that law and life would imitate each other, but because the subject, the subject-position and the law of this position exist only as elements in a legal assemblage. Jurisdiction must be *produced* in the process of captivating bodies with an imagery of subjectivity; matters with a textual regime of authority.[9] The week following his hearing however, when K again arrives at the chamber of inquiry (which strangely this time happens not to be in session), his attitude towards the law has already changed. He solicits the help of the washerwoman to allow him to look at the examining magistrate's books which at the initial inquiry, K had only dismissed scornfully:

> You can continue reading it at your ease, Herr Examining Magistrate, I really don't fear this ledger of yours though it is a closed book to me, for I would not touch it except in my fingertips . . .(Kafka, 1968, p. 51).

But this time, when the books are opened up to him, he finds not the "closely-written" (Kafka, 1968, p. 51) script he had noticed at the initial hearing but only an indecent drawing of a man and a woman on a sofa (Kafka, 1968, p. 62).[10] The texts of law, K finds, are not entirely inaccessible; they are only closed if one has an aversion to them. Opened however, they reveal nothing but the empty space of jurisdiction, into which the subject encounters its laws as pure desire. K may have expected to find in the book a particular law to which he would be subject but instead finds that the law is equally subject to his own whims.

Advocacy

On the other hand, the entire discourse of law in *The Trial* does not appear to depend on any definable site of juridical speech or jurisdiction. If anyone speaks in relation to the law, it is only by speaking on behalf of another. The formula of speech in the novel would thus be given in the statement: I am speaking to you, but at the same time I am being spoken to, speaking on behalf of another who speaks to me, or through me. It seems that everybody is an intermediary between two parties which remain absent. Discourse is always *between* two intangible sites of enunciation. When the priest interprets the parable "Before the Law" for K, he merely recites the opinions held by various commentators on the story, his own

opinion not mentioned or rather guarded. K at his hearing, concerned to play down the singularity of his case, claims that what has happened to him

> is representative of a misguided policy which is being directed against many other people as well. *It is for these that I take up my stand here, not for myself*. [emphasis added] (Kafka, 1968, p. 52).

The guards at K's arrest moreover, admit that they are only "humble subordinates who can scarcely find [their] way through a legal document" (Kafka, 1968, p. 12) and yet, almost in the one breath and in a most unequivocal tone, represent the law that states that the department doesn't seek out guilt but is rather attracted by it. "That's the Law. How could there be a mistake in that?" (Kafka, 1968, p. 13). The discourse of law might even at times be delivered as incontestable, yet it is always done so indirectly. It merely circulates between these guards, lowly-ranked officials, students, shysters, even defendants, who are each as ignorant as the other and who require no other skill than to summon the law through speech.

The law is spoken then through certain individuals, but even this is only a matter of spreading rumours, of repeating what one has heard from somewhere else, no-one having seen anything first-hand.

> They [the authorities] are blind and accept no evidence but take into consideration only hallway events, the whispers of the courtroom, the secrets of the chambers, the noise heard behind doors, the murmurs from behind the scenes . . .(Deleuze & Guattari, 1986, p. 49).

It is no longer any object of law which would cast this shadowy discourse, but the shadows themselves which cast all objects in relation to the trial. K himself appears to derive every aspect of his subjectivity through the discourse of others. The news of his trial spreads like a rumour and in a certain way, it becomes apparent that it is only in connection with these proceedings that people happen to recognise him or engage with him in some matter. It even appears that K has to be told by another who and what he is, and that contrary to appearances, he has in this sense always been summoned in speech:

> 'You are Joseph K,' said the priest, lifting one hand from the balustrade in a vague gesture. 'Yes,' said K, thinking how frankly he used to give his name and what a burden it had recently become to him; nowadays people he had never seen before seemed to know his name. How pleasant it was to have to introduce oneself before being recognized! 'You are an accused man,' said the priest in a very low voice. 'Yes,' said K, 'so I have been informed.' 'Then you are the man I seek,' said the priest. 'I am the prison chaplain.' 'Indeed,' said K. 'I had you summoned here,' said the priest, 'to have a talk with you.' (Kafka, 1968, pp. 234–235).

Here is the redundancy of discourse/jurisdiction: notifying, seeking out, summoning. In this formula everything seems to be presupposed from the beginning. But whatever there is to say about the law, it is a speech that must be transmitted indirectly, or must always take the form: "so I've heard." Advocacy

as hearsay.[11] No-one, it would appear, is able to speak for themselves, least of all K concerning his own guilt, for after all, that's how guilty people always talk.[12] But, the authorities might ask, what's the word on the street? One might note in passing that the noun "acquittal" which the painter Titorelli uses to describe the possible outcomes of K's trial, in German "*Freisprechung*" connotes literally a "free-speech," a speech which sets free but also a capacity to speak freely. And indeed, what is postponed by the proceedings is not just an acquittal but also the possibility of speaking free, for oneself that is, without the constraints of always having to address (or summon) someone while being oneself addressed (or summoned).

Advocacy would be the presupposition of a system of law that denies any site of political contestation, for the voice of the people is heard only in the very expression of imperial or bureaucratic signification, which in itself prohibits different or multiple sites of enunciation at the same time as a truly authentic site.[13] Words and statements circulate and only gain any degree of authority or significance by displacing their origin. The parliament speaks not for itself but for an electorate who, when they come to the law as individuals, are spoken for by representatives. A judge too must not simply speak his or her opinion, but must cite the opinions of others, these opinions being nothing more than further citations.[14] If the law is capable of being spoken, it is always by one speaking on behalf of another. An "other" whose voice will be summoned in order to dictate or regulate the terms of our relation. In *The Trial* however, this rule of advocacy which would prevent anyone from having any direct relation to law as discourse, or to their own discourse as law, is always traversed by different potentials. The potential of *wirkliche Freisprechung* (actual acquittal) for example, which – although it is unheard of – is more than a freedom from court proceedings or guilt, but also a freedom of speech or a free relation between one's own idiom and the discourse of law. K's mistake is to assume that actual acquittal would be a verdict delivered at some point rather than a tactic, as the third option *Verschleppung* (protraction or drawing out) implies. The potentials of eluding or ignoring the court, but more importantly the uncontainable potentials of women and children whose language and desires only echo hollowly in the halls of the authorities; the momentary possibilities of expressing oneself in no predetermined image but through a life that affirms itself in law. What is always at issue in advocacy is desire and its disfiguring through representation:

> While the Uncle pushes him to take his trial seriously, for example, to see a lawyer and pass through all the steps of transcendence, K realizes that he should not let himself be represented, that he has no need of a representative – that no-one should come between him and his desire. He will find justice only by moving, by going from room to room, by following his desire. He will take control of the machine of expression . . .(Deleuze & Guattari, 1986, p. 50).

KAFKA AND CARROLL: BEFORE THE LAW

There will have been many commentators or interpreters of parables: religious and secular, critical and conservative, fictional and real. Kafka's short tale "Before the Law" recited by the priest for K in the chapter of *The Trial* entitled "In the Cathedral" summons or brings forth these exegetes in droves, these guardians who in representing the text, also necessarily represent the law. Indeed, this story in particular, would appear to lend itself to infinite interpretations and that, as it were, that each of these interpretations must fall short of the text itself, or as the priest says: "the comments often enough merely express the commentators' despair" (Kafka, 1968, p. 243). Jacques Derrida suggests, that it "does not tell or describe anything but itself as text" (Derrida, 1992, p. 211) It performs itself as a text which does not signify any content other than its own, but which nonetheless affirms itself as an event for which significance must be granted by those who come before it. If there were some purpose to the parable however, it would have already been achieved in the act of deference/deferral that it creates, and any interpretation would remain essentially pointless, or just an expression of despair to the extent that it must always answer to the immutable original while denying itself true access. If it is us (or life) that must by necessity remain before the law (in respect of the law), what *lies behind* this "you must" of the law?

The majority of the present day commentators, one might say, claim that there is only a "nothing." Derrida writes that the law in the parable

> guards itself without doing so, guarded by a doorkeeper who guards nothing, the door remaining open–and open on nothing (Derrida, 1992, p. 206).

Agamben reads it as an "allegory of the state of law in the messianic age" (Agamben, 1999, p. 172) which recalls Gershom Scholem's concept of "the Nothing of Revelation" (Agamben, 1999, p. 169).[15] Certainly, the parable never tells us, nor does the doorkeeper allow us to see, what is behind the door of the law. Any decision on the matter would seem unwarranted, even a decision that maintains that there is nothing there to see, or that the guarding is all there is to see. Rather, the doorkeeper lets one believe – and who are we to disbelieve him – that beyond the door lies not nothing, but an infinite series (of doors and doorkeepers). It is, in other words, a regress that would prevent or rather defer anyone from progressing past the first stage. Two questions present themselves along this line of infinite regress: (1) What is it that must be obeyed as law? and (2) What must be obeyed in order to obey the law? In fact the parable itself plays out this very relation, for if it is to be read as a *preface* to the law, we must ask: what would be the laws by which one reads it? Would it not perhaps remain a "medley of letters without any order" (Agamben, 1999, p. 165) as Agamben says of the

possible original form of the Torah, and in respect of which life would be reduced to various misinterpretations, themselves becoming indistinguishable from the law itself?

In Lewis Carroll's *Alice's Adventures in Wonderland* a mouse recites a "tale" to Alice concerning his dislike for cats and dogs. Alice mistakes the word "tale" for "tail" so that she imagines this narrative delivered by the mouse in the form of a tail (and it takes this appearance in the text); a long and slender thing with curves (Carroll, 1974, p. 29). If this misinterpretation of the homophone tail/tale by Alice shows anything other than a humorous mistake however, it would be that, for any instance, the form is not given by the content but must be imposed upon it in order for it to take shape. "Neither identity nor non-identity is natural," writes Derrida, "but rather the effect of a juridical performative" (Derrida, 1992, p. 212). Alice delivers a judgment which, like any judgment, is both an understanding and misunderstanding of the matter. One must recall the priest's remark:

> The commentators note in this connection: 'The right perception of any matter and a misunderstanding of the same matter do not wholly exclude each other (Kafka, 1968, p. 242).

We might even say that one necessitates the other: every understanding being essentially a misunderstanding capable of setting down its own laws. Nevertheless, to be brought before these laws would only entail a further (mis)interpretation. The mouse's tail, which we have deferred for long enough, reads as follows:

> Fury said to a mouse,
> That he met in the house,
> "Let us both go to law:
> *I* will prosecute *you*, –
> Come, I'll take no denial:
> We must have the trial;
> For really this morning
> I've nothing to do."
> Said the mouse to the cur,
> "Such a trial, dear sir,
> With no jury or judge,
> would be wasting our breath."
> "I'll be judge, I'll be jury,"
> said the cunning old Fury;
> "I'll try the whole cause,
> and condemn you to death" (Carroll, 1974, p. 29).

Like Kafka's parable "Before the Law" this tale also tells of two entities who play out a scene before a law that remains inaccessible, absent or redundant. We are told nothing of the law other than it is a place or site where, upon little more than a whim, one chooses to go. The law is not a rule or an imperative but a space. And it is here that one must accept certain presuppositions: that they will be each set against

each other – Dog v Mouse – in antagonism and in prescribed roles of prosecutor and defendant. Furthermore, there need not be a crime in order to have the trial, the mouse is simply invited and his only objection to being prosecuted – despite not appearing to have done anything wrong – is that without a judge and jury, without any figures of right or impartiality in other words, they would be simply wasting their breath. Fury however is well aware that anyone can fill these positions, and indeed takes this duty upon himself. "Even better," he probably figures, "if one is not completely impartial, for how else will a decision be reached?" Nothing functions in this tale without desire; indeed nothing functions but desire, and the mouse's guilt, like everyone else's, is reduced to a matter of presumption and persuasion. To be persuaded to "go to law" (summoned) where it will be presumed that one of the parties is guilty and that a punishment is required. We are of course reminded of K's trial.

The law in both stories remains an obscure site in relation to which – since it reveals nothing – everything must be presupposed. The man from the country also presumes that the law would be accessible at all times and to everyone and learns only at the very end that it was meant only for him. But to the extent that it withholds all content, the law is always something that must be produced by those who simultaneously come before it.[16] The drama played out between peasant and doorkeeper or mouse and dog, whether real or fictional, always has the status of myth, and like Alice who would see it just as a tail, the law can be experienced only in its very singularity. The enactment both creates law and repeats it; a myth in the process of being both written and embodied; a law in the process of being both legislated and enforced. Agamben would not really contradict Derrida in saying that

> the story ['Before the Law'] tells how something has really happened in seeming not to happen (Agamben, 1998, p. 57)

rather than "an event that happens not to happen" (Derrida cited in Agamben, 1998, p. 57) for the performance (the "happening") and that which dictates or prescribes it (the non-event), become indistinguishable.[17] As Agamben himself writes:

> A pure form of law is only the empty form of relation. Yet the empty form of relation is no longer a law but a zone of indistinguishability between law and life . . .(Agamben, 1998, p. 59).

The juridical then, as Alice discovers, would be that which transforms (bodies, a scene, an event), but it achieves this only to the extent that the proposition does not denote or signify the Law per se but rather simply commands; says "you must." The law in other words would not be the subject of the statement itself but the essence of its being a command (and at the same time an obligation).[18] What lies behind the "you must" of the law therefore is an indefinite series in so far as the law that inheres

in or lies behind any command cannot be given other than in another command. The Duchess in *Alice in Wonderland* for example is intent to extract the morality from every statement which in turn can only form the basis of a new statement.[19] This series (of doors or doorkeepers) which *backs* and supports the first (and only?) doorkeeper at the same time *faces* and hence captivates the man from the country. It is a discourse that simultaneously authorises the statements of the doorkeeper while holding the man from the country before it. The door necessarily remaining open – in this way immobilising as Agamben suggests citing Massimo Cacciari, since it is impossible to enter "into what is already open" (Agamben, 1998, p. 49)[20] – and open not onto nothing but an infinite regress. The doorkeeper does not signify nor even express the law but simply guards it. Indeed he would remain wholly incapable of expressing this law which always withdraws the moment one opens one's mouth. And, like K's lowly and inept guards at his arrest, the guarding itself by the doorkeeper would become indistinguishable from the law only to the extent that, being contained in but not expressed by the proposition, the law recedes at the same time as it is summoned, leaving only statements and desires, orders and obedience. The point is that the law speaks but never speaks of itself, enforcing and displacing itself in the same gesture. It never stops representing, but always representing an "other" which shall never become the object of any knowledge.

> Truth to tell, to the extent that it denotes the lost object, one does not know what the voice denotes; one does not know what it signifies since it signifies the order of pre-existing entities; one does not know what it manifests since it manifests withdrawal into its principle, or silence. It is at once the object, the law of the loss, and the loss itself. Indeed, as the superego, it is the voice of God, that which forbids without our knowing what is forbidden, since we will learn it only through the sanction (Deleuze, 1990, p. 194).

Only at the very end does anything show itself: "a radiance that streams inextinguishably from the door of the Law" (Kafka, 1968, pp. 239–240). The man is apt to exclaim: "so that's what I was prohibited from!" as if merely describing his own life. But in fact we can never tell where law begins and life ends, or where law ends and life begins. The law that would institute life depends solely on that very life that is lived before it: understanding and misunderstanding the text, composing and fulfilling the myth. "Here we 'touch' without touching this extraordinary paradox," Derrida proposes:

> the inaccessible transcendence of the law before which and prior to which "man" stands fast only appears infinitely transcendent and thus theological to the extent that, so near to him, it depends only on him, on the performative act by which he institutes it (Derrida, 1990, p. 993).

But at the same time, it would never be enough to stop here: abandoning a "man" to law and law to a "man." The law in *The Trial* is transcendent only in so far as one always encounters it (and hence brings it into the world) in its singularity: as

that which is "meant only for you"; but at the same time it is entirely immanent to a plane of desire in which this "meant only for you" is already a collective assemblage. The novel goes further in its attempts to bring legal discourse back from the heights down onto the dirty ground; to produce new statements, to give people a new voice, or to give in a voice new people. For this, an image of law must be denuded, deterritorialised, orphaned. It is always possible to place too much weight on the parable "Before the Law," and any lawyer will tell you that a preamble to the law carries very little significance in any case. It speaks only of one dimension: height, and serves no-one other than the law itself. It's sole purpose is to keep you before it, while you search for the impossible key to open an open door. This is why *The Trial* is so necessary for Kafka, even though the content between the parable and the novel appears to be essentially the same. One never gets anywhere on the dimension of height; one always remains at the lowest level, on the surface one could say. But what surface there is to travel! And what an array of voices one discovers! If all these voices have an intimate relationship, in one way or another, with a vast law-machine (if not with law itself) – a machine in which offices, bedrooms, attics, courtrooms and apartments exist contiguously and on the same plane – we can no longer silence, relegate or exclude any of them. Jurisprudence, as Kafka finds, will only be the necessary question of life as desire.

NOTES

1. See in particular Litowitz (2002) and Minkkinen (1994).
2. This will be a useful image for Kafka. See especially Kafka (1992a, p. 190): "I had no way out; but I had to make one for myself, for I could not live without it. Always up against this crate – that would inevitably have been the end of me. But up against this crate is where apes belong with Hagenbeck – very well, then, I would cease to be an ape."
3. Deleuze and Guattari describe how the machine of "In the Penal Colony" allows itself to be developed into Kafka's unfinishable works (the novels): "here, the machine is no longer mechanical and reified; instead it is incarnated in very complicated social assemblages that, through the employment of human personnel, through the use of human parts and cogs, realize effects of inhuman violence and desire . . ." (Deleuze & Guattari, 1986, p. 39).
4. The only possible manifesto that the people of *The Trial* could produce would look something like Kafka's tale "The Problem of Our Laws" in which "it is an extremely painful thing to be ruled by laws that one does not know" (Kafka, 1970, p. 147).
5. On the topic of minor use of major languages see in particular Deleuze and Guattari (1980, pp. 102–106).
6. Giorgio Agamben would call this relation a "being in force without significance" or a "pure form of law." See Agamben (1998, p. 49), and Agamben (1999, p. 160).
7. Foucault describes this mutual dependency of the transgression and the limit or prohibition. "The limit and the transgression depend on each other for whatever density of

being they possess: a limit could not exist if it were absolutely uncrossable and, reciprocally, transgression would be pointless if it merely crossed a limit composed of illusions and shadows" (Foucault, 1977, p. 34).

8. Roland Barthes writes: "K is arrested on the orders of a tribunal: that is a familiar image of justice. But we learn that this tribunal does not regard crimes as our justice does: the resemblance is delusive, though not effaced. In short, as Marthe Robert explains, everything proceeds by semantic contraction: K feels he has been arrested, and everything happens *as if* K were really arrested . . ." (Barthes, 1974, p. 142).

9. See in this context Legendre (1997).

10. Slavoj Zizek reads this scene as representing the obscene superego (Zizek, 1991), while Deleuze and Guattari write "where one believed there was the law, there is in fact desire and desire alone" (Deleuze & Guattari, 1986, p. 49). On the other hand, it can be viewed as a particular example of the detachment of image and place in *The Trial*; a free-floating image. The point is that the images which attach to this chamber are produced in different machines from one week to the next. An interrogation-machine and a domestic sexual-machine. Is it that the place of law has become sexualised? Or is it sex and domestic life that have now become subject to the law of place? The people, in any case, will be ruled over all the more effectively by not being able to tell.

11. A passage by Jean-Paul Sartre eloquently situates the role of hearsay in the construction of law lived as authority or totality. "The government constituted Paris as a totality from outside . . . And on the morning of Sunday 12 July the city was full of posters 'by order of the king' announcing that the concentration of troops around Paris was intended to protect the city against bandits. Through these notices the city was designated as both the place and the population organised as a totality, sealed by the military action which produced it as a confined crowd. The *rumours, the posters, the news* . . . communicated their common designation to everyone: each was a particle of sealed materiality. At this level, the totality of encirclement can be described as being lived in seriality" (Sartre, 1976, pp. 352–353 cited in Hachamovitch, 1997, p. 53).

12. Two things must be presupposed: (1) that there is crime and hence guilt; and (2) that no-one is competent to speak for themselves concerning their own guilt.

13. "Without access to any higher Court, all activity within the Court must take the form of an interminable production and circulation of bureaucratic texts, a writing activity to which the Court is so committed that it can never 'speak freely' (*Fresprechen* [sic]), but rather can only systematically 'misinterpret speech' (*Verhören*)" (Rickels, 1987, p. 114).

14. An opinion is never law unless it is expressed on behalf of another: "It is my client's opinion," or "It is the opinion of this court," never "my opinion."

15. Agamben writes: "We can compare the situation of our time to that of a petrified or paralyzed messianism that, like all messianism, nullifies the law, but then maintains it as the Nothing of Revelation in a perpetual and interminable state of exception, 'the 'state of exception' in which we live' " (Agamben, 1999, p. 171). K himself can also be seen as a liberator or Messiah in *The Trial*, his calling is to free the people from laws that only he can see are unjust. Yet Kafka writes in his notebook: "The Messiah will only come when he is no longer necessary, he will only come after his arrival, he will come not on the last day, but on the very last day." (Kafka as cited in Agamben, 1999, p. 174).

16. Compare Håkan Gustafsson's view that the door is "a mirror-passage from muteness to muteness . . . Behind [it] there is nothing which does not already exist in front of it" (Gustafsson, 1996, p. 105).

17. See also in this context Anidjar (2003, p. 162): "It is an event that occurs – if it occurs – in a zone of indistinguishability and that 'arrives *at* not arriving . . . manages not to happen'. It may also and *at the same time* be the story of 'how something has really happened in seeming not to happen.' "

18. Panu Minkkinen notes on Nietzsche in the context of Kafka: "As a command given by a particular will, law would accordingly be the actuality (*Wirklichkeit*) and the efficacy (*Wirksamkeit*) of the power to command. Law would, then, be an effective command in which the command given and the corresponding obedience are indistinguishable." (Minkkinen, 1994, pp. 359–360). Crucially for Kafka however, since the Law would signify nothing, commands and obedience can no longer *correspond* as such, but exist as two separate planes of enunciation and desire in reciprocal presupposition.

19. " 'The game's going rather better now,' she (Alice) said, by way of keeping up the conversation a little.–" "Tis so," said the Duchess: "and the moral of that is, 'Oh tis love,' 'tis love that makes the world go round!' " – "Somebody said," Alice whispered, "that it's done by everybody minding their own business!" – "Ah well! It means much the same thing," said the Duchess, . . ."and the moral of *that* is, 'Take care of the sense, and the sounds will take care of themselves' " (Carroll, 1974, p. 85). Deleuze (1990, p. 31) cites this passage to make the same point.

20. Consider also the immobilising reciprocity between the two figures in the parable: without the doorkeeper the man would no longer be a "subject" of law but would freely enter into it. Conversely, if it were not for the man from the country, the doorkeeper would not be able to "guard" anything and thus would be free to leave his post.

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6. CHARACTER EVIDENCE AND THE LITERATURE OF THE THEOPHRASTAN CHARACTER: A PHENOMENOLOGY OF TESTIMONY

Michael FitzGerald

> Thou com'st in such a questionable shape
> That I will speak to thee – *Hamlet* I.iv, pp. 43–44.

INTRODUCTION – ETHICS, TRUTH, OTHERS

In the drama of the evidentiary process, it would hardly be thought exceptional that the judge's intuition of the formal order of things – which is to say, their sufficient *standing-to-reason* – should falter when confronted with the sprawling and confused immediacy of stubborn matter-of-fact. The circumstantial given is a bewildering Gordian Knot of data; the analytic legerdemain of localising our attention and following one of its threads cannot reduce the tangle into which it soon recedes. And in comparison to the knot's multiplicity, our scope for unifying abstraction, or "large-scale" comprehension, is limited and flickering. We possess fragments of intuition, and fragments of formal connection between these fragments. But the panorama is merely agglutinative – the fragments do not congeal into one perfect, *self-evident* totality. And an offhand remark amongst the lectures

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of Alfred North Whitehead suggests that this defect is of more than methodological significance – even when one takes one's example from arithmetic: "the snippet of knowledge that the addition of 1 and 4 produces the same multiplicity as the addition of 2 and 3, seems to me self-evident" (Whitehead, 1968, p. 47). And yet we would disclaim any such self-evidence were larger numbers involved – only skeptically could we hazard a guess. So, he continues, we have recourse to "*the indignity of proof*," securing our opinion through the rationality of calculation. Nor is it so much that proof and method are chastening of themselves – the nemesis, the sting of the creatural condition is rather *having to prove*, the imperfection of finite judgment and the infinite possibility of perfecting it. This predicament was already known to Sophocles; if humanity "holds out" against the overwhelming by its inventiveness, by finding a means in *to mêchanoen technas*, the machinations of technique, it is because our ultimate condition with regard to the overwhelming is *amêchanôs, aporos*, resourceless and without means.

This Indignity of Man would be older than the dignity in which Pico and the humanists famously confirmed him. It belongs not to that moment in which he finds himself *free* to *value* and *do* in accordance with an undetermined nature, voluntarily disposing his actions toward the possibilities of a world which they can alter. Rather, the exigency to *do justice to the truth* is first articulated in the original moment of this truth's *givenness*, and in our orientation to the world as *given*.[1] At trial, the *quaestio quid facti* is certainly separable from the *quaestio quid juris*, both in procedural form and by the logic of "relevancy."[2] Suppose one were to ascribe a deontological content to the purely *opinionative* dimension of the judgement, the *doxa* – it would only be in view of the *decision* or ruling, the *kerygma*, for which knowledge of the circumstances is merely a supposition. And because of the positivist paradigm on which the evidentiary process must therefore be instituted, the more urgently we subscribe (with Bentham) to the paramountcy of "rectitude of decision," the more we subsume the question of fact into a techno-mechanical model of scientific observation – the demand for "objectivity" determines the purely doxic moment of human experience as *apathetic* and *disinterested*. Or again: qua opinion, truth per se would be ethically neutral, its significance entirely deferred to the evaluations it informs and the actions it implements.

This framework must be contested. Truth is not, for the arbiter of fact, merely a discovery or disclosure, preliminary to the "application" of juridical norms – it has its own interest, quite apart from the decision of right. Likewise, the fallibility of opinion before a "mass of mixed data bearing on a single alleged fact" (Wigmore, 1913, p. 83) is not simply a supplementary consideration, to be tallied against each inference as a "margin for error" – more than this, fallibility is the arbiter's conscience *qua* the "repugnance" of finitude and doubt. An *interest in truth* asserts itself in that irrefragable interval between the external given and its

internal acceptance as a judgement – and here "interest" is to be understood as an *inter-esse*, a being *amongst* other things which were supposed to set themselves out *before* consciousness as its objects. The judicial *doxa* is interested because, as a taking-up or an acceptance (from *dechomai*, to accept) its essence is not absolute availability, but donation and offer. For the eminence of truth is that the taking cannot encompass and annul the donation – cannot fulfil itself in a totally adequate self-giving. The interest in truth is absolute. It demands a commitment beyond question to what opinion affirms in each instance, foundation for a belief in one's beliefs, *dokei dokein*. But *because* the truth is absolute, because it literally absolves itself from the grasp of knowledge, it must abjure the finality of the doxa, preferring the radical openness of the questioning, the *quid*?

That is precisely the relevance to be ascribed to the irony of Socrates, an archetype which is no less an inescapable determinant of our situation for being itself the expression of an especially pregnant historical juncture. For Socrates articulates the philosophical break with the naiveté of *dokei dokein*, and irony imposes itself upon his soul at the instant when all the givens of the phenomenal world appear to him as illusive shadows of a higher realm, when the first sting of doubt intervenes between outward "reality" and his inward adumbrations of it – the birth pangs of the objective world-spirit. As *skepsis*, the interrogation of first appearances, asserts itself as the precondition of philosophical thought, so irony, Kierkegaard reminds us, lays claim to being the highest personal expression of the philosophical ethos, the creatural residuum of knowledge's exile from the reality of truth. It is that crisis, so prominent in the *Apology* and the *Meno*, of awakening to one's ignorance, to that small measure by which the skeptic, the one who knows that he cannot know, is closer to "true knowledge" than the dogmatist. The crisis endlessly calls into question the *auctoritas* which the judicial opinion arrogates to itself. It is not an acknowledgement which can be reintegrated as the asymptote of a criteriology. The inscription of this enigma in the text of the judicial opinion can only come at a cost to the "letter of the law" – if the inquiry, the *skepsis*, must be open to the exception without providing for its reception or its re-absorption as a "margin for error," then the claim of the evidentiary process to tell the "literal truth" will be plagued by the shadow of doubt. This essay speaks to a specific instance, an example, of this ordeal – that of "character," as the trace, in the text of evidence, of the witness, the other voice.

MATHEMATICS AND VISION

If one can only do justice to the truth through doubt and abjuration, then whosoever undertakes the arbiter's duty is consigned to perjure himself. For the duty to which

truth binds him is to prove *beyond doubt* – in Gilbert's enlightenment terminology, one must secure "a clear and distinct perception" of final probative significance, from a complex mass of data whose net persuasive force is "partially or in some degree obscure and indistinct" (Gilbert, 1791, p. 3). Proof divulges the *fuscum subnigrum*, the obscurest recesses of the shadow of doubt, and discloses them to a clear-sighted arbiter; and this rhetoric of light and vision is determinative for the concept of evidence. Gilbert himself recapitulates passages in Locke's *Essay* which speak of a species of judgment which *illuminates itself*, which "like the bright Sun-shine . . . leaves no room for Hesitation, Doubt, or Examination, but the Mind is filled with the clear Light of it" (Locke, 1975, p. 531). Such an intuition would verify itself beyond doubt *at first view* – as for instance that the addition of 1 and 4 is equal to that of 2 and 3; this proposition objectifies its own certainty indissociably from its terms themselves. It presents itself in its own light, *clare et distincte*. For such indubitable truisms Gilbert recurs to the notion of the *self-evident*, and it is such accents of absolute self-evidence that determine the particular rhythm of a process of proof; *one cannot have the concept of evidence without that of self-evidence*, in its unqualified sufficiency as intuition. For Locke and Gilbert, a complex proof is entirely reducible to the lucidity of "simple ideas" – where the truth does not manifest by mere view, it must be made to do so by a *review* in which the datum is analysed into a succession of necessary inferences. "There must be a progression by steps and degrees" (Locke, 1975, p. 532), an *intermediation* of ideas such that each individual moment of the proof is *immediately* cogent. Gilbert calls this "demonstration" – from the Latin *monstrare*, to show – and by ascribing all probative force to this method, Gilbert inaugurates a tradition in legal evidence which can rightly be called *rational*: "What was formerly "tried" by the method of force or the mechanical following of form, is now 'tried' by the method of reason" (Thayer, 1969, p. 199).

Hereafter, proof appeals to the *mathematical*, which is not to limit self-evidence to number and quantum – Locke had already relieved us of the illusion that only *counted* differences are insusceptible of confusion. Even if the relations between quanta are the most familiar loci of certainty "at first view," the essence of the mathematical is not numerical. In its original sense *mathesis* is that categorical positing of the being of things according to which we *know* them as beings at all, what Husserl called the *Ur-doxa*. In the broadest sense, it announces the *fiat lux* which the principles of a certain algebra accomplish for human knowledge. For instance, the first exercise of the mind, in Locke's scheme, is simply to produce *for itself* the principles of Yea and Nay – it "clearly and infallibly perceives each *Idea* to agree with it self, and to be what it is; and all distinct *Ideas* to disagree, *i.e.* the one not to be the other" (Locke, 1975, p. 526). As Gilbert maintains, opinion grounds itself in the intuition that one idea or perception is not another, that *this*

is this and is not that – and this "either-or" structure represents the orientation of knowledge to the inner possibility of affirmation, that is, truth as the factual, the assertoric. I have a *real sensory intuition* of the whiteness and flatness of this page – but I alone amongst creatures have also an *ideal categorial intuition* whose content is that this page *is* flat and white. *This is this* and *this is not that* count as the immediate intimation of being in the sense of truth – they are the most primitive and total achievements of *mathesis*. But if every objectifying act of the doxa is built upon this foundation, then all *thisness* is reduced to its objectivity for a cogito which rediscovers its self-sufficiency in everything it thinks. For these *a priori* conditions of knowledge are coextensive with transcendental subjectivity as such – indeed, they are constitutive of it. This consciousness, this cogito, affirming itself as absolute sovereign being, *originates* knowledge. It only learns what it already knows, what it can illuminate by its own fiat.

For what is mathematically "beyond doubt" is that which, as Heidegger says, we know about things in advance, the pre-given; "we do not first get it out of things, but in a certain way, we bring it already with us" (Heidegger, 1993, p. 276). The totality of knowledge which Socrates ascribes to the immortal soul, which, having seen all things that exist, has knowledge of them all, embodies that illimitable amplitude with which the cogito assimilates to itself, as absolute principle, all that can be learnt. Meno's slave discovers that the problems of geometry are far from obvious at first view – he *counts* confusedly. But he *accounts* only to himself, reducing the Gordian Knot to the sufficiency of those "true notions" whose form is clear to him. The demonstrative reduction is by essence self-certifying; it admits into counting a compulsion to account for what has been counted by the infallibility and coherence of its procedure. As Hume puts it: "Merchants . . . by the artificial structure of the accompts, produce a probability beyond what is deriv'd from the skill and experience of the accomptant" (Hume, 1978, p. 181). The word which now determines our understanding of the doxa, *ratio*, originally meant such an account, which a Roman merchant might produce to show a client that the sum claimed indeed tallied with the variety of services rendered. Calculation can in principle be shown and seen, it introduces transparency; the *ratio* is delivered up to the gaze of the customer as an assurance of good faith and honesty. The latter must satisfy himself of the sufficiency and intelligibility of its reckoning, in spite of the obscurity which attends his dealings with numbers – so the merchant marshals the probative force of monstration. He holds the abacus up and invites the customer to *see for himself* – in other words, he *demonstrates*, makes manifest for another cogito, the adequacy of the calculation. The mathematicisation of doxa has an inextricable connection to this display or disclosure – and yet the cogito, the *Ur-doxa*, posits itself as the absolute precondition of this visibility. It arrogates to itself a vision in which the correlation of subject and object is realised through

the relation of the object with the non-object "proof," of which the cogito makes itself the source and the final account.

Proof, then, is not a phenomenon amongst other phenomena. It is the very reification of an object's phenomenality, the categorical fulfillment of its givenness as truth. And if *to prove is to show*, then it maintains an exemplary relation to the peculiar privileges of a certain vision as guarantor of the "account" deposed by any witness, even by the naked eye itself. Vision supplies the paradigm for knowledge – a prejudice ingrained in the Proto-Indo-European root word *wid-*, which means both "seeing" and "knowing." For instance, the Platonic *idea* contains an irreducible reference to the "look" of a thing, to the manner in which it offers itself in its visual aspect, its appearance, to a view. In showing itself, it assumes the definite form of its species, the *eidos* From the German *Wissen*, "knowledge," we get not only "wit" and "wisdom," but also "witness" – the one who knows by having seen. And that by which the witness borne accredits the account given, we call *evidence*, from *videre*, to see. Evidence, as a *factum probans*, a "mean to an end," lets some *factum probandum* be seen from out of itself. It shows and points out the truth – and this showing and pointing cannot be understood without reference to self-evidence, to the fulfillment of a thing's standing-to-reason in the unquestionable clarity of that "seeing for yourself" at which all credit aims. A logical probative presentation, as a "method of solving a complex mass" of data, thus always involves an invitation to bear witness to its demonstration *with one's own eyes*. In the *ego affirmo*, the "I witness," the arbiter becomes an *eye*-witness – an *autoptes*. All evidential reasoning involves what Wigmore called an "autoptic proference," an inward approbation furnished by the arbiter's own clear-sightedness. *Res ipsa loquitur* – the thing proves or disproves itself, so long as it can be seen for what it is. And Wigmore substitutes for the merchant's abacus a chart of the inferential process specific to each case, a schematisation of the Gordian Knot, by a review of *mechanising* the process of exposition. "successive subsumings of single instances into groups of data and of the reduction of these groups into new single instances" (Wigmore, 1913, p. 81). To prove is to show. A thing "is" inasmuch as it is given, which is to say, inasmuch as it appears or shows itself. The true is what is manifest, the phenomenon as such – beings are not "in truth" other than as they disclose themselves, as they let themselves be seen. Proof is the self-certifying fulfillment of this disclosure. "Truth," then, surpasses the correspondence between a subjective judgment and an objective nature, established within the immanence of thought. More than this, truth is the event of coming-to-light, showing and letting-be-seen, by which something irreconcilably ulterior is nonetheless given to thought. As the privative alpha prefixed to the Greek word *alētheia* suggests, truth is "*un*-concealment" or "*dis*-closure" – every doxic objectification rests on the emergence of a "something" from

the nothingness of *lēthē*, obscurity and oblivion. The word *alētheia* directs us "to rethink the ordinary concept of truth in the sense of the correctness of statements and to think it back to that still uncomprehended disclosedness and disclosure of beings" (Heidegger, 1993, p. 125). The "truth of things" is, in other words, the way in which they evidence themselves, or present an aspect – and we call this givenness-as-showing a doxa. Doxa is the "look" which a being offers in showing itself, the aspect by which it gives itself to be judged as this or that being. But this view must be taken – it must be accepted from this or that viewpoint, for an aspect inexorably presupposes a determinate perspective from amongst the infinite possible perspectives. Thus the doxa by which the thing is experienced as a being "is also one that *we* take and make for ourselves" (Heidegger, 2000, p. 109). Because "truth" consists here in appearing, in the offering of perspectives, it remains bound to the possibility of a look that precisely obscures and conceals the truth in its essence – that mis-takes the given. It will be understood, then, that because showing is necessarily bound to sight and to points of view, it *necessarily* risks degenerating into "mere appearance," into a doxa constructed from a distorting and delimiting perspective.

CREDIT AND THE VERBAL

Epistemology is destined to confront this problem over and again – it is the crisis with which Socratic *skepsis* begins, and from which the exigency to prove derives. For if appearances must be doubted – if it is repugnant to contemplate that we may be misled through attending only to some prominent fragments of the mass of data – then phenomena must be reduced to the autoptic, to their self-evidence. We show things such that they can be seen from out of themselves, as they are in truth – we demonstrate them. "Truth" is mathematicised, subsumed into the self-grounding programme of knowledge and its hyperbole of vision – and by deferring all independence in being to the fiat of the cogito, the intellect reduces the pure *event* of appearance to the factual *content* of appearances. In annulling the priority of the given, of what was gifted to it by the unconcealment of things in each intuition, the doxa no longer does justice to truth as *alētheia*, as *event*. This perjury is the inevitable resolution of the arbiter's double-bind in favour of totality, certainty and closure. For, as has been argued, the paradigm of truth which takes monstration and view for its founding reference must re-assimilate the given as presence and representation, as availability through-and-through. The circularity of only learning what one already knows prevents the exception, the event which would be radically ulterior to the programme of calculation. In order, then, to take the unaccountable into account, by an examination whose conclusiveness would be

deferred *ad infinitum*, one must surpass the truth which would consist in disclosure and presence without reserve. Truth as exposure to the other is testimony, the excess of the fact of speech over what is, in the given instance, spoken, deposed and understood. Speech, then, which would bespeak the approach of the wholly other, "the possibility of an enigmatic equivocation for better and for worse" (Levinas, 1996, p. 70) – in other words, the persistence of the question, donation without coincidence. For in testimony, the speaker is not announced in the deposition as a content adduced, is not taken as given. The witness' presence stands in for a certain absence – or rather what is expressive in it refuses to stand aside to disclose the inwardness to which witness is borne. The other is this depth behind the doxa that dissimulates him, this ironic or *paradoxical* non-coincidence between being and truth. And yet this uncanny dissimulation and *inadequacy of truth* would be, as Emmanuel Levinas (1996, p. 101) puts it, "more directly 'veritative' " than the demand for coincidence between thought and the given.

Bentham, then, is right to acknowledge that we are "deeply interested" in the truth of testimony – indeed we are infinitely and insatiably interested. There will always be more to say, for speech does not proceed towards a term or object to which it would be adequate – the interest in it intensifies as it is defrayed. Again, the etymology of *inter esse* is instructive here – because the face-to-face of colloquy is not correlation, the investment of an object by a subject; it is society, and beyond what we already bring with us. For what speech gives is, in every instance, more than the return of an investment, more than what was "due" – it is gift, unpredictable gratuity, and irreducible to reciprocity and return. It is unaccountable – and this is its *straightforwardness*, its independence from the *circularity* or self-reference of the "I witness" – and is given "only at the instant an effraction in the circle will have taken place, at the instant all circulation will have been interrupted" (Derrida, 1992, p. 9). This instant, which was never due, takes place *ex tempore* – the present of the *viva voce* does not refer to the presence of a presentation "put under the eyes of the judge" (Bentham, 1981, p. 146). For if the responsiveness of the interrogatory is at the heart of the evidential process – if the straightforward emergence of answers from questions and questions from answers reveals what was clouded in equivocation – this is not because the "examination" of the witness can be referred to autoptic proference. Nothing in testimony can be "sourced" in the unanimity of the mathematical rule. The clarity of speech is not e-vidence, but rather intrigue. As Bentham attests, "the first obscure word brings on explanations" (Bentham, 1981, p. 55) – it interests us *ad infinitum*, and not by an incontrovertible finality, because the giving of speech prophesies more speech. Prediction of the unpredictable, speech is the chance encounter, the open possibility, the "first obscure word" against which all prediction falters – for this

foreword promises only speech itself, which is precisely nothing definite. And the foreword is – *quid?*

It gives nothing and it gives everything – it is the interval in which things can be given. And as one is interested in the gift, one is interested in the interval, in the questionable, in what was already identified as an ethic of doubt. This interest without guarantee – and precisely *in* or *for* the insufficiency of every guarantee that the doxa could arrogate to itself – can only be *credit*. Not a credit that could circulate, nor institute the term, or terms, of a debt – for if the gift must needs be unaccountable, it is just as certainly disjoins itself from the possibility of restitution and return. Credit without term, and beyond the account; not the *reddendum* of a liability which the subject would have "taken on," inverting its passivity into propriety and self-possession. Nor as one's stance towards this or that given, and already participation in economy and rationale, a credit which one would have to account for by reference to further givens. This credit is *inappropriate*, it carries us beyond a doxa based on the proprietorship and ratiocination of the cogito – it welcomes the paradoxical; *credo quia absurdum*, I believe it because it is absurd, because I cannot account for it. Beyond the sovereignty which we arrogate to ourselves over the given, we are radically disposed, as Bentham says, to receive the gift of testimony. But this openness before every origin, this hospitality before the title, is more than simply a general presumption conformable to our habitual experience, and pending some "particular objection." There must be a faith in the straightforwardness of testimony without consideration, *directly* and not by reference to *circum*-stance. From the very relation of the facts by the witness, says Bentham, "it is inferred that the facts are true" (Bentham, 1981, p. 183) – yet this exceptional inference is passivity and horizon, and not a step in a chain, an operation of the doxa. It is a leap of faith, a leap into the interval, the ethical gesture par excellence – and it becomes clear, then, that a certain credit and a certain doubt come indivisibly here. For testimony which comes from the other, *although* it gives, cannot be taken as a given. Or even *because* it gives itself to be taken, because this is giving itself – and indeed the absurdity of the paradox is that it turns on both an "although" and a "because." In either event, the one extended a right to speak is "hostile" – the directness of testimony *is* evasiveness, its candour *is* irony. And this dissimulation is determinative of truth wherever it takes on the paradox of speech – that *someone is speaking*. Which is more than a simple "fact," for "if the question who does not question in the same sense as the question what, it is that here what one asks and he whom one questions coincide" (Levinas, 1969, p. 177). The dimension of speech opens out from this doubling or sharing of presence, from a mindfulness that the other *also* speaks fully for itself, that its words are only for me in order *also* to be independent of me.

But if the terms of the question are already premised on the manifestation of this one who is not a content – if, that is to say, the *who* must precede the *what* – then, nonetheless, no sooner has the question been asked than the addressee is already "in issue." The unconditional credit which guaranteed the "first obscure word" is subordinated to a circumstantial credulity which always wants to know *what sort of who?* is betrayed by the examination. The presentation of the witness, although presence does not exhaust its meaning, *pro-vides* this person as a representation of the autoptes – as an evidence inferred from the forwardness of expression, from that security of exposition which Bentham (1981, p. 17) calls the "physical": the radical secrecy of "this state of mind, this interior of man" is thwarted by the physiognomic detour which necessarily attends the directness of face and voice. In other words, just as the truth of disclosure is fulfilled in a demonstrative proof, the credit of testimony must be projected into a determinate *character* – as soon as speech scatters into statements. And yet this accommodation of the uncanny to knowledge, this making-available of the *who?* can never recuperate the pre-original donation for which face and voice stand. For how can one reduce the other to a "fact in issue," institute a hermeneutic which would subsume the person, fore- and surname, into the doxa? By dint of the inexhaustible excess of speech over the statement, the question *who?* is never syllogism, never the regularity of the self-evident. And so "character," as the proference of the witness, does not coincide with the reality to which it points as an index does – it attests to a depth behind its presence, but without unconcealing it, without letting it be seen from out of itself. Here, the indiscretion of appearance is itself an ambiguity.

CHARACTER AND THE LITERAL

Or again: the monstration of character is not demonstration, is not what Aristotle calls an *apodeixis*, a proposition verifiable from out of itself and on its own terms – where the prefix "apo," like the "e" of "evidence," names this "from out of itself," the fundamental tautology of the autoptic. Rather, and because he sees the sociality of rhetoric as complementing the unanimity of logic, Aristotle relates the pointing-out or specifying of character to a proof which, as contemporary theorists of evidence might say, is *in principle nonmathematical*, one might even say *anecdotal*. The mathematical is, after all, the general, the generic abstraction of conceptual "essences" – numeric, semantic, taxonomic – but always eidetic, always the reduction of the brute and vicissitudinous singularity of the example to the idea which informs it, which makes it what it "is." The object taken up in knowledge is not an impression diffused into its own particularity, it is the identity

arraigned in the *this is this*, the unity of meaning posited by the concept. And with this intuition of the generic in the singular, of the species in the individual, one passes from an optics to an "autoptics" of the factual statement. But that which fore- and surname come to represent cannot simply be replaced by a designation or denotation – *who?* is not a concept, because to be other is to be irreplaceable. The otherness of the other is an unqualifiable uniqueness, an individuality in excess of the species, an idiom without a type. Of course, the witness could not be presented without being identifiable, somehow characteristic, and the price of appearance is always the *Wesenschau*, the show-of-essence. But the one presented is irreducible to the presentation – the objectification of character is fractured by a dialectical tension between the synoptic demands of indication and fact, and a commitment to the indefinable singularity of the other. If the other exemplifies a character, then "the example itself, as such, overflows its singularity as much as its identity" (Derrida, 1995, p. 17). And a characterology can only concern itself everywhere with examples, and yet never anywhere with an example – in the sense of a wholly adequate incarnation of some immutable type. The ordeal of this double-bind distinguishes the exemplification of the unique one from the demonstration of the generic – and Aristotle calls the former *epideixis*, the portraiture of an ethos. Any instance of language which illustrates some ethical object with a more or less didactic or critical accent – that is to say, where actions and qualities are cast in such a light as to become objects of praise or blame – belongs to the epideictic genre, the most common examples being encomia and funeral orations.

And, gradually, from the Aristotelian tradition of *epideixis* emerges the character-sketch, and thence the very notion of "character," which devolves upon a certain moral psychology as it develops a terminology answerable to the notion of *ēthos*, the personality, be it virtuous or vicious. The pivotal figure in this genealogy – the individual with whom any consideration of character must begin – is Aristotle's student and successor as head of the Peripatetic Academy, Theophrastus. It remains controversial, if not somewhat moot, to presume the particular motivation which his "rogues' gallery" of sketches was intended to satisfy – whether they represent a catalogue of stock figures for the comic stage; whether they were composed as illustrations of Aristotle's doctrine of the vices; or whether their author, anticipating the institution by which his inspiration would ultimately be transmitted, meant them as commonplaces of a rhetoric of denigration. Certainly, Theophrastus' innovation was not entirely unprecedented, and beside Aristotle's treatment of ethos in its dramatic, moral and rhetorical dimensions, one might recall a contemporary literature of ethnic types, based on a climatological determinism of Hippocratic derivation, or Plato's account, in the *Republic*, of the psychological archetypes of the various forms of political organisation. The afterlife which Theophrastan personification enjoyed amongst the rhetoricians was no more unifying, unfolding

into a series of mannered figurative techniques, none of which can truly sustain the originator's epigrammatic genius for *trait*. But nevertheless, the mounting traffic in *notatio* and *descriptio* throughout the commonplace books of the grammar schools made possible the rediscovery of the Theophrastan project in seventeenth century England and France – and no doubt the sententious stylisation of "wit" ensured the currency of the "character-book" well into the Augustan age. Here, the dramatic paradigm by which the representation of ethos had been subordinated to that of action was inverted – the *telos*, and typically the whole substance, of the character qua genre is "a witty and facetious description of the *nature and qualities* of some person, or sort of people" (Johnson, 1665, quoted in Smeed, 1985, p. 35). With the squint and recoil of one who would behold its first spark, the author of characters dramatises the brilliance of the trait itself, by whose sudden glints the image of action takes on its significance. And if the Theophrastan genre demands a style which is "all matter and to the matter," it is because here, as in the fabler's moral, the writer must portray in its frontal candour something which more or less enigmatically is at the heart of literary language –

> 'tis that in every sort of writing delights the most, and, though the treatise be gold, it is the jewel still, which the author of Characters, like your lapidary produces single, whilst others, goldsmith-like, in-chase them in their works (Flecknoe, 1658, quoted in Aldington, 1924, p. 392).

In other words, although or because character is ubiquitous in poetics, it is only in the "tart nipping jerks" of something like epigram that we can genuinely get at it. It gives you the hint of a discourse, as one of the seventeenth century authors announces in his manifesto, but it discourses not – both at a stylistic or expressive level, and at the level of essence, the character is pervaded by irony. Indeed, the irony here results from the antinomy in which the expressive and the essential, aspect and core, are indeterminably fused together.

And somehow in this confusion is foreordained the gradual encroachment of the term "character" on the conceptual ground of what had previously been understood as ethos – which is to say, the personality, but as the frankness of a phenomenon or mimesis, something which presents itself. The original sense of *charassein* is "to inscribe or imprint," to produce something identifiable by marking an otherwise undifferentiated surface – as for instance the stamp of a coin gives it currency, or the inscription of a letter transforms the wax tablet into a text. By extension, what is called "characteristic" comes to encompass any distinguishing mark or feature by which something is known as what it is and set apart from others, its formal *quale*; and so Diogenes Laertius gives the name of Theophrastus' collection as *Ethical Characters*, that is, traits of *ēthoi*. However, through a metonymy whose inevitability was determinative from the beginning, "character" gravitates towards

its modern meaning, as the substantive nature which the form defines and of which the trait would be characteristic – it pursues a semantic trajectory from appearance to essence which would likewise have been probed by *idea* and *eidos*. And also, notably, by *tupos*, "type," which no less than "character" derives from an elementary reference to a stamp or die. Indeed, when one speaks of a character the notion of type is never far away – and this is true whether one is referring to elementary psychological traits or to the symbols of a writing system. The difference makes no difference here – the more strictly we expect in the trait a "nature" rather than a construct, the more exactingly we prescribe a literatim definition of the phenomenon to be observed. Any ontological valence it might have had in or for itself must be subsumed into a determination which might be called *typographical* – rather than purely typological. Which is to say: the mark is constitutively *graphematic* – it is produced, marked out as a mark, through the very identity that it marks, its referentiality. One can never recognise the example as what it "is" without the establishment of the type, the generality, the noumenal model to which it is subscribed; "let us say that a certain self-identity of this element . . . is required to permit its recognition" (Derrida, 1988, p. 10). The instance of the mark is re-marked in advance by the ideality of the grapheme, that abstract *Wesen* which detaches itself from the brute here-now-ness of the *Schau* through which it is iterated. And it is of decisive importance that one acknowledge, in the structural ramifications of character, this effect of meaning which Derrida proposes under the motif of *iterability* or remainder. In order that character *indicate*, in order, that is, that character, wherever it appears, be identifiable, recognisable as itself – then whosoever would count the different instances in which "there is" such a character must be prepared, at least theoretically, to account for whatever remains identical throughout these alterations or instantiations of the trait – to account for something which *could* be repeatable elsewhere and otherwise. Inasmuch as personality is character, it is typical – formulable or describable literatim.

The very essence of the Theophrastan project is to enact this complicity of the ethos and writing. This project documents types; it institutes itself on the insistence that there is no absolute idiom, no novelty of an event so unprecedented and singular that it would be "illegible." If such a thing could even be witnessed, it certainly could not be proven – not until it availed itself as the mastered prize of recognition's *hic ille est*. Rather – and this would be the manifesto of character-literature – there are only relatively specific examples of types. And "type" here implies rather a typography than a typology; not a pre-determined catalog of immutable human forms, but rather that minimal determinacy in which identity originally becomes legible – the possibility of a marking, a signature perhaps, which would not yet suppose the Book. In whatever traces the other human can be known, or in whatever primitive articles it can be conceived – that, for instance, there even is another

human behind the "first obscure word" – then in and through those effects, those marks or signs, the most basic typification would have already come to pass. Trait is simply this other human's objectification for knowledge, its presentation for the *who's there?* of the summons. When Aristotle demands of the poets that their characters follow the law of "the necessary or probable" – follow it, as it were, *to the letter* – the verisimilitude he envisages is merely the condition that neither speech nor deed be so utterly contradictory to the sense of character as to *obliterate* it. For except to the extent that they reflect a borrowed light, speech is equivocal and the deed anonymous; "character is unfolded in them like a sun, in the brilliance of its unary trait" (Benjamin, 1986, p. 310), the inner consistency which they would typify. And this disjunction between the type and its presentations is nowhere better illustrated than in the formal austerity of the original characters of Theophrastus. The structure reproduced without alteration in each of his portraits is as diagrammatic as it is terse. Each begins with a definition of the relevant quality – given, at this point, as an *abstract* noun, with the feminine ending *-ia*: for instance, *agroikia*: "boorishness would seem to be an embarrassing lack of sophistication" (*Characters* 4.1); or *akairia*: "untimeliness is a usage of time which is detrimental to those whom you happen to meet" (*Characters* 12.1). But, as if from a false start, the Theophrastan portrait begins again in the second sentence, the phrase which opens onto the illustrative body of the portrait – a cumulative list of typical speeches and deeds. The phraseology of this second beginning betokens the crux of character itself – a point-of-exchange between the general and the particular, the abstract and the concrete. The change in register is subtle, and must be so if mere descriptions of speech and deed would of themselves be definitive without abstraction. And so the earlier designation is commuted to a *concrete* masculine noun, such as *agroikos* or *akairos*, which names the representative individual, the boorish or untimely man. Then – with a monotony unprecedented in Greek literature – each such character is "hitched" to its characteristics through the formula *toioutos tis oios*, "is the sort who . . . " So for instance, "the boorish man is the sort who has some gruel before going to the assembly" (*Characters* 4.1–2), or "the untimely man is the sort who goes up to someone who is busy and asks his advice" (*Characters* 12.1–2).

This allegation or *katēgorēsis*, this positive "sorting," synchronises the iterable type with the presentation of the real person that it would inhabit. No sooner has the evidence been deposed than the witness' *persona* can be deduced from it, becoming evident in an outline, a verifiable accessibility of that which can never be given *originaliter*. The vaguest phenomena of "demeanour" and the most methodical psychological analysis are founded on this access. It is the destiny, then, of the example that it ultimately be subsumed into what Husserl refers to as its *kundgebende Funktion*, its valence as an "appresentation" of the type. The example's forwardness, that physiognomic detour which the "interior of man" must

needs undergo if it is to be imputed at all, is already underwritten by the denotation which permits it to be noted, taken as given – as Husserl insists, the concrete is a *dependent moment* of the abstract. There is in this sense a certain phenomenology of character, no less than of proof: if the example is a positive phenomenon, then it becomes available only in the *categorial intuition* which "hitches" its singularity to its identity, the *toioutos tis*. To ask *who's there?* is at once to ask *what sort of who?* And that is still to ask *what?* Or again: it is impossible for the ethos to be presented as an object of judgement, a "fact," without betraying or pre-empting whatever in the judgement was supposed to pertain to the real person, the person of flesh and bone, fore- and surname, the Other. For, inevitably, the one whom we name in the accusative, the categoresis, is only a concept, a philosophically digested silhouette, a *no-one*, "neither of here nor there, neither of this age nor another, who has neither sex nor country, who is, in brief, merely an idea" (de Unamuno, 1954, p. 1). And if the example were *merely* an example, a no-one, then the creature of flesh and bone with which it coincided would have to be emptied of everything that bespoke its otherness – the enigma or hyperbole of the irreplaceable. The possibility of character's qualification as evidence, as the objective *suppositum* of an "observation," can only be derived from that original *presupposition* of truth on which knowledge rests – the entity as identity, as "one and the same." The ascription of an ethos, if it is to have an unequivocal probative significance, must be determined from its proof in *similar facts* – as the identical nature which assimilates this manifold. Aristotle himself would have naturalised the concept of *ēthos* when he glossed it as a modification of *ethos*, "habit," but he, of course, would only have been following this law which dictates that the discourse of character be rendered susceptible of a literal meaning. To put it summarily, this surrender to positivity and proof, to the necessary or probable, would befall character as soon as it evidenced itself, *as soon as it spoke* – perhaps this typography might be called a condition of character's verisimilitude. There could not be a gesture, not even that of speech, if such a gesture were not recognisable as such, if it were not accountable to some model that could provisionally be recounted or reiterated – that could be knowingly reflected on and accepted as a fact, as really having happened. Only in typography, then, could it be *shown* that *someone is speaking* The witness only speaks by the letter, and only as the selfsame character, the "scarecrow of the determinist" and not the irreplaceable other.

TRUTH AND IRONY

And yet the condition of the example's verisimilitude is here also verisimilitude's limit – for the reason, as was argued, that whilst there are only examples there is no

"true" or "pure" example. Each is more or less as idiomatic as it is concrete, a *tode ti* and not merely a *toioutos tis* – ultimately *Wesenschau* is still *Schau*, and opacity is an inexpungible moment of it. For by dint of the same verisimilitude that would permit its recognition, the character, if it is really "true to life," is unrecognisable. It presents a person; it must portray a radical excess over everything mechanical. And if a genuinely epideictic literature tends towards the furtiveness of epigram, which "discourses not," it is because it must brook this double-bind or paradoxography of the example. Consider the distance that separates even the most diagrammatic of Theophrastus' creations from their most relevant forerunners – say, the typifying disquisitions with which Aristotle illustrates his doctrine of the virtues, especially that of "magnanimity," *megalopsuchia*. Not only does this latter item distinguish itself from the Theophrastan tradition in representing a virtue, but for this reason it has to elaborate, and rather canonically, a programme capable of being learned and practiced. A tablature imbricated into the continuity of a longer treatise, and which therefore incorporates, as a legend, the logical scheme which has structured it in advance, it is contrived exclusively for demonstration. And the imperative of *apodeixis* dictates that a hypothetical personification will be an abstract and relatively bloodless one. Contrast any Theophrastan character – its most striking feature, and its most natural, is a depth of detail sometimes so particular as to defy exemplification. Where Aristotle had given a literal exposition, Theophrastus prefers the suddenness of a *mimesis* in which the trait is not the anonymous knot in the psychological net, but rather the glint of an individuality developed to the utmost vividness. One finds the "tasteless man," for instance, relating whilst he dines that "he's drunk some hellebore that cleaned him inside out, and that the bile in his stool was blacker than the soup that is on the table" (*Characters*, 21.6). No doubt such excessive detail is all the more characteristic for its hermetic abruptness, its resistance to analysis. For inasmuch as exemplification is essentially mimetic, character-literature is as bound to the idiomatic as to the typical. Not only for its pleasure, but also for its didactic pith – Aristotle himself acknowledged that what we "learn" in such minutely faithful imitations gives the liveliest pleasure.

This is that stubborn, creatural presence in which an ethos must realise itself, according to Bishop Hall, if its "spiritual" nature is to have expression. The character is a *figure* and not a symbol – it gestures towards a fulfillment that remains in abeyance, but "without prejudice to the power of its concrete reality here and now" (Auerbach, 1953, p. 555), and indeed the more intensely as an effect of this power. Nor would the ethos simply be the theme of these expressions, given to be conceived and known "in itself" through their transparency – the recognition to which they give rise is irreducible to criteria, because it is effective only as a "sensibility" or affectivity, an *aisthēsis*. It is not merely that the figure of the character *is* an example,

what must be noted is that it *sets* an example, *displays* itself as exemplary – even if it only assumes visual plasticity in the pointedly narrow regions defined by established categories, ethics, without this aesthetics, is empty. "Virtue," pronounces Hall (1608, quoted in Aldington, 1924, p. 53), "is not loved enough; because she is not seen: and Vice loseth must detestation; because her ugliness is secret." Nowhere does Hall here invoke the language of doxa and judgement, of the "literal" truth – the example made of the character, though it would be "sermon as well as picture" and save the labour of exhortation, is *not* demonstrative. The two poles of the figure – aesthetics and ethics, idiom and type, concrete and abstract – are of different orders, and *do not coincide*. They mediate one another, certainly – if ethics without aesthetics is empty, then aesthetics without ethics is no less blind. But this expressiveness which Bentham understood as a physiognomy does not evidence the noumenal interior, is not merely a *probans* which discloses its *probandum* according to a more or less obvious deduction. Or at least the "evidence" of character is not guaranteed by a literal, *clare et distincte* deducibility-from-itself. Which is not to say that the problematic of truth can simply be abandoned whenever a court concerns itself in the opinionative process, explicitly or incidentally, with the question *who?* The witness can only attend his own deposition "under a character," and never *in propria persona* – "but this effect too," cautions Aristotle (*Rhet*., 1356a8–10), "must come about in the course of the speech, not through the speaker's being believed in advance to be of a certain character."

In the word more than the word – this absence, this non-appearance even in appearance, infiltrates the judgement as its absolute margin of injusticiability, its paradox. The "truth" of the ethos, issuing into this obscure foreword which "says not all," is never true enough to do justice to itself – the example at once *avers* and *abjures*.

If the witness did not respond to the call in this "questionable shape," the sovereignty of reason could never be interested in – bound to – the impartment of its testimony. Without its ambiguity, the interval *from the one to the other* in speech would be foreclosed – the self-sufficiency of ratification would not dehisce to account for the unaccountable, to give credence. Nor, to follow an foregoing argument, can one know to expect "airs from heaven" or "blasts from hell" by the other – doubt devolves upon faith, conditions it even as the unconditional. And so it has been urged that the exemplification of the ethos, even in its candour, be thought as *irony*. In the long tradition of peripatetic characterology, from its incipience in Aristotle's *Ethics* to its rigidification in Byzantium, no single consideration is addressed with greater attention than this of character's *truthfulness* as what it gives itself out to be – although during its denouement, the subtlety with which this problematic was previously approached is largely abandoned. By the time of the Byzantine scholiasts, in whose agenda Theophrastus' work is preserved, the

ironic figure, the *eirōn*, a character which is not "open" but rather "contrived and double," is proscribed. The growing distance from the Socratic legacy is no doubt a factor here – irony, rather than the authentically undemonstrative abeyance of a "higher something that still is not" (Kierkegaard, 1992, p. 262), is now repositioned as an especially motivated form of duplicity, whose "hidden" meaning could yet displace it in the same light. No longer the abjuration of Kierkegaard's "infinite absolute negativity," which gives nothing but what remains radically withheld, irony becomes a positive – that is, perjurious – *mis*representation. Which means: the *eirōn* has been confused with another category altogether, that of the impostor, the *alazōn* – a connotation which it had never completely lost on the comic stage, even where, as in the late peripatetic Tractatus Coislinianus, the two types are relatively distinct. Already amongst the fragments of Ariston, head of the Aristotelian school only a century after Theophrastus' death, one finds a figure of the *eirōn* which, despite its obvious overtures to Socrates, maintains that such a character is "for the most part a species of *alazōn*" (Philodemus, *Peri Kakion* 10.21). On the contrary: the Aristotelian and Theophrastan precedents, read for their attention to the question of speech and truth, militate strongly against this amalgamation.

Theophrastus himself evinces the master's influence here. Of the thirty-two "vices" which compose the extant manuscripts of the *Characters*, nine are drawn directly from the taxonomy outlined in the *Nicomachean Ethics* – but for only one of Aristotle's antitheses are both poles represented: *eirōneia* and *alazoneia* And this distinction reflects, perhaps, their exceptional status in the earlier work. Its argument is renowned: in every sphere of human life there is an optimal disposition of one's actions or thoughts, a *mesotēs* or "Golden Mean," to overshoot which is as grievous as to fall short. Effectively, Aristotle tabulates the Greek folk wisdom that proscribed extremes – *mēden agan*. This structure demands, then, that a vicious trait be determined as a deficiency or an excess located along a continuum – *not* as the anithesis of the mean, which would occupy a middle ground, an in-between. There is incompatibility, but no contrariety, even in those cases where Aristotle speaks of a "farther" and a "nearer" evil. But in the case of *eirōneia* and *alazoneia*, this formula is stretched so as to seemingly exculpate one of the terms – which, except in its worst exaggerations, is nowhere during the exegesis reprehended as vicious. Not only would the *alazōn* be worse than the *eirōn*, it would in fact be the mean's direct opposite. And the mean, in this trichotomy, is the *alētheutikos*, the forthright or ingenuous man, the man of *alētheia* – truth in the sense of the open, the *dis*closed, the *un*concealed. Aristotle very deliberately limits the sort of honesty in speech and action to which he is referring – he is not simply concerned with "the person who speaks the truth in making an agreement, nor with conduct that involves justice or injustice" (Aristotle, *Eth. Nic.*, 1127a7),

but rather with a character which will stay "true to type" even in the absence of ulterior consequences. In other words, the ideal individual is the one in whom "what you see is what you get" – in whom nature and its outward semblance would exactly coincide. The question which resonates throughout Aristotle's discussion of pretence would not be "can what this person says be trusted?" so much as "is this person who he gives himself out to be?" The concern is less with the characteristic ethos of truthfulness than with the characteristic truth of the ethos – its *alētheia*, its genuinely letting itself be seen for what it is. And so Aristotle, echoed by Theophrastus ("a pretence of non-existent virtues": *Characters*, 23.1) defines the impostor as "one who pretends to have distinguished virtues which he possesses either not at all or to a lesser degree" (Aristotle, *Eth. Nic.*, 1127a2). By contrast, the ironic character disclaims or disparages such virtues as he does possess, or simply withholds his opinion. His "true character" remains in reserve – if anything, he is guilty of taciturnity and evasion rather than fabrication. Even in the Theophrastan version, where it is rendered as an almost farcical meekness, *eirōneia* is associated with an equivocation that manages at all times to have nothing to say, true or false – the *eirōn* maintains that he is "thinking it over," or that he only just arrived, or that he doesn't know but will "look into it." He does not lie outright or positively, as the *alazōn* does – his conduct is merely refractory, because in it, as Aristotle attests, revelation is limited.

But, as Aristotle admits, the *alētheutikos* must also incline "towards irony," must abandon his testimony to suggestion, suspense and lacuna – but not to a simple ambiguity which would encode a second message within the limits of its own signification, and where the relative dissension of the competing meanings would nonetheless be synthesised without residue in the overarching order of a common sense. Instead, the absolute understatement of *eirōneia* would expose the programme of a "whole truth" to the possibility of an unlimited negation, obliteration or oblivion (*lēthē*). It negates not by another signification, but by signification's other – if truth as testimony is irony, it is not by way of a sense spoken "in so many words," but by a *non-sense* which can only ever be *bespoken* in it. Because *someone is speaking* – the witness presented and represented to the court, the one identified in the accusative, would absolve himself from this accusation by his very readiness to respond to it. If the interrogatory were not also vocative, if it did not address the witness as one who spoke "for himself" and therefore irresponsibly, there could be no possibility of a genuine, "true" testimony. The witness' irony, as this impossibility of a final, proving word, is intrinsic to its good faith – credit would have no meaning if it only gave credence to the "necessary or probable." A truth which here posed as the "whole" or the "literal" truth, the definitive account of the person, would already be imposture, perjury, *alazōneia* – the witness and his character, the other one and the "one and

the same," are not one and the same. At most the account exemplifies: while its typography or *Wesenschau* would make the witness justiciable, by justifying the judgment passed upon his deposition, no account could pretend to do him justice – the justice that consists in letting speak, in invoking again a living discourse behind the message hypostasised in thought and rewoven into the tissue, the *textum*, of meaning.

NOTES

1. Cf. Levinas (1969, p. 82): "We also say that to know is to justify, making intervene, by analogy with the moral order, the notion of justice. The justification of a fact consists in lifting it from its character of being a fact, accomplished, past, and hence irrevocable, which as such obstructs our spontaneity . . . the concern for intelligibility is fundamentally different from an attitude that engenders an action without regard for obstacles. It signifies on the contrary a certain respect for objects. For an obstacle to become a fact that requires a theoretical justification or a reason the spontaneity of the action that surmounts it had to be inhibited, that is, put itself into question. It is then that we move from an activity without regard for anything to a *consideration* of the fact . . . Theory, in which truth arises, is the attitude of a being that distrusts itself."
2. See, e.g. Stephen (1872, p. 10): "It is obvious that the belief of the court in the existence of a given fact ought to proceed upon grounds altogether independent of the relation of the fact to the object and nature of the proceeding in which its existence is to be determined."

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7. INJURY AS MELODRAMA

Samantha Hardy

INTRODUCTION

Our legal system has a well-established set of laws and procedures for injured people to seek redress for their injuries. Over the years universalised legal injury narratives have developed. In other words, repeated applications of the law have generated standard, abstract, generalised versions of individual injury narratives. Accordingly, from any particular injury narrative, there can be distilled an "*essential or abstract*" legal injury narrative which is the same universal narrative that can be distilled from other like cases (Klinck, 1992). It seems likely that there are different versions of the legal injury narrative that have developed due to an accumulation of a large number of similar cases. For example, there is likely to be a version of the legal injury narrative for injuries arising out of each of motor vehicle accidents, workplace incidents, occupier's liability, medical malpractice or defective products. However, this paper will demonstrate that underlying all of these versions is the generic legal injury narrative with particular and common characteristics. This paper develops the idea of the universal "legal injury narrative" – that is, a legally idealised narrative about injury, based on a number of implicit rules about the way injuries occur and their consequences. The legal injury narrative is the framework by which other injury narratives are judged.

I should note here that there is a difference between what makes a narrative legally acceptable and what makes it "true." The universal legal injury narrative may not necessarily correspond with any objectively identifiable "truth." Theories of truth tend to fall into two categories: correspondence theories of truth and coherence theories of truth. A correspondence theory of truth assumes that events

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and states of affairs occur and have an existence independent of human observation and that true statements are those which correspond with these facts (Jackson, 1990). In contrast, a coherence theory of truth proposes that a statement may be construed to be true primarily on the basis of the overall narrative plausibility of the story told, rather than a notion of correspondence with some external reality.[1] In this paper I argue that any universal legal narrative is acceptable based on its coherence rather than its correspondence with any pre-existing truth.

Legal narratives reconstitute people's stories of pain into a wider, more social "realm of shared discourse" (Scarry, 1985) and the personal injury client is required to submit their claim for compensation in terms of this wider narrative so that the legal decision maker can understand and sympathise. The legal injury narrative makes personal injury litigation more time efficient (certain aspects of the narrative can be assumed) and also reinforces normative ideas about injury. However, it is important to identify the characteristics of the legal injury narrative and, in particular, what makes it "coherent," so that we can examine it as a reference by which other individual injury narratives are judged. If the legal injury narrative is "significantly and qualitatively different" (Toombs, 1992) to the injury as it is experienced and given meaning by the individual, there are potential consequences affecting both litigants and society in general.

In this paper I suggest that what makes the legal injury narrative coherent is its melodramatic form. After first considering the characteristics of melodrama as a literary genre, I then examine how the legal injury narrative reflects the melodramatic form. I apply and develop Feigenson's definition of the accident melodrama (Feigenson, 1999/2000) and, using case transcripts and reports, identify the melodramatic characteristics of the legal injury narrative. As a starting point, I discuss the use of stock characters and roles, in particular the stereotyping of plaintiff and defendant into "heroine" and "villain." I then shift the focus to the plaintiff, and in particular the characteristics of virtue required by the role. I also consider the effect of a plaintiff's gender and ethnicity on the representation of virtue. The difficulty in communicating those virtuous characteristics is the next topic of discussion. Finally the focus shifts back to the defendant and how blame is assigned in the legal injury narrative. This leads into the discussion about melodrama and morality.

I conclude by considering the possible ramifications of the melodramatic nature of the legal injury narrative. In particular, I point out that the fundamental role of a melodramatic narrative is the recognition of virtue. In the legal injury narrative, virtue is embodied in the plaintiff and its characteristics are implicitly reinforced by the requirements of the role. The two main questions that arise from this are (1) How does the plaintiff "prove" her virtue; and (2) What are the consequences

of this process? The following discussion will form the basis for the development of answers to those questions.

WHAT IS MELODRAMA?

Melodrama was necessary to remind the audience,

> by a presentation of constantly new situations and perpetually uniform results, of that great lesson shared by all great philosophies and religions: that even here on earth, virtue is never without reward, crime is never without punishment (Charles Nodier, "Introduction", in Pixerécourt, 1971, pp. vii–viii).

The *Concise Oxford Dictionary* defines melodrama as "a sensational dramatic piece with crude appeals to the emotions and usually a happy ending." Its characteristics include strong emotions; moral polarities and schemes; extreme states of being, situations, actions; overt villainy, persecution of the good and final reward of virtue; inflated and extravagant expression; dark plottings, suspense, breathtaking peripety (Brooks, 1976). Melodramatic narratives are based on a simplified plot with an overriding monopathic tone. We enjoy the seductive pleasures of melodramatic wholeness without considering the effects on those outside the narratives or acknowledging alternatives (Smith, 1973).

The characters undergo extremes, passing from heights to depths (Brooks, 1976). The story inevitably starts by demonstrating the protagonist's virtue, and reminding the audience about the desirability of, and the pleasure implicit in, the virtuous state. The protagonist's virtue, and thus happiness, is then placed in peril due to the actions of an essentially evil villain. The events that follow are portrayed as having been caused by individual human agency and are explicable in terms of the individual's characters (Feigenson, 1999/2000). Thus, the "villain" performs despicable actions, but the "heroine" demonstrates only virtuous conduct. Melodramatic plots are based on Manichean conflicts between pure goodness and pure evil. The drama is heightened by the use of one-dimensional characters.

In melodrama, the characters are stereotyped into the roles of "heroines" and "villains." This binary opposition is reinforced by appeals to the audience's emotions. Appeals are made to negative emotions directed against the villain (hatred, fear, vindictiveness) and positive emotions towards the heroine (sympathy, pity, compassion). The villain is driven by a morally negative motivation such as ambition, avarice, anger, jealousy or lust (Smith, 1973). The heroine is always free from fault, defenceless and presented sympathetically as the helpless victim of the villain. Evil reduces virtue to powerlessness (Brooks, 1976). The passive

victim does not act, but is acted upon (Heilman, 1968). This maintains the euphoric illusion that we are innocent victims of a hostile world (Smith, 1973).

In melodramatic plays the virtuous role is often represented by a young female. She demonstrates stereotypical feminine qualities, such as weakness, passivity and muteness. Muteness is a common theme in melodrama. Virtue is unable to "effectively articulate the cause of the right" and is symbolic of the defencelessness of innocence (Brooks, 1976). Muteness is often metaphoric or representative; for example, the protagonist is from another culture and cannot be understood. The protagonist's muteness emphasises her helplessness, and places her in a position in which she needs assistance to demonstrate her virtue. Her message will often require elucidation by cross-examination or verbal interpretation (Brooks, 1976). The protagonist must also prove her moral identity. Traditionally in melodramatic theatre there are documents such as birth certificates setting clear identification and recognition (Brooks, 1976). The protagonist's word is not sufficient and there must be other authoritative evidence to support her claim to virtue.

Melodramatic narratives place considerable focus on the heroine's suffering. Virtue undergoes unbearable trials and endures extremes of pain and anguish (Brooks, 1976). The audience is thus encouraged to feel sympathy and compassion. However, the protagonist, consistent with her virtuous character, must demonstrate a passive response to this anguish. Again, this brings in the theme of muteness. The protagonist must suffer in silence, and it is up to others to name and prove her pain, thus reinforcing her virtue.

Peter Brooks, in *The Melodramatic Imagination*, argues that melodrama is primarily aimed at resolving the problem of recognition of the protagonist's virtue. Mark Mullen (1998) extends Brooks' analysis, arguing that melodrama is characteristically concerned with the problem of expressing the radical interiority and communication of an individual's lived and felt experience. He also suggests that an important objective of melodrama is to encourage the audience to feel sympathy towards the protagonist. Mullen distinguishes between sympathy and empathy, the former including both a feeling of identification and the arousal to act on that feeling.

Consistent with melodrama's typical happy ending, the protagonist, against all the odds, overcomes the danger and the villain receives his come-uppance. The story ends with public recognition of virtue and evil and the eradication of evil to reward the virtuous. This "dream justice" inherently involves a moral claim. Brooks (1976) argues that melodrama takes the place of the sacred in demonstrating moral and ethical imperatives. Melodrama acts as a fictional system for making sense of experience and in the absence of any more transcendant principles, provides a creative rhetoric of moral law (Brooks, 1976).

However, the nature of melodrama means that morality becomes personal. Melodrama is dependent on Manichean dichotomies, so a person can only be morally good or morally bad. There is no middle ground and no allowance for ambiguity. Melodrama primarily reinforces the idea of the morally good and provides a very public representation and recognition of virtue (Brooks, 1976). It also demonstrates that virtue's suffering is caused by the moral failings of the villain. This personification of moral evil simplifies the often complex question of responsibility for suffering (Feigenson, 1999/2000). Questions of morality are portrayed as self-evident. Melodrama simply "uncovers" or makes legible the underlying moral universe. As such, it makes an implicit statement about social reality and has the potential to wield a certain amount of power by normalization, particularly when held out as a realistic representation of experience.

When the melodramatic narrative is held out as universal and objective, the simplified and stereotyped representations of experience may not truly reflect the realities of the particular individuals who are subject to its moral imperatives. This is problematic when melodrama is more than simply entertainment, such as when it is enacted as part of a judicial system by which peoples' actions are regulated. There is a danger that the melodramatic narrative and moral undertones tend to become generative, producing reality effects that become "facts." In making these truth-claims, melodramatic narratives in the law have the potential to cut off everyday experiences as being irrelevant and by reducing the ability of those involved to cope with their everyday lives. This article focuses on one part of the law in which melodramatic narrative can be found – personal injury trials – and asks how the melodramatic nature of the legal injury narrative might affect plaintiffs' abilities to cope with their injuries and their consequences.

HOW IS THE LEGAL INJURY NARRATIVE MELODRAMATIC?

> [T]he jury lawyer in his address to the jury [does] not confine himself to clear and concise logical arguments based on a passionless summary of the evidence: He does the reverse; he uses every trick of oratory and acting to appeal to the crudest emotions of the 12 good men and true (Frank, 1963).

Since Burke's *A Grammar of Motives* (1969) and Propp's analysis of folk narratives (1968), structuralist critics have proposed that "one principled way of analysing ordinary narrative is to fit it into classic literary form" or genre, which identifies the end point to which the explanation orients itself (Antaki, 1994). In this sense, I intend to demonstrate that the legal injury narrative fits neatly within the genre

of melodrama and the end to which it is oriented is the recognition and reward of virtue.

Melodrama is traditionally a performance. When considering the legal injury narrative it is important to identify both the performer and the audience. In its most pragmatic sense, the legal injury narrative is performed repeatedly, with minor variations in the detail, in personal injury litigation. The performers include the parties to the case, their lawyers and witnesses. Neal Feigenson, in his article "Accidents as Melodrama" (1999/2000), suggested that accidents tend to be portrayed by plaintiff lawyers in melodramatic terms to play on certain inherent psychological characteristics of jurors and to elicit sympathy for the plaintiff. In Australia personal injury trials are rarely heard by juries. Instead, the judge is the factual and legal decision maker in the trial. In this sense the judge is the audience for the lawyers' presentation and performance of the case. Most judges will have heard a large number of personal injury trials during their time on the bench, and will have developed their own ideas about what makes a successful case. However, from an examination of the judgments, I suggest that a universal narrative has developed which is commonly applied by all judges. Thus, for the plaintiff lawyer to present their client's case in such a way as to maximise their chance of success in the litigation, he or she needs to make the story as similar as possible to the universal narrative for this kind of event – the legal injury narrative – which is fundamentally melodramatic in nature.

In this section, I demonstrate how the legal injury narrative is melodramatic and discuss some of the possible consequences. I will draw on parallels from feminist legal theory as many of the issues legal feminist scholars have addressed with respect to the representation of women in the law are also worthy of consideration with respect to the representation of injured people. In many respects, my task is a similar one to the feminist legal scholar, but with a different subject – to consider the language of the law in order to assess how it represents injured people, in order to later assess the implications.

The Basic Plot

Generally speaking, the melodramatic injury narrative fits the following framework: The plaintiff, ideally characterised as inherently good, suffers from an injury due to the acts or omissions of the defendant, who is characterised as inherently bad. The injury results in the plaintiff's previously good life completely transforming into a life typified by pain and suffering. The plaintiff consequently feels dissatisfaction with life but resignation to their fate. The plaintiff and defendant are linked in a relationship of complementarity in that the defendant

is portrayed as highly blameworthy and the plaintiff as not at all blameworthy. The plaintiff makes a public demonstration of virtue and the defendant is publicly judged. The plaintiff is then rewarded to the defendant's detriment and justice is served.

The following parts of this paper deal with some of the more prominent aspects of the legal injury narrative. Firstly, I will deal with how the legal injury narrative portrays fault and blame in a monocausal way. As blame is individualised and portrayed as attributable to character, this leads into a discussion about the use of stock characters and roles, particularly the dichotomies of heroine/villain and victim/oppressor. I will also briefly consider the phenomenon of role reversal. As one of the main aims in melodrama is the recognition of virtue, I then focus on the plaintiff's virtuous characteristics. This includes an analysis of the implicit assumptions relating to gender and ethnicity that are often linked to the plaintiff role. I then address the problem of communicating the plaintiff's virtue. Following this I consider the role of communicating pain. Finally, I foreshadow some potential consequences of the melodramatic form of the legal injury narrative, particularly in relation to its moral overtones.

Assignments of Blame

> The defendant may indeed cause the plaintiff's injury, and if the story begins and ends with these two events, legal liability might well follow. The plaintiff's prior conduct, however, might have placed him in a position in which the defendant's actions would result in the injury, and if the plaintiff's actions were negligent, this fact might well reduce or eliminate the defendant's liability to him. To make matters more complex, a single cause may have several effects, some of them necessary, some of them not, and any effect may have many possible causes (Melton, 1998, p. 441).

In narrative, events may be related temporally, spatially and causally (Prince, 1982). In legal injury narratives, the concept of causation is particularly relevant. All events need to be connected in some way. For example, in an action about events in which two cars were involved in a head-on collision, there are typical events which might be connected to the accident. If one of the drivers had been drinking immediately before the accident, and is found to have a high blood alcohol content, then the events surrounding the driver's drinking would obviously be relevant. However, other events that could be seen to have an impact on the accident might not be as relevant, even though they may have contributed to the risk of the accident occurring. For example, it might not be too far-fetched to refer to events such as the invention of a new kind of safety barrier that, if installed in between carriageways of major roads, would have had the potential to significantly reduce the risk of such accidents occurring. If the government had installed this type of barrier in

the area in which the accident occurred, the accident would never have happened. In a sense, the invention of the barrier and the government's failure to install it are events which could be said to have caused the accident (or at least contributed to it). However, in a legal narrative they are unlikely to be seen as relevant unless the government is a party to the litigation.

In the legal injury narrative, events must be directly linked to the parties involved. The injury has to be portrayed as having been caused by the defendant's actions. Any external political or social issues are masked by the focus on individualised justice. The legal injury narrative is concerned about facts of individual injuries, not on the societal roots of such troubles (Koenig & Rustad, 1995).[2] The focus on human responsibility for events is inherent in the adversarial system. The plaintiff has to hold someone up as being responsible for their injury. This simplistic approach to blame clearly reflects the fault principle in tort law, that only the person causing the injury should bear the burden of the consequential loss (Atiyah, 1975). Compensation will not be awarded without the associated requirement for blame.

The legal injury narrative tends to convert the complex chains of events leading up to the accident into a compact monocausal account (Feigenson, 1999/2000). Feigenson explains that a melodramatic plot is satisfying because people tend to prefer simple explanations for events or behaviours to complex ones. He calls this the monocausal model. Monocausality may be preferred because people are motivated to accept a single sufficient explanation for any event above one that is the best of all possible explanations or because of the "seductive pleasures of melodramatic wholeness" (Smith, 1973). Lawyers are accustomed to simplifying causal explanations, usually choosing to interpret and/or portray the problem as one of necessary or "but-for" causation (Melton, 1998).

In the legal injury narrative events are caused by human agency and the agent is the defendant. The defendant is masculinized in that he is the subject agent acting upon the plaintiff object. In order to attribute blame, it is necessary to show that the plaintiff has been subordinated to the defendant's actions. The focus on the defendant as the agent of injury is emphasised in the legal injury narrative by the use of active voice to describe defendant's actions, and the use of passive voice to refer to plaintiff's actions (Feigenson, 1999/2000). This also reinforces the dichotomy between the defendant as the all-powerful agent and the plaintiff as the passive victim of the defendant's conduct.

The defendant's actions are explained by reference to his morally reprehensible nature. For example, in a drink driving case, the defendant is portrayed as:

> the sinner against society, the deviant "problem drinker" as opposed to the "normal" user of alcohol, the cause of half of all traffic deaths. From a complex reality, the drunk driver is constructed as the villain in a cultural melodrama, the sower of disorder in an otherwise orderly

> world. Thus, ... responsibility for these accidents is simplified, personalized, dichotomized, and moralized – individual responsibility (the "unsafe driver") rather than corporate ("the unsafe car") or collective (the "unsafe road" or "unsafe transportation system") responsibility (Feigenson, 1999/2000, p. 790).

Feigenson notes that this is supported by the psychological phenomenon of "fundamental attribution error" – the tendency to attribute the cause of a negative event to a person's blameworthy act and to attribute the blameworthiness of the act to the person's character (Feigenson, 1999/2000). Closely connected to this is the phenomenon of "culpable causation" – the tendency to assign more causal responsibility to an act which is more morally blameworthy, even if moral aspect is not relevant to the result (Feigenson, 1999/2000).

In the legal injury narrative this melodramatic theme is clearly evident – issues of liability focus on what the defendant could and should have done differently (Feigenson, 1999/2000). In order to provide an explanation as to why the defendant did not act as expected, reference is again made to the defendant's role as villain/oppressor. Conversely, the defendant's role is generally to challenge the plaintiff's case by arguing that the defendant does not fit the role of villain (in other words, they haven't done anything wrong) or that the plaintiff does not fit the role of heroine (and hence does not deserve to be compensated). The following section discusses the characteristics of these stereotyped roles of plaintiff and defendant.

Stock Characters and Roles

> When individuals come before a court, they do not present themselves as they would in everyday life; instead, they come before the court in one of their roles (Bumiller, 1988, p. 62).

Universal legal narratives assign characteristics and define people in certain ways based on their position or circumstances (Gilkerson, 1992). They tend to rely on stereotypes with respect to the roles people are required to play in the narrative. For example, universal legal narratives may treat

> black femaleness as unreliable, untrustworthy, hostile, angry, powerless, irrational and probably destitute (Williams, 1991).

Some common roles include those relating to family, work, gender, race or victim status. These roles tend to be superimposed over and limit the information provided about the individuals' identities, experiences, perspectives and images (Gilkerson, 1992). In many cases they may contradict the person's own concept of the role they

have played in the events in question. For example, in order to make a successful sex-based claim, women are often required to represent themselves as victims, although this may contradict their experience (Gilkerson, 1992).

Peoples' relationships are also often stereotyped in legal narratives, such as in the reoccurring themes of poor client and state, and oppressor and victim. Consistent with law's tendency towards binary systems of logic, the relationships between characters in legal narratives tend to be defined in oppositional terms (Smart, 1989). This is also typical of the melodramatic form, in which relationships are generally based on the characters' polarized differences, particularly with respect to their power and moral nature. Given that the melodramatic narrative tends to explain peoples' actions by reference to their characters, the representation of a character's moral nature is used to explain his or her actions. Universal legal narratives contain similarly preconceived ideas about peoples' expectations and motivations. For example, in universal legal narratives relating to welfare law, there is a clear distinction between the worthy poor, who are morally virtuous (for example the disabled, blind and elderly), and the unworthy poor (such as nonworking "employable" single people and heads of households), who are morally reprehensible (Gilkerson, 1992).

These kinds of stereotypical roles are clearly evident in the legal injury narrative where the plaintiff is inevitably characterised as the "heroine" and the defendant as the "villain." In the legal injury narrative the plaintiff and the defendant are diametrically opposed – they represent the polarization of good vs. evil. In keeping with the melodramatic theme, the goodness and badness of the parties is highly personalized, and is inherent in their characters (Brooks, 1976).

Feigenson (1999/2000) uses the case of *Faverty v. McDonald's Restaurants of Oregon Inc*. 892 P.2d 703 (Or. Ct. App. 1995) to demonstrate the polarization of characters in a personal injury trial. Theurer was an eighteen-year-old student employed by McDonalds. He had worked a 3.30p.m. to 7.30p.m. shift, then returned to do a midnight shift that same night. As he drove home, very tired, at 8a.m. the next morning, he fell asleep at the wheel and hit the truck driven by Faverty. Faverty was seriously injured and Theurer was killed. Faverty settled with Theurer's estate and sued McDonald's. In this case Faverty, as the plaintiff, should technically have been cast as the heroine. However, in order to succeed in his claim he had to, in effect, argue Theurer's case for him. He had to show that it was McDonald's fault that Theurer was on the road in an over-tired condition. Arguably, the case emphasizes Faverty's good, passive and mute status in that he is very rarely even mentioned in the arguments.

In essence, Faverty argued that McDonald's should be held responsible for allowing Theurer to work such long shifts and then drive home. Faverty's lawyer clearly set up a "heroine/villain" character opposition. Theurer was described as

> a good kid. Everybody liked him. All the terrible things that kids can get involved in and exposed to, he'd done a good job of avoiding most of them.

Faverty argued that McDonald's "should have known better," that they kept Theurer at work when they didn't have to, that "common sense" and "common decency" should have told them that, that McDonald's wasn't thinking about safety, they wanted to make money. McDonald's was cast as a greedy corporate profiteer who "pushed the kid off a cliff."

Faverty's case is perhaps an extreme example of how characters in a legal injury narrative are polarised. However, to a certain extent the same Manichean contrast can be found in all legal injury narratives. In *Lonsdale v. Smith* [2000] ACTSC 15 the distinction between the characters of the plaintiff and defendant was made very clear, even though the circumstances of the accident were not particularly malicious. The plaintiff had agreed to give the defendant, who had been drinking, a lift home. The defendant then invited the plaintiff to come and see his new workshop and car inspection pit. Due largely to the lack of light and inadequate barriers, the plaintiff fell into the pit and was injured. However, the interesting aspect of the judgment was the clear reiteration of the fact that in the events leading up to the accident, the plaintiff was motivated by courtesy and resignation, whereas the defendant was motivated by pride which was exacerbated by the consumption of alcohol.

Another good example of the "heroine/villain" dichotomy can be found in *Australian Capital Territory v. Van der Gevel and the Nominal Defendant* [1998] ACTSC 118. Ms Van der Gevel fell from a culvert when she stepped from a road over a guard barrier to avoid an oncoming car. She brought an action against the Nominal Defendant (in place of the unidentified driver of the oncoming car) and the Australian Capital Territory (as the relevant road authority). Her case emphasized the inappropriate behaviour of the men in the oncoming car and her entirely understandable response. The road authority was also interested in laying blame for the incident on the occupants of the car and presented their argument in clearly moralistic terms, stating that the accident was:

> precipitated by the completely unjustifiable actions of a group of young men shouting and waving in an errant motor vehicle that they aimed at the plaintiff

and that:

> the action of the driver and passengers in the car was *without any justification*, was almost certainly intended to frighten the plaintiff, *had no redeeming social value of any kind and would be condemned by right thinking people*.[3]

Gallop ACJ and Higgins J, in their judgments, accepted and reinforced the contrast between the actions of the men driving the car and Ms Van Der Gevel. Both judges

clearly indicated their approval of Ms Van der Gevel's state of mind and subsequent actions.

> The plaintiff was walking alongside a steel guard barrier when a car containing a group of young men approached, slowed down and weaved towards her. The plaintiff, a young woman alone on a lonely stretch of road at night, *understandably* feared for her safety and decided to step over the guard barrier to avoid the oncoming vehicle.[4]

> At this precise point, the plaintiff was approached by a vehicle containing a number of young men. The car slowed and weaved towards her. The occupants were jeering and yelling. Some were waving their arms about. Being *understandably* alarmed, the plaintiff stepped over the guard-rail. She expected to find herself on a grassy slope down which the car could not follow her. Instead she found a void into which she toppled. She was seriously injured.[5]

Often, the defendant's "villain" status is reinforced by evidence of habitual bad behaviour, even if this is not directly relevant to the case at hand. For example, in the *Faverty* case McDonald's was portrayed as a greedy corporate profiteer with a history of exploiting its teenage employees (Feigenson, 1999/2000). The *Faverty* case also demonstrates another common characterisation of the parties to the injury narrative, the roles of victim and oppressor.

An interesting variation on the heroine/villain dichotomy is when the plaintiff becomes the villain. Defendants often attempt to use this role reversal, arguing that plaintiffs are guilty of malingering or exaggeration, or that they have a history of past accidents or illnesses. For example, in *Zorzi v. Robbins* [1999] ACTSC 72, considerable time was spent discussing the plaintiff's history of previous car accidents. This information was, strictly speaking, not legally relevant, but seems to have been used in an attempt to attack the plaintiff's character. There was also a large amount of discussion about the fact that the plaintiff was a migrant, and argument about whether or not the plaintiff was guilty of malingering. Similar discussions took place in *Bagic v. Commonwealth* [1999] ACTSC 134, in which the plaintiff was described as being an immigrant, who had had previous accidents, had previously taken sick leave, and had a history of difficulties with management and other staff.

Character evidence was also heavily relied on in *O'Rourke v. Gordon* [1999] ACTSC 120, in which it was found that the plaintiff's version of events was vague and confused, and considerable emphasis was placed on the fact that the plaintiff had a vision problem. A specific comparison was made with the defendant who was described to have given persuasive, clear and logical evidence. In this context, reference was also made to the fact that the defendant was a sworn officer in the RAAF, which could only have been relevant in terms of the defendant's character.

Recognising Virtue

In order to be accepted as virtuous, and thus deserving of sympathy leading to an award of compensation, the plaintiff is required to demonstrate characteristics of weakness, passivity and muteness. Additional characteristics apply depending on whether the plaintiff is male or female, or from a different ethnic background.

Tort law, with the goal of deterring unsafe behaviour, has been said to be concerned with actual and potential victims (Bell, 1990). Interestingly, nearly all scholarly discourse in relation to personal injury litigation also refers to the injured person as a "victim" in some form or another.[6] The concept of victimhood relates to two aspects of the personal injury plaintiff's role. The first is in the sense of causation, in that the plaintiff is a passive victim, not responsible for having caused his or her invalid status. The plaintiff is clearly portrayed as being the innocent victim of the defendant's action or inaction. The second is in the sense of mitigation, in that the plaintiff is helpless and is not responsible for the continuation of her suffering.

The first aspect of victimhood is evidenced in the Faverty case, in which Theurer was cast as a passive victim of McDonald's lack of "parental" care (Feigenson, 1999/2000). Similar examples abound in Australian personal injury cases. Fundamental to the passive victim role is the need to establish a clear delineation between power vested in the plaintiff and the defendant. In other words, the defendant must be held out to be all-powerful, and the plaintiff subject to the defendant's control of that power. The plaintiff is represented as "virtue-as-innocence," placed in peril by the evil reign of the defendant (Brooks, 1976). The defendant controls the structure of events and the plaintiff, silenced and passive, is unable to call into question the defendant's conduct (Brooks, 1976). In the legal injury narrative, this power imbalance is often demonstrated by arguments that the defendant failed to protect the plaintiff by providing instructions, warnings, or assistance.

In cases in which the plaintiff has been injured at work, the plaintiff's silence and passivity is often characterised by the subservience of the employee to the power of the employer, and the lack of any right in the employee to criticise the employer's conduct. The plaintiff is portrayed as lacking any power to control his or her own destiny, for example by having no choice as to whether or not to carry out a dangerous task. For example, in *Bagic v. Commonwealth* [1999] ACTSC 134, the plaintiff was injured when lifting a heavy beam at work. He gave evidence that he recognised the dangers inherent in trying to lift the beam by himself, and in fact asked his employer for assistance, which was refused. Although the plaintiff was described as "an experienced tradesman [who] knew about lifting," Miles CJ found that:

> The plaintiff was working, presumably under pressure, and did not fail to ask for assistance. When it was refused, the decision to try and lift the beam on his own did not constitute a failure to exercise reasonable care for his own safety. His decision does not need to be excused as momentarily inadvertent. *In practical terms it was either lift the beam or refuse to work*. He chose to lift the beam.

A similar example can be found in *Future Look Landscaping Pty Ltd v. Hanlon* (SC NSW, CA 40658/97), in which Giles JA (with whom the other judges agreed) stated that:

> under the circumstances, the respondent had *no choice* but to help to lift in the manner . . ., *[he] had lifting thrust upon him*.

The plaintiff is also frequently portrayed as not having sufficient knowledge to protect him or herself. For example, in *Frost v. Woolworths Pty Ltd* [2000] ACTSC 106, the plaintiff was injured when he tried to move a carton that appeared to be stuck for some unknown reason. Miles CJ described the plaintiff as acting in a "*state of ignorance*." However, ignorance is no excuse for a defendant, who is presumed to be all-knowing as well as all-powerful. In *Loiterton v. PD Mulligan Pty Ltd* [2000] ACTSC 36, the plaintiff sued his employer for failing to protect him from an assault by another worker. The plaintiff alleged that the defendant knew of regular acts of violence among staff but did not take any steps to discourage or prevent them.

The second aspect of victimhood requires the personal injury plaintiff to demonstrate that they do not derive any pleasure or satisfaction from their injured condition (Brody, 1987). This is constantly reinforced by the universal legal injury narrative in a number of ways. The plaintiff's case will generally present a stark contrast between the pre-injury able-bodied plaintiff and the post-injury disabled plaintiff. This contrast is important as it is inherent in the melodramatic genre that the central event results in a transformation between the protagonist's prior and subsequent condition. It is necessary to show that the injury is a turning point in the plaintiff's life, turning a previously happy (or at least bearable) existence into one centred on suffering and dissatisfaction. Any improvements in the plaintiff's condition are brushed over or immediately followed with a negative aspect. This seems to be important in order to achieve consistency in the post-injury state. This state, according to the melodramatic genre, is a negatively valued and generally unsatisfactory one, to which the plaintiff must resign him- or herself. The plaintiff is unable to improve her condition by her own will or actions.

Victim roles tend to draw on stock imagery to reinforce the desired sense of victimhood. They are based on stereotypes of people in similar circumstances. Tied in with these stereotypes are implicit requirements relating to gender and ethnicity.

Gender and Ethnicity

> Women suffer in ways that men do not, and . . . the gender specific suffering that women endure is routinely ignored or trivialized in the larger (male) legal culture. Just as women's work is not recognized or compensated by the market culture, women's injuries are often not recognized or compensated as injuries by the legal culture (West, 1993, pp. 179–180).

The casting of the personal injury plaintiff in the role of good, passive victim effects a kind of feminizing of the plaintiff role. The active agent in the legal injury is the knowledgeable defendant. This reflects the traditional association of reason and mind with masculinity. The focus on the plaintiff as silenced victim and the emphasis on her physical injuries and subsequent suffering reflects the feminine, characterised by the mute body, awaiting signification from the opposing masculine subject (Butler, 1990). In the melodramatic form of the legal injury narrative, these binary oppositions are exaggerated. Apart from the implicit feminization of the personal injury plaintiff, the characterisation of the personal injury plaintiff as innocent victim is often reinforced by corresponding stereotypes of gender and ethnicity, which often implicitly incorporate aspects of victimhood.

The roles of plaintiff and defendant in the legal injury narrative are usually implicitly gendered. This is particularly so with respect to the plaintiff. The plaintiff's character includes stereotypical assumptions about men and women, about men and women's work, about men and women's motivations and expectations and about their roles in relationships. When a woman or a man is a personal injury plaintiff, they come to the law in a pre-existing stereotyped role imposed by their gender. For example, a woman is already categorised as mother, wife, sexual object, pregnant woman, deserted mother, single mother and so on (Smart, 1990). Whether or not the plaintiff fits the stereotypical assumptions of gender may affect whether or not the plaintiff fits the role of "heroine" or "victim" and is thus deserving of compensation. It may also affect the amount of compensation that a plaintiff is awarded, due to consequential assumptions about the nature of a particular plaintiff's loss. Regina Graycar (1995) notes that in Australian cases gender bias is pervasive, subtle, nuanced and therefore difficult to address directly. The effect of this bias is that the reality of women's life experiences is often not reflected in law (West, 1988).

In the melodramatic form, the legal injury narrative explains a person's actions by reference to their character. When their character's role is based on a gender stereotype, the explanations are necessarily affected. These kinds of role assumptions may have an effect on how liability is determined. For example, Leslie Bender (1993) suggests that tort law tends to be "male" as applied although the concept of foreseeability is "broad and flexible enough to be inclusive of male and

female experiences, perspectives and concerns." She discusses the case of *Doe v. Linder Construction Co*., 845 S. W.2d 173 (Tenn.1992) in which a landlord was accused of negligent key handling such that two men were able to use the key to gain access to a female tenant's apartment and rape her. The Tennessee Supreme Court majority said that such an event was not reasonably foreseeable. Bender, and the sole dissenting judge, Justice Martha Craig Daughtrey, both argue that to the average woman, who lives in fear of rape in her daily life, rape was a very foreseeable consequence of key mishandling. In other words, the defendant in that case was characterised as having behaved as a reasonable "man" rather than the apparently neutral reasonable "person."

Brown et al. (1996) note that mythic generalizations often reduce women to one of two archetypes: madonna or whore. This neatly corresponds to the melodramatic "heroine" and "villain" dichotomy with respect to the female gender. Brown et al. (1996) describe the madonna as "the ultimate maternal nurturer and virtuous role model, neutred and asexual." Women who fit the madonna stereotype in the legal injury narrative are more likely to have their evidence accepted. For example, in *Conyard v. Hancock Bros Pty Ltd* (SC QLD, 1713 of 1995, 25th March 1998, White J) the judge commented that the male plaintiff's wife

> presented as a devoted, supportive and loyal wife and I accepted her evidence without reservation.

Other examples can be found where the female plaintiff's virtue is judged on the appropriateness of her behaviour with reference to stereotypical gender assumptions. The case of *Australian Capital Territory v. Van der Gevel and the Nominal Defendant* [1988] ACTSC 118 is a good example. The judges placed considerable emphasis on why the female plaintiff was in this particular setting at that time. The judges explain that her partner had been apprehended for drink driving and she was walking to where his car had been left on the side of the road. This information is really not relevant to liability, but was mentioned a number of times. This raises an interesting issue about why an explanation for the plaintiff's presence in this particular setting was required. It seems likely that the judges thought that it was important enough to mention because its absence in the narrative would reflect badly on the plaintiff. In other words, nice girls don't walk on lonely stretches of road at night. This seems to add to the melodramatic characteristic of the narrative.

Another aspect of the plaintiff's role in the legal injury narrative is that it tends to include particular ethnic characteristics. This is not surprising given that the legal injury narrative has traditionally been developed by white anglo-saxon upper middle-class males. To a certain extent the legal injury narrative is a product of this culture and expresses that communities' values (Ifill, 2000). As such, the legal

injury narrative tends not to "fit" those from other cultures, and the stereotypical roles it incorporates do not necessarily make sense to some of those people upon whom it is imposed.

This is particularly noticeable in personal injury unreported judgments, where a disproportionate number of the cases involve a plaintiff who is an immigrant, generally from an Eastern European country. The distinction between a "good" immigrant and a "bad" immigrant role is also clear in these judgments. The "good" immigrant is characterised as one who "through sheer effort" has established an affluent lifestyle, and takes pleasure and pride in this considerable achievement. The "good" immigrant shows evidence of having been a hard worker all of his life and as having assimilated well into the Australian culture. In contrast, the "bad" immigrant is one who has a poor command of English. They tend to have earnt their livings in Australia as physical labourers, and accordingly, when they lose their physical capacity, their level of English limits their opportunities for future employment.

Medical practitioners often refer in their evidence to the "typical scenario in migrants" in which they are injured and

> they don't get better, because there's something going on. They don't all just decide on one day to stop work and tell lies and sit reading the newspaper, there's something happening to them physically and mentally . . . (Dr Knox, cited in *Risteska v. The Commonwealth of Australia* [1999] ACTSC 56).

There are repeated insinuations in the judgments that immigrant plaintiffs are prone to malingering. For example, they continue to wear cervical collars despite advice from rehabilitiation specialists that it is no longer necessary, and tend to develop pain disorders associated with psychological factors such as the difficulties they have had in their life since coming to Australia. There is an implication that these difficulties make immigrants more prone to develop pain disorders and malinger compared with those born in Australia. This also ties in with the focus on the plaintiff's suffering – these kinds of stereotypes include ideas about what makes these kinds of characters suffer.

In summary, the injured plaintiff's stereotyped victim role can be described as that of "invalid." The *Australian Concise Oxford Dictionary* defines the word invalid as:

> (1) a person enfeebled or disabled by illness or injury; (2) not valid, especially having no legal force.

Ironically, the role of invalid in the universal legal injury narrative incorporates elements of both aspects of the definition in the sense that the invalid is both physically and legally enfeebled. The concept of legal enfeeblement is based on the plaintiff's difficulty in communicating her virtue.

Communicating Virtue

In melodrama, everything must be said, even the unspeakable (Brooks, 1976). The characters must clearly demonstrate to the audience their status of virtue and villainy, and the lesson of their relationship. However, there is an inherent conflict between this need to speak and the muteness of the plaintiff role. Again, this reinforces the fact that the plaintiff is objectified, represented by her body, and in need of someone else (a lawyer or medical expert) to speak her pain in order for it to be heard.

If in melodrama the protagonist is unable to express her own virtue, in personal injury litigation the plaintiff is unable to present her own case. The plaintiff needs the assistance of a lawyer to represent her and to articulate her claim. In the courtroom, the lawyer does most of the talking, and when the plaintiff does take the witness stand, she only speaks in response to questions from the lawyers. Just as in traditional melodrama, the plaintiff's message will often require elucidation by cross-examination or verbal interpretation by the lawyers.

In melodrama, muteness is often metaphoric, in that the protagonist is from another culture, and although he or she can literally speak, the dominant culture cannot understand. In the same way, the plaintiff is generally not familiar with the legal culture, and he or she needs someone well-versed in that culture to make the legal decision maker understand and sympathise.

The reliance on documentation in the personal injury trial also reflects traditional melodramatic theatre, in which the protagonist's virtue is finally demonstrated by documents such as birth certificates. In the personal injury trial, documents such as medical reports are necessary to prove the plaintiff's pain – the plaintiff's word is not enough.

Virtue in Pain

In the legal injury narrative the focus on the plaintiff's suffering makes positive emotions directed towards the plaintiff a central feature. These positive emotions are seen as necessary to encourage the decision maker to feel empathy. In her article "Legality and Empathy," Lynne Henderson (1987) notes that empathy has three distinct meanings:

(1) Recognising emotions in others;
(2) Imaginative experience of the situation of another; and
(3) The distress response that accompanies this experiencing – which may (but not must) lead to action to ease the pain of another.

In terms of the legal injury narrative, it is the third definition of empathy that is most relevant. The plaintiff wants the decision maker to feel empathy for his or her situation, and to take action to ease his or her suffering. The motivation to take action arising from feelings of empathy is "sympathy" (Mullen, 1998). Feigenson (1997) defines sympathy as

> a heightened awareness of the suffering of another and the urge to alleviate that suffering.

He explains that sympathy goes a step further than empathy in that it

> includes the cognitive appraisal that the sufferer does not deserve his suffering and the desire to help relieve that suffering for the sufferer's sake.

In the legal injury narrative, it is the distress response that the plaintiff seeks to trigger in the decision maker, leading to the action of awarding damages as compensation for the plaintiff's suffering. The audience's focus moves from the evil defendant to the plaintiff and his or her suffering. The plaintiff thus becomes the central object of the audience's emotional participation in the legal injury narrative (Feigenson, 1999/2000).

Susan Bandes (1996) has considered the role of victim impact statements in encouraging empathy and compassion in judging. In the personal injury trial there is no real debate about the appropriateness of the "victim's" narrative. It is a fundamental part of the case. The injured plaintiff must demonstrate how the injury has affected his or her life in order to receive just compensation for what he or she has suffered. Accordingly, the role of sympathy is inherent in the part of the legal injury narrative relating to quantum. However, this part of the legal injury narrative is again subject to certain normative constraints. The particular must be reduced to the universal. Commonalities must be emphasized and personal perspectives downplayed (Bandes, 1996).

Given that physical pain resists objectification in language, the focus must move out of the body into the external circumstances that can be pictured as having caused the hurt (Scarry, 1985). This again reinforces the melodramatic nature of the legal injury narrative – shifting the focus onto the defendant as the cause of the plaintiff's suffering. The plaintiff is relegated to the status of the object of the defendant's actions.

MELODRAMA AND MORALITY

> The Law – the archetype, the originary model – experienced in sacred times at the site of mythic reality, teaches us a new the proper patterns for belief, for feeling, and for social behaviour generally. Here lies the originary fount for cultural and characterological normalization. Here

> is a site where transgression of newly appreciated cultural and social norms may be appropriately assessed and resolved – with the aid of refreshed cultural forms: legendary or mythic themes, popular genres, familiar plots and character types through which the drama of trial is enacted. In this way the trial assures us of the intelligibility of reality. The heightened understanding it allows lifts us, at least for a while, above the constitutive ambiguity of everyday life. And in the transcendent euphoria it brings comes the moral beauty, and persuasive payoff, of a well-played narrative truth (Sherwin, 2000, p. 69).

The legal injury narrative provides this truth with the aid of the melodramatic genre. Melodramatic narratives display an extreme form of moralizing, emphasizing the presence and force of good and evil in the world, and demonstrating the need to confront evil and remove it from the social order (Brooks, 1976). They imagine an alternative world in which good always triumphs over evil. The legal injury narrative relects this melodramatic moral resolution. It attributes a morally charged meaning to the defendant's action and provides the community with a coherent and comforting resolution. The trier responds to the breach of a social norm – rationalizing and creating order over chaos (Berman, 1994). In true melodramatic form, the recognition of the appropriate order is often given in "a full-fledged trial, [with a] public hearing and judgment of right against wrong" (Brooks, 1976).

Public recognition is given by the judgment of where liability resides, but, as Brooks (1976) points out, correct recognition by judges does not always bring immediate resolution to the protagonist. The victim is still in an injured state and in need of catharsis. The legal injury narrative provides this desired resolution by the fiction that an award of damages puts the plaintiff in the position as if the injury had not occurred. The fact that it is the defendant making the payment of compensation[7] reinforces the notion of individualised morality, inherent in the melodramatic form.[8] This also reinforces the justice conception of tort – that negligence law is an articulation of our ordinary moral conceptions of agency and responsibility, carelessness and wrongdoing, harm and reparation (Keating, 2000).

In a sense, the whole concept of negligence presupposes some uniform standard of behaviour, based on the fiction of the reasonable person (Galligan, 1996). However, what is often more important in the sense of setting normative standards for behaviour, and which is highlighted when the legal injury narrative is viewed in its melodramatic form, is the implicit recognition of the characteristics of virtue *in the plaintiff*. Further work is needed to analyse in detail what those characteristics are and the possible ramifications of the fact that they are presented as "normal."

Lloyd-Bostock (1979) points out that social norms about accidents tend to be based in law – that they tend to reflect law, rather than being reflected in law. If the legal injury narrative thus forms the basis for society's response to injury, and the normative standards by which injured people are assessed, there is a risk that injured people will also assess themselves by the same standards. If the virtuous

characteristics are not truly representative of the injured person's experience, what are the consequences?

NOTES

1. See for example, Jackson (1990).
2. See also Scheppele: "If, for example, you see the particular car accident as the result of an individual driver's error . . . you miss the role of broader forces that provide a context for these local causes. A public policy that encourages cars over mass transportation has a certain causal effect in creating a particular accident rate, and hence may be seen as responsible for the individual accident" (1998, p. 323).
3. My emphasis.
4. Gallop ACJ.
5. Higgins J.
6. For example, Miller (1994) refers to "victim[s] of value deprivations."
7. At least theoretically, although there are obvious implications with respect to liability insurance.
8. Note that this has been criticised by subscribers to the enterprise liability theory of tort law, who urge adoption of compensation plans and strict liability rules by the courts in order to shift tort law in the direction of emphasizing social as against individual morality (Nolan & Ursin, 1999).

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8. GRAVEN IMAGES: "THE HART ISLAND PROJECT"

Rebecca Scott Bray

> When historical visibility has faded, when the present tense of testimony loses its power to arrest, then the displacements of memory and the indirections of art offer us the image of our psychic survival. To live in the unhomely world, to find its ambivalencies and ambiguities enacted in the house of fiction, or its sundering and splitting performed in the work of art, is also to affirm a profound desire for social solidarity: 'I am looking for the join . . . I want to join . . . I want to join' (Bhabha, 1994, p. 18).

This chapter follows points and practices of cultural and legal suture. My aim is to trace a thematic excursion into the unremarked or culturally *unseen* spaces that repeatedly inter dead bodies. This task is rewarded by aesthetic practice excavating a site of repression, a site that confesses our flight from, but necessary management of, dead bodies within cultural spaces. To achieve this, my attention turns to a State-owned graveyard on Hart Island, located in Long Island Sound, New York. Hart Island is a graveyard for New York's poor, unclaimed or unknown dead – what is commonly known as a "potter's field."[1] It is a place where law and art intersect in remarkable absence of any significant cultural claim on the island, and it is a landscape where the failings of forensic conclusion are now mingling with an aesthetic revelation.

This chapter introduces the work of New York artist Melinda Hunt, whose ongoing work, entitled the *Hart Island Project*, signals a restless return to images of the island, highlighting the spur for meaning and the call for evidence that we make as viewers of photographic images. In this way, through her re-telling of the island's activity, the dead are resurfacing in a tense excursion between visibility and invisibility. The exercise of imaging the island highlights *looking* as a practice

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directed *beyond* the spaces of the text given to be seen, into the extended spaces of language and the image; that is, into spaces of the *imagination*. The seat and scene of longing, memory and distillation, the imagination fosters fantastical perspective, trading in oneiric sights and encounters with the invisible. [2] Therefore, as an essay that seeks to dialogue with the visual text, this chapter necessarily teems with oneiric industry. Similarly, to cite and to imagine the island is to explore the textual dimensions and therefore the discretionary, shifting boundaries, of concepts such as "history," "community" and "citizenship" as they are ratified at the sites and bodies of *others* and, simultaneously, as they lie fallow in our cultural archives.[3] To encounter these bodies and sites through aesthetic images is also to enlist the power of cemetery landscapes to sign identity and structure public space.[4]

Through delimiting the notion of "perspective" from a purely spatial location, my text creeps out toward a critical approach to perspective as both informing subjective *distance* and *difference*, thus readily assuming the properties and assumptions of a gaze that *moves* through culture.[5] Living in such flux we move proximate always to the figures and voices of *others*. Correspondingly, as citations of balance between burial and remembrance, the Hart Island pictures breathe with imaginative weight and ghost us with their call for citizenship and historical significance, one that implores we write history as a "present" concern. Ultimately, functioning as socio-political panoramas, they uncover historiographies of our own bodies, cities and everyday lives.

***

Hart Island is an *other* space. It is the ninth potter's field in New York. Its location on the outskirts of the city echoes the State history of public burials that situate graveyards on the *fringe* and removed to the *edges* of New York. Each successive potter's field established ground for public burial beyond the city limits. Previous potter's fields were located on Ward's Island, Randall's Island and at a number of sites in Manhattan. Despite Hart Island's status as a State-owned cemetery, public access is difficult since the New York City Department of Correction administers the island and the burials, and the graveyard is inaccessible to the public, unless by special request. It is therefore further *at a remove* due to this administration, and is sealed from public access and thoroughfare by its formal, institutional status. Since the State acquired the island in 1869, it has accommodated programs of penal reform in addition to welfare and healthcare rehabilitation, which variously established prison workhouses, a tubercularium, an insane asylum and defence barracks.[6] Currently, law convenes punitively, and daily, to oversee burials performed by prisoners from Riker's Island. Prisoners, as *other* bodies similarly at a remove from the city, dig the graves and inter the dead.

Burials occur Tuesday through to Friday, with Mondays reserved for disinterments. Around three thousand burials are performed a year, and, since 1869, more than three quarters of a million people have been buried on the island (Hunt, 1998, p. 19). The legacy of burial and disappearance on Hart Island is thus scored in the labour of the crimino-legal body, that of the prisoner.[7]

Prisoners bus from Riker's Island and board a ferry at City Island, accompanying the mortuary van, which contains bodies of the homeless, the poor, the unclaimed and unidentified dead. If relatives are unable to afford burial costs, the State will also ferry the body to the island for interment in a mass grave. The Health and Hospitals Corporation mortuary van collects bodies from the Office of the Medical Examiner (with morgues located in four of the five boroughs of New York); the city hospitals also forward bodies to the Office of the Medical Examiner (OME). Bodies that remain unclaimed and unidentified at the OME for approximately two weeks are transferred to the island for burial, unless the police and Missing Persons Squad requests otherwise. Here, the removal of a body to Hart Island signals forensic inconclusion. Without the necessary cumulative components that might establish the personal history of individual life and the circumstances of death, such as identity – from which (hopefully) spring relationships, family, troubles – there is little evidence to enliven a medico-legal narrative with enough force for successful forensic pursuit and conclusion.

The process shifts from forensic action to *archive*, as the medico-legal citation of a deceased is filed, while the body is ferried to the island. Detectives from the New York Missing Persons Squad are stationed at the OME to photograph and fingerprint all bodies transferred to the island, and these records are kept at the OME. The Missing Persons Squad maintains a database of photographs, names and descriptions of missing persons against which to check details of the deceased. From such visual and textual memoranda, significant forensic archives are built.[8] Since the archive involves the selection and regulation of images, *absence* also gathers in the archive and illustrates that substitution is an obligatory practice in the disappearance of the dead.[9]

Disembarking on the Hart Island, prisoners on burial duty unload pine coffins from the mortuary van and place them in graves or "trenches" twenty feet wide, seventy feet long and six feet deep (Hunt, 1998, p. 25). Children and adults are buried in separate graves, and each gravesite holds one hundred and fifty adults or one thousand children. Temporary retaining walls separate buried coffins from spaces dug for forthcoming burials, leaving some trenches partially filled and large black holes in the landscape. If the names of the adult dead are known, they are written on the coffin in black crayon. Each coffin is assigned a number that is retained in burial records. Coffins of infants carry only numbers to define their identity and location in the ground. Small white concrete markers identify the

Fig. 1. Grave of First Child to Die of AIDS in New York City with Pages from the Hart Island Record Books. *Note:* ©1992 Melinda Hunt with photo by Joel Sternfeld.

gravesites, and each marker bears a designated number. The first child in New York to die from AIDS is buried deep within a wooded area on the island, with a sole marker "SC-B1, 1985" (see Fig. 1). The isolation of this small grave from the rest, its sad testimony to island quarantine and anonymity, *marks* the displacement and removal that *continues* to shape the island landscape. This shaping is both literal and figural, as burials disturb and fill the soil of the island with the dead, interring bodies away from the city and cultural imagination.

Themes such as absence, burial and denial, and their relation to how New York City history is imagined and recollected, drove Melinda Hunt to explore the deep patterns of what she terms the hiding and secrecy around the island's presence.[10] This invisibility is echoed in the landscape itself. She writes that:

> What intrigued us about Hart Island is how the natural landscape seems to completely mask almost 140 years of burials. Each mass grave of 1000 children or 150 adults disappears from view

> within a season. Small, white concrete markers barely interrupt a view of Long Island Sound framed with successive bridges and crowned by the Manhattan skyline (Hunt, 1998, p. 20).

This quote contemplates the disappearance of burial action, as the landscape of Hart Island seasonally sutures evidence of gravesites. Each season weathers and settles the ground, concealing the past disturbance of soil. The island therefore accommodates thousands of bodies with minimal evidence of burial. What remains of burial movement are the small white concrete markers that subtly pocket the landscape. These markers, cast by the prisoners, exist as the only cultural clues of such considerable interment, yet maintain the integrity of the city skyline – a view unencumbered by the dead.

The skill of everyday perspective that glides across the landscape of the island is culturally fortified. Hart Island has little carriage in cultural memory and one of New York's largest tourist attractions – the *Panorama of The City of New York* on display at the Queens Museum of Art – does not register the island within the perimeters of the city model. The *Panorama* was created for the 1964 World's Fair and is a major New York tourist attraction. The model was reopened to the public in 1994 after two years of reconstruction and updates. The model is 9335 square feet and represents the 320 square miles of New York City. The Queens Museum of Art states that the contract for the original model "called for less than one percent margin of error between model and reality."[11] Changes were made to the model throughout the 1960s and 1970s, and in 1990 respective architects donated major architectural changes to Manhattan buildings. Following updates to the model to address sweeping changes, the Museum states that

> [F]or the first time in a quarter century the panorama is a living model of New York City as it really is.[12]

Here, the notion of the "unmarked" or anonymous grave is also structured by blindness – by the refusal to see and accommodate the dead.[13] Hart Island therefore exists as a counter weight to the revelation of dead bodies in culture; it is an example of the symptom or unceremonious real that requires attention and suffers erasure. Subsequent to its relative anonymity and its massive activity, Hart Island demonstrates the irrepressible productivity of the unknown and the historical weight of the unseen. The State use of Hart Island to bury the *other* dead, coupled with the prisoners' presence and the island's largely silent (and culturally invisible) existence demonstrates that burial occurs at many levels in culture, and includes many bodies.

Once or twice a month between November 1991 and December 1993, Melinda Hunt travelled to Hart Island, inviting photographer Joel Sternfeld to photograph the burials and the island landscape. In 1998 Hunt and Sternfeld published a book of photographs, and Hunt wrote an essay detailing the history of the island, including

Fig. 2. Prisoners Pause During Maintenance Duty with Public Statements. *Note:* ©1998 Melinda Hunt with photo by Joel Sternfeld.

pictures from installations of the *Hart Island Project*. The installations included Sternfeld's large 24 by 30 inch photographs surrounded by either prisoners' writings, burial records, early newspaper articles, prison documents or responses from the public. These installations are overwhelming, measuring 48 inches by 52 inches. Joel Sternfeld's photographs depict the burials in differing seasons, the wider island landscape and foreshore (see Fig. 2), building ruins and cemetery markers (see Fig. 1). His images begin by skirting the perimeters of the island, looking back toward views of the New York City skyline over the water, and thereafter moving in to details of the island landscape, including the burial process (see Figs 3–6). The book also concludes at the island edge, with images of an unnamed cove and pictures of the shelled shoreline. The *Hart Island Project* has thus far extended over approximately thirteen years and at time of writing Hunt is working on a film of the island.

Fig. 3. The Burial of Florence Leo with Pages from the Hart Island Burial Record Books. *Note:* ©1992 Melinda Hunt with photo by Joel Sternfeld.

The film is in the first cut. It comprises interviews with retired Correction officers, police from the Missing Persons Squad and personnel from the Office of the Medical Examiner. Hunt purposefully involved and asked questions of these people – such as questions regarding methods of forensic identification, and medico-legal practices of managing the dead – so they could answer questions that she has repeatedly been asked over thirteen years. Hunt describes the film as a response to the number of people who have approached her in response to her book – those who had family buried on the island, and who were trying to, literally, track them down.[14] Interlaced with the perfunctory and useful accounts of medico-legal and penal process are narratives from families who have relatives buried on the island, and the film specifically tells the stories of two individuals who travel to the island after searching for relatives. One, Paul Devany, went to Hart Island to retrieve the body of his Irish grandfather; another, Patricia Doherty, learnt that the body of her sister, buried fifty years ago, lies in land long re-excavated. After twenty five years the island's gravesites are re-excavated; for Patricia and many other families, there is no precise location, no exact place to pinpoint.

Fig. 4. Adult Mass Burial with Pages from the Hart Island Burial Record Books. *Note:* ©1997 Melinda Hunt with photo by Joel Sternfeld.

Hunt's concern with articulating the *absence* of the island in New York culture is therefore a persistent practice of opening sites of dedicated *suture*. Since Hart Island manifests this suture at a remove from the city and by way of *other* bodies, it enacts a terrain of superlative and *accumulated* disappearance. At the same time, Hunt's work is repeatedly exhuming burial records and names of the dead, continuing to exhibit Sternfeld's images with prisoners' writings and historic newspaper articles about the island. The relentless exploration of the island signals a repetition ensconced in *interstitial movement*, a "way that responds within the cracks."[15] Her installations include, in 1998, the laying out of one hundred and thirty coffins in gallery space holding baby blankets with mother's or infant's names to represent each year that bodies have been buried on Hart Island (see Figs 7 and 8).[16]

In the significant amount of burial action that has occurred on the island since the late nineteenth century, Melinda Hunt's aesthetic textualisation of the site becomes our only significant recourse to these dead. Her large multi-media images allow us to partially wander, as people are commonly able to do, through a public cemetery full of inscriptions. In this sense, her exhibitions provide the tombstones largely absent from the island. By exhibiting the fragments of records, archives, and

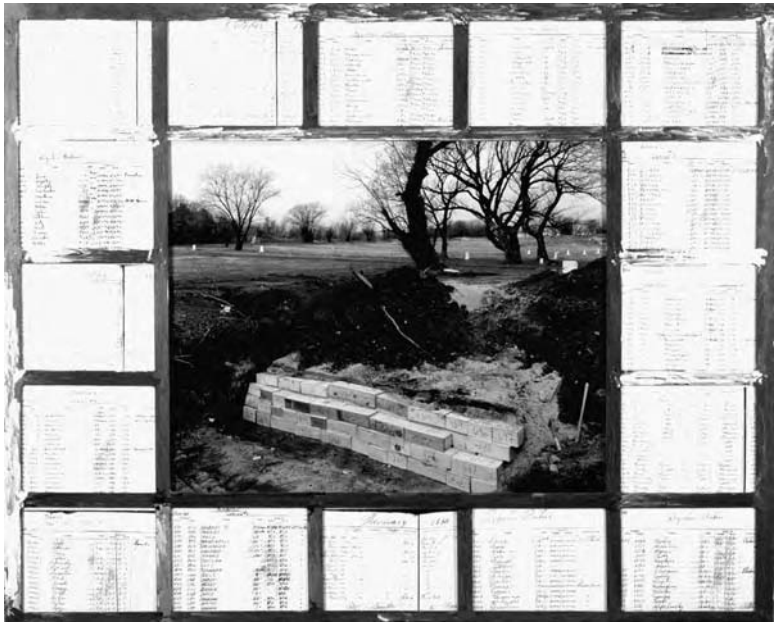

Fig. 5. Mass Grave for Babies with Pages from the Hart Island Burial Record Books. *Note:* ©1992 Melinda Hunt with photo by Joel Sternfeld.

newspapers in city spaces, and by linking the bodies of some who have died, some who bury the dead, and some who view the images, Hunt's artworks accumulate and curate into view a contemporary corpus of historical concern.

Retrieving these bodies within city spaces, Hunt's project follows the history of New York's potter's fields. Due to population growth, previous potter's fields in New York are now located within the city limits, and are parks such as Madison Square Park (1794) and Washington Square Park (1797). The New York City Public Library stands on the site of the 1823 potter's field. Except for the graveyard located at what is now the Waldorf Astoria Hotel (1836), the last potter's field in Mahattan, there are no records of the bodies being relocated within or outside of the city (Hunt, 1998, p. 20). New York City's soil is therefore rich with the bodies of *others* buried below. Some of these previous sites, most particularly the parks, carry a sign which acknowledges this history. Following her research into the history of potter's fields in New York, in 1994 Hunt's public artwork *Circle of Hope* was installed in Madison Square Park. Hunt sought to commemorate the 200th anniversary of the Park's origin as a potter's field, assisted by 100 school children who replanted Indian corn from the original burial ground and etched their hopes for the future

Fig. 6. New Mass Grave and Mussel Shells with Pages from the Hart Island Burial Record Books. *Note:* ©1997 Melinda Hunt with photo by Joel Sternfeld.

into tablets of plaster. This small site of generative tombstones, latched onto a fence encircling a corn crop, gestures towards recognition and renewal over the site of buried dead bodies (see Fig. 9). The seamless circling fence thus serves as the binding symbol of historical unrest where "roundness offers no beginning, no end" (Bal, 1999, p. 111). Approaching these tablets, we enact moments of reading that are caught in the rejuvenation of the image (of the grave, of the park, of New York's history) (see Fig. 10). The installation's comprehension, its capture in photographic images, relies on sustaining "history" as a *present* concern that is capable of tracing a graspable past and imploring a sight of future possibilities.[17]

Hunt's work *Circle of Hope* summons acknowledgement of the unseen *on the site* of the grave. The *Hart Island Project* similarly attracts the gap and beckons the interstice, coalescing otherwise unseen images to make visible a repressed and cordoned off site/sight. As Derrida writes, "[r]epression, not forgetting; repression, not exclusion" (1978, p. 196). The pictures from the *Hart Island Project* inscribe activity both evacuated beyond the sight of the city and entrenched below the skin of the soil. Since the weather veils burial by effectively settling the island soil,

Fig. 7. Stadthaus Ulm, Germany. Installation with 130 Baby Coffins and Ulm Cathedral in Background. *Note:* ©1998 Melinda Hunt photo credit Andreas Langer.

Fig. 8. Stadthaus Ulm, Germany. Detail of Baby Coffin Installation. *Note:* ©1998 Melinda Hunt photo by Andreas Langer.

the Hart Island images *excavate* and commemorate a history of hitherto invisible cultural, that is, criminological/penal work. How do we respond to or challenge the dexterity of the image when it offers a sight that is otherwise refused? The existence of the Hart Island graveyard suggests that we also acknowledge the insecurity of the image – such as the image of New York City offered, for example, in the *Panorama of The City of New York* at the Queens Museum of Art. This recently updated model maintains a testimonial blindness to the island, and thus, occludes insight into the dead bodies buried there (Fig. 11).

Moreover, it is the living body of the *other*, that of the prisoner, who accumulates and carries a response to the burial of the dead on Hart Island. Whilst on the island during burial duty, some prisoners leave offerings next to small broken statues, such as pieces of fruit, crosses made of branches, or rosary beads (see Fig. 12). In March 1992, Hunt travelled to the island to meet with prisoners during burial duty who were willing to write down their impressions of the island, and gave Hunt their responses to the experience of travelling there and caretaking for the dead. Hunt includes these responses in the *Hart Island Project* installations, in her film and additionally quotes the words of prisoners at the conclusion to her essay. One quote is placed on the back cover of her book, as binding insight. These words read:

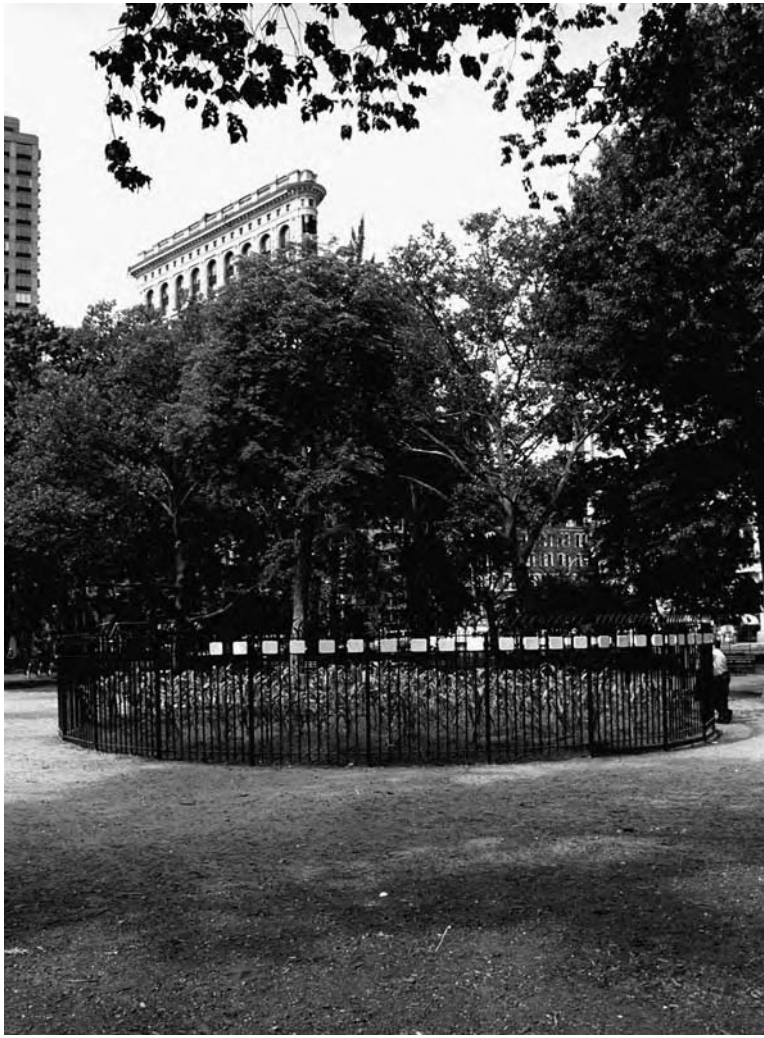

Fig. 9. Circle of Hope, Public Art Work, Madison Square Park, New York City. *Note:* ©1994 Melinda Hunt.

> I sometimes get curious about Hart Island. How long has it been here? How long have they been burying bodies here and what will this island be like in the years to come? *I sometimes wish I was here at night when everything is still just to see what it's like, to get the feel of the island and maybe discover something new*. To me, this island is like a huge monument surrounded by water. I call it the *Land of the Unknown*. (Pito in Hunt, 1998, p. 29, emphasis added).[18]

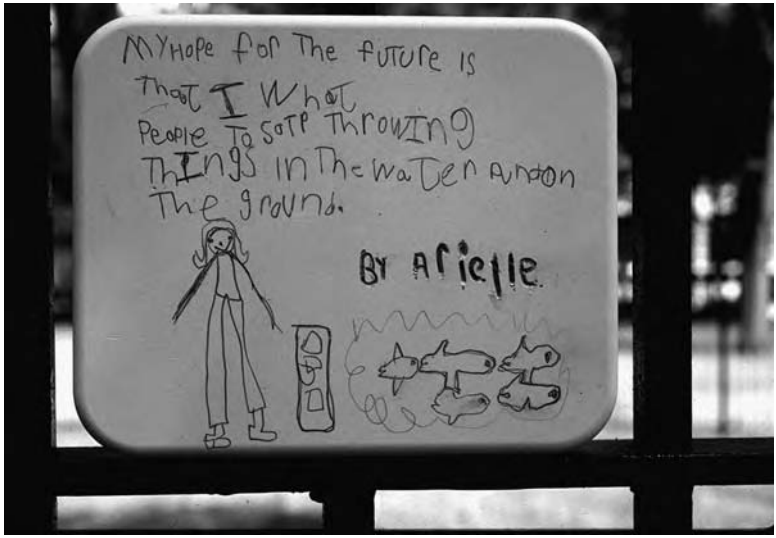

Fig. 10. Circle of Hope, Public Art Work. Detail of Children's Writing on the Circle of Hope. *Note:* ©1994 Melinda Hunt.

Here, in spaces of momentary darkness, is the possibility of a new vision. Through the displaced body of the prisoner, an *other* commemoration is built. Consequently, it is to ask, which bodies bear the onus of testimony? and who are enlisted as caretakers of the dead? By presenting a confluence of law and aesthetic practice around the island, it becomes necessary to acknowledge the bodies of *others* that underwrite this revision. As such, it articulates much about discourse that writes history and (literally) *sentences* bodies, extending the image beyond any singular or given conclusion, promoting an awareness of what lies out of immediate view. Images, photographs, can fool just as surely as they can falter. Photographs of Hart Island fall between evidence and the imagination since they visualise a space geographically isolated but nonetheless "real" – a space that binds the liminal bodies of the dead and the prisoner according to *law*.

Therefore, just as Hunt's work offers an ongoing and restless history of the dead, she also seeks to acknowledge the responding movements of those bodies that bury them. With the *Hart Island Project*, this response moves outside of institutional and crimino-legal space. As with law, aesthetic practices unfold the dead body before audiences who are often *invited* to answer. As mentioned earlier, Hunt has included responses from the public to the Hart Island pictures, many of whom were deeply moved by the images, writing comments such as "I don't know what to say or feel," "nobody will believe this potter's field in New York even exists unless they see

Fig. 11. Young Prisoner During a Mass Burial with Writings by Inmates Working on Hart Island. *Note:* ©1992 Melinda Hunt with photo by Joel Sternfeld.

these pictures themselves" and "[t]hank you for making this so visible."[19] Hunt's work illuminates a suture, and provides for a vision, that nevertheless *recalls* the disorder of the surface. Her practice notes this disorder as that which also rattles the inside, and risks the skin, of the viewer. They suggest the degrees to which the suture *attracts* curious attention, and the instability of the grave that situates us at the edge and next to the *join*. Similarly, as cultural and historical *remainders*, these images sign us with "the disquieting destability that remains once the grave has been filled, the failure to achieve closure, the scars and differences that stay on" (Bronfen, 1992, p. 241, (Fig. 13)).

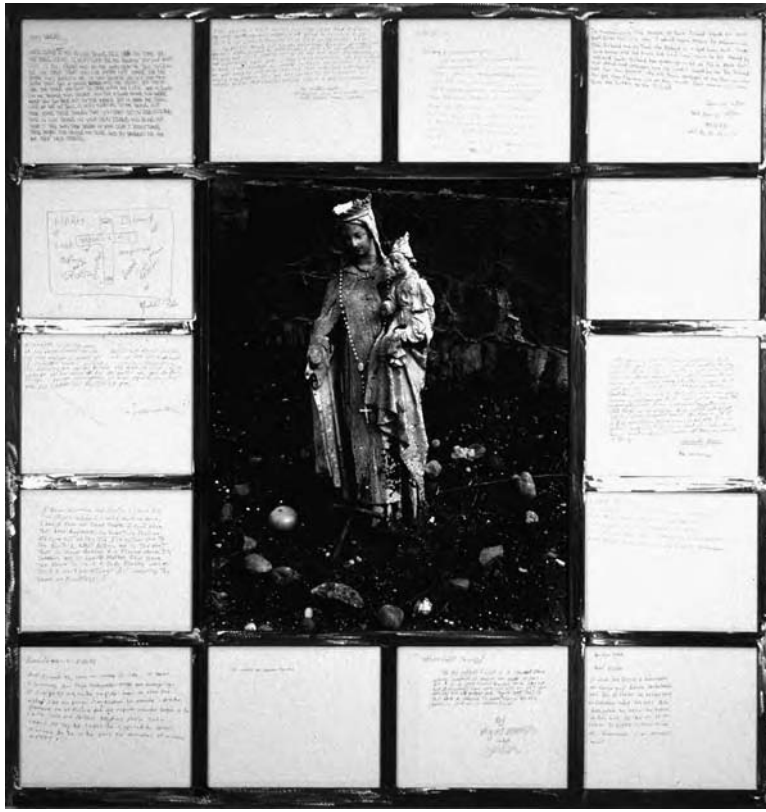

Fig. 12. Madonna with Orange with Writings by Prisoners Working on Hart Island. *Note:* ©1992 Melinda Hunt with photo by Joel Sternfeld.

Cemetery landscapes, such as those offered in the *Hart Island Project*, entrance viewing positions both in proximity to and distance from death and the horizon. These orientations signal the moves we make towards and away from dying. Jeff Wall has written of the pictured cemetery as:

> [T]he 'perfect' type of landscape. The inevitably approaching, yet unapproachable, phenomenon of death, the necessity of leaving behind those who have passed away, is the most striking dramatic analogue for the distant – but not *too* distant – viewing position identified as 'typical' of the landscape. We cannot get too distant from the graveyard (1996, p. 144).

Revisiting the cemetery illustrates that we live as subjects in degrees of luminescence in addition to encountering moments of peril – the landscape of a cemetery represents the visual field *par excellence*. Maintained as a place of

Fig. 13. Vicki Pavia Honoring the 40th Birthday of her Baby, Denise, on Hart Island with Historic Prison Documents. *Note:* ©1992 Melinda Hunt with photo by Joel Sternfeld.

assumed wholeness, memoralisation and coherence, it constitutes a field that is in fact structured by blind spots and veilings. As very "real" and functioning sites of disappearance and memorality, the place of graves in the visual landscape renders as treacherous the very geography of our vision. In that they provide for gaps in (and for) understanding, blind spots in vision and the trauma of their discovery, they exercise the critical tension between exercising insight into the other and entombing the othered body. These activities mark the passage between disappearance of the dead and the movements towards memorialisation and commemoration – activities that *demand* the physical disappearance of the dead body and their textual substitution. The *Hart Island Project*, with its accent on the paradoxically elusive but permanent State-owned cemetery, is as a privileged site for both the interment and unveiling of the *other* – and not simply because dead bodies are buried there. There exists also an *active* interment of *othered* bodies and their spaces that can be

Fig. 14. Prisoner Holding Baby. *Note:* ©1990 Melinda Hunt.

traced through the crimino-legal body – that of the prisoner – who merges law's management of the dead with demonstrations of caretaking and commemoration (Fig. 14).

Ultimately, Hart Island simultaneously resists the visual and deters the document. Graves, such as those on the island, suggest that there are narratives available on the surface, and in the historical text, that can offer us insight into disappeared lives. Yet these images remain partial accounts of what stirs beneath the soil, there remain gaps in the records, unknown activity below the surface. The pictures and installations detailing the Hart Island graveyard signal the ruin of the final image of the body that makes of the inscription *an excursion*. As a place of *joining* and wandering, cemeteries enact the seam as much as they speak to the scar. Hunt's film and, indeed, the entire, ongoing *Hart Island Project*, is prizing this space open so that the images ricochet in life, invigorate interest and mobilise access to the island. Trusting the unseen as a survival of invisible and *other* geographies warns us to remain *mindful* of sight. The clue lies in forsaking what is immediately visible for traces of what is yet to come (Fig. 15).

NOTES

1. As Melinda Hunt writes: "The term 'potter's field' refers to land purchased for the burial of strangers just outside of town and comes from a passage in Matthew 27: 5–7:

Fig. 15. Old Grave and Peace Monument on Hart Island. *Note:* ©1999 Melinda Hunt.

'So Judas flung the money into the temple and left. He went off and hanged himself. The chief priests picked up the silver, observing, 'It is not right to deposit this in the temple treasury since it is blood money.' After consultation, they used it to buy the potter's field as a cemetery for foreigners' " (1998, p. 19). See also Conlon (1993).

2. Please refer to Young who writes of the imagination as the "process by which we make images" (1996, p. 15).

3. Contemporary theory discussing "vision," particularly in relation to art criticism, has successfully disassembled any stance of "pure" vision, instead imbuing the field of sight with relations of power and discourse. This is extensively covered by the work of Jay (1993), Bryson (1983, 1988) and Bal (1991) amongst others.

4. On the power of the landscape as cultural practice, see the essays contained in W.J.T Mitchell (Ed.), *Landscape and Power* (1994).

5. Refer to Foster, where he writes that: "vision suggests a physical operation, and visuality sight as a social fact, the two are not opposed as nature to culture: vision is social and historical too, and visuality involves the body and the psyche" (Foster, 1988, p. ix). To heighten an awareness of the facility of looking (at the dead) through the movement and meanings of sight and perspective, I follow Foster who aspires to "thicken . . . vision, to insist on its physiological substrate *and* on its psychic imbrication" (Foster, 1988, p. ix). See also Phelan (1997). Please refer to the introductory chapter of Jay (1993) for an account of the limitations and distortions structured into human vision. On the intersection of vision and visuality, see the collection of essays and discussions presented in Hal Foster (Ed.) *Vision and Visuality* (1988). This collection effectively situates vision and visuality as key terms for expansion and analysis within any discussion of the subject positioned in a visual field of *relations*. See also Melville and Readings (1995) and Brennan and Jay (Eds) *Vision in Context* (1996) for further reflections.

6. For a history of the island, please refer to Hunt (1998), who condenses her remarkable collation of the history of Hart Island into an essay accompanying Joel Sternfeld's photographs of the island and Hunt's multimedia installations. Before travelling to the island in 1991, Hunt undertook extensive bibliographic research, creating a spiralbound collection of newspaper press and journal articles dating back to 1874. Copies on file with author. There is little aesthetic activity in relation to the island. Jacob Riis photographed Potter's Field on Hart Island ca 1890. His photographs of Potter's Field are held in the *Jacob A. Riis Collection*, Museum of the City of New York, New York, NY. Jolie Stahl also photographed the burials on the island in the mid-1980s. Her images were included in exhibition *The Interrupted Life* (1991) curated by France Morin. See Morin (1991).

7. The term "crimino-legal" is from Young (1996). Young employs the term to emphasize the collapse of criminology and criminal law, and all discourse, practice and knowledge that falls between the disciplines. In addition, she includes popular discourses such as the media, so as to evoke the expansive and complex ways in which "crime" is imagined in the community. See particularly Chapter 1: *Textual Outlaws and Criminal Conversations*.

8. For a discussion of the archive, see Derrida (1995). The archive has a foundational place in culture, law and criminology. Since revising an image rewrites histories and bodies anew, archives hold case files and images that stay the dead in culture. Put simply, archives maintain in tangible proximity the means through which to narrate the dead. See also Hutchings (1996, 2001) and Sekula (1986).

9. See Bronfen (1992) on the concept of substitution. My thinking around the textuality of the dead body bears always the influence of Elisabeth Bronfen's *Over Her Dead Body* (1992). Most particularly, Chap. 1 of her text sets up the relation between dissection/anatomy and the substitution or replacement of the dead body in discourse. We know through Bronfen that the dead body is recouped in and by representation – that is, the body is redrafted by language. Thus "alive" in discourse, the body can be used and fades before language, reinscribed as a sign that can endlessly refer to concepts other than death. Bronfen writes that as the dead body stands in for something else, "it fades from our sight and what we see, whenever an aesthetic representation asks us to read tropically, is what is in fact not visibly there" (1992, p. xi).

10. Written correspondence with the artist, 26 November 2002.

11. Please see http://www.queensmuse.org/exhibitions/panorama.html.

12. Please see http://www.queensmuse.org/exhibitions/panorama.html.

13. Refer to Phelan (1993) on the power of the unmarked.

14. Written correspondence with the artist, 27 November 2002. Melinda Hunt has advocated on behalf of families seeking to travel to the island and visit the grave of their relatives. In the early to mid-1990s people were referred to her through the New York Municipal Archives and now contact her through the internet. Please refer to the Hart Island website: http://www.hartisland.org.

15. Melinda Hunt, 9 June 1999, New York. Interview with the artist. Elisabeth Bronfen has explored repetition and the unfolding of plurality. See Bronfen (1992).

16. The burial records of infants until 1940 articulate the otherness implicit in the burial archives. See Hunt where she writes of the archiving of infant details: "In this century the names of babies up until 1940 are strictly female; each child's identity is linked exclusively to the mother. She is the person forever associated with the potter's field" (1998, p. 25).

17. Cadava outlines wayward time by saying: "[T]he traces carried by the image include reference to the past, the present, and the future, and in such a way that none of these can be

isolated from the other" (2001, p. 39). He continues by writing that "possible pasts emerge, like an image from a photographic negative, to meet us from future possibilities. This is why every image is an image from the future – an image of possible, future pasts" (2001, p. 56).

18. Albert Carraquillo Pito wrote this statement on 12 May 1992. It is also included in a book of prisoners' writings photocopied and bound by Melinda Hunt. The book also includes statements made by visitors to Melinda Hunt's exhibitions. Copies on files with author.

19. Statements collected by Melinda Hunt. Copies on file with author.

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PART III.
(POST)COLONIAL APPROPRIATIONS

9. AWASH IN A TIDE OF HISTORY: "RESPONSIBILITY" FOR CULTURAL VIOLENCE – A COMPARATIVE ANALYSIS OF *NULYRIMMA* AND *VOSS*

Lee Godden

> Legendary explanations of history always served as belated corrections of facts and real events which were needed precisely because history itself would hold man responsible for deeds he had not done and for consequences he had never foreseen (Arendt, 1958, p. 208).

INTRODUCTION: THE TIDE OF HISTORY

What is this tide of history that washes over the continent of Australia after 1788 destroying in its wake much of the indigenous people's relationship with land and waters? Now only remnants, fragments of a former aboriginal inscription of law/lore remain evident in the Australian physical and metaphoric landscape.[1] In Law, the "tide of history" has been extended from its original voicing in *Mabo v. Queensland [No. 2]* (1992) to become a justificatory strategy for the limitation of responsibility and a concurrent apologia that simultaneously acknowledges a previous aboriginal connection with land but denies its current legitimacy.[2]

In *Mabo [No 2]*, Justice Brennan noted the inability of Australian law to protect aboriginal people's relationship with their land where it was overwhelmed by the force of history –

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> The common law can, by reference to the traditional laws and customs of an indigenous people, identify and protect the native rights and interests to which they give rise. However, when the tide of history has washed away any real acknowledgment of traditional law and any real observance of traditional customs, the foundation of native title has disappeared. A native title which has ceased with the abandoning of laws and customs based on tradition cannot be revived for contemporary recognition (*Mabo [No. 2]*, at 60).

The tide of history, as it is employed in the stories told by judges about the colonization of Australia, is appropriately majestic and exonerable – not the accretion of individual choice and acts of conflict and violence but a force that carries all before it. It is a force that denies the attribution of responsibility to any individual or institution. The image appears in many manifestations; all emphasising the inexorable nature of the extinguishment of aboriginal customary rights to country. The imaginary of the tide of history is to be found in a number of recent native title cases, most notably in *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002). Perhaps though, it reaches its most formidable modern instrumentalism in the *Native Title Act* 1993 as modified by the "Wik 10 point plan" amendments of 1998.[3] The central significance of the "tide of history" imaginary must be understood as part of the development of the particular doctrine of extinguishment of native title in Australian law. Native title cannot stand in the face of its being engulfed by a tide of history that wipes away the traditional connection with land.[4] The *Native Title Act* supersedes[5] and extends the effect of this common law doctrine with regimes of validation and confirmation[6] – of extinguishment. The range of "acts" and Acts, that extinguish Native Title are extensive and, arguably, continue the wash of the tide of history.

The Legends of Settlement History

At first instance, Arendt's insights into the retrospective power of history and its legendary qualities appears markedly different from the manner in which law assigns responsibility for past acts and makes its declaration of liability. Arendt exposes the slippage between the inspirational qualities of history as legend and a firmer, darker notion of "responsibility." The legendary, inspirational scope for law, as judges declare, is much more restricted. Justice Merkel, in delivering judgment in *Nulyrimma*, reminds us that,

> It is not within the court's power, nor its function or role, to set right all of the wrongs of the past or to chart a just and social course for the future (p. 638).

Despite judicial assertions of the limited aspirations of law, it is contended here that the tide of history imaginary within Australian law does need to be understood as one of legendary function.

The imaginary of settlement history reinvents through its authorization in legal memory the founding and re-founding stories that constitute the Australian nation in law. This is achieved by a denial of responsibility for particular acts of violence upon which a nation is founded.[7] The denial of responsibility is predicated upon the legal characterisation of the series of acts of violence as ones devoid of an intention to destroy the Aboriginals as a cultural group. As such, these acts do not, and cannot, equate to cultural genocide.

The lack of requisite intent as a means to limit responsibility for "history" in the descriptions of the violence between Aboriginal and non-indigenous cultures in the settlement of Australia is set against Arendt's wider analysis of European colonialism and the rise of the nation state in the nineteenth century. The legends of history that are examined comprise two often-repeated narratives of Australian history. The first is the stories of past and present "settlement" in the judgments in *Nulyrimma v. Thompson* and *Buzzacott v. Hill*. The second is a story of inland exploration as a forerunner to settlement; a story told in *Voss*, the novel by Patrick White.

Nulyrimma, Voss and the Desert Heart of the Nation

In the *Nulyrimma* case it was alleged by aboriginal claimants that the executive acts of key figures of the Howard Government and Pauline Hanson[8] in implementing the Wik 10 point plan amendments to *Native Title Act* 1993 constituted a form of cultural genocide. The case also included a related action by Kevin Buzzacott. Buzzacott, a representative of the Arabunna people, claimed that the failure of the Howard government to nominate Lake Eyre, to the World Heritage list[9] comprised a form of cultural genocide. The Lake Eyre basin sits in the "desert heart" of Australia, and is an area of great significant heritage value to the Arabunna people. In the course of deciding whether these acts of government could be construed as constituting the crime of genocide, several judgments also dealt with the historical circumstances of the settlement of Australia.

Voss is loosely modelled upon Leichardt, the German explorer who made several expeditions into the interior of Australia in the early 1800s before perishing in the desert. Voss, the antihero explorer created by White, is one of the harbingers of history to the Australian desert interior. That is the very area at the centre of much of the violence discussed in *Nulyrimma*. In metaphorical terms, Voss represents the flawed, limited version of the European; a human driven by inner compulsion to the nihilism of violence and obliteration in the Australian desert. In examining this story, attention is focused upon the encounter between Aboriginal and European cultures and the sense in the novel of an inevitable precipitation toward violence

between the two cultures. The violence arises from a sense of alienation between the two cultures. It is a portent of the wave of settlement history that will engulf many aboriginal people as the competing desires for the possession of the interior of Australia are played out over the next century and the nation of Australia comes into being.

Legends of History, Nation and Law

Mabo [No 2], the source of the tide of history imaginary, also has a wider legendary function as a foundation for Australian law (Rush, 1997). It is an origin story for the grand narrative of law in Australia (Dorsett & Godden, 1999). That origin story was once predicated on an absence of racial difference through the convenient fiction of terra nullius and settled colonies – through the very denial of an aboriginal cultural and legal history in the Australian continent.[10] Thus the nation of Australia, as it was to become, could asset itself as having a unitary foundation in its English heritage of law and executive governance. The assertion of native title rights in *Mabo [No 2]* presented as a direct challenge to this unitary vision of the foundation of law and nation.

As a consequence, in *Mabo [No 2]*, the tide of history imaginary masks the ambivalence needed to retain the concept of a British inheritance (Parkinson, 2001) but yet to acknowledge the violence of colonisation and its impact upon the colonized people. The British inheritance in colonial land in the nineteenth century was one clearly touched by a race consciousness.[11] Yet the implicitly racist assumptions of that inheritance are concealed in *Mabo [No 2]* by the insistence upon a unitary origin for all "British" lands.[12] The need to assert a unitary origin is central to an understanding of the manner in which imperialist ideas became transmuted into the "rhetoric" of nationalism that founds the nation state as this institutional form of cultural imperialism rose to prominence in the nineteenth century (Arendt, 1958).

The concepts of race and bureaucracy are key factors that Arendt identifies as integral to the rise of the European imperial powers during the nineteenth century. This analysis forms part of her broader study of the rise of Imperialism and the development of the nation state –

> Of the two main political devices of imperialist rule, race was discovered in South Africa and bureaucracy in Algeria, Egypt, and India; the former was the barely conscious reaction to tribes of whose humanity European man was ashamed and frightened, whereas the latter was a consequence of that administration by which Europeans had tried to rule foreign peoples whom they felt to be hopelessly their inferiors but at the same time in need of special protection. Race in other words was an escape into irresponsibility where nothing human could any longer exist,

> and bureaucracy was the result of a responsibility that no man can bear for his fellow man and no people for another people (Arendt, 1958, p. 207).

The constructs of race and the institution of bureaucracy allowed the European nation states to preserve internal domestic cohesion through the projection of an external unifying sense of national identity that was superimposed against the diversity of peoples that were encountered in the pursuit of European colonialism (Arendt, 1958). A significant aspect to the development of the concepts of race and bureaucracy was the denial of responsibility for the colonial impact upon diverse; different peoples.[13] The denial of a common humanity and the lack of a collective sense of responsibility for those not comprehended by "the nation," was instrumental, in allowing an escalation of violence against these peoples.[14]

Arendt's main concern with European colonialism is to trace these developments as a background to events in Europe in the mid-twentieth century. For, as she discusses in detail, the ultimate outcome of one specific trajectory of the association between nationalism and race in the foundation of the modern nation state is the move toward cultural genocide.[15] Unfortunately, any examination of the Australian colonial situation by Arendt is cursory at best.[16] Nonetheless, her explorations into the historical and ideological antecedents of the nation state in European imperialism provide a fruitful basis upon which to analyze both the colonial and modern Australian situation. Arguably the twin factors of race and bureaucracy were, and are, clearly significant in colonial and [post-colonial?] Australia.[17] A bald racist position where a lack of responsibility is predicated upon an explicit denial of the humanity of Aboriginal people was no longer tenable after *Mabo [No 2]*. *Mabo [No2]*, despite other limitations, was at least recognition of the common humanity shared with aboriginal people. Yet bureaucracy in the more recent context can be understood as a policy direction of executive government which continues the trend of producing laws and policies ostensibly for the "benefit" of Aboriginal people but which ultimately cannot bear the burden of such responsibility for another race. Thus "bureaucracy" continues to operate as form of colonial power within Australia to deny a responsibility for executive actions that seek to re-institute a unitary insistence of nation.[18]

The Insistence of One Nation and the Context for the Nulyrimma and Buzzacott Cases

The actions in the *Nulyrimma* and *Buzzacott* cases need to be understood as part of wider campaigns by aboriginal people for recognition of customary rights to land. However the more specific catalyst can be found in controversies surrounding the

Wik decision, the rise of *One Nation* politics and proposed amendments to the *Native Title Act* 1993. As Justice Wilcox states,

> [The cases] are different in nature and derivation. Their common feature is that they involve claims by members of the Aboriginal community that certain Commonwealth ministers and members of parliament have engaged in genocide (p. 623).

In *Nulyrimma*, an application was made to the Registrar of the Magistrates' Court in the Australian Capital Territory to issue warrants for the arrest of the Australian Prime Minister and Deputy Prime Minister, and two other members of Federal Parliament. The allegation was that these Members of Parliament had committed the crime of genocide when developing and instituting the "Wik 10 point plan" and the legislative amendments to give effect to that plan.

Buzzacott's initially separate action was joined on appeal. Buzzacott sought a mandatory injunction, on the basis of a genocide claim amongst other actions, to compel the Environment Minister, Senator Hill to nominate Lake Eyre to the World Heritage list. Further relief was sought by way of an injunction to prevent activities which harmed the World Heritage values of the land, such as a nuclear waste dump and the resumption of uranium mining on the land. The Federal Court, on appeal, briefly considered Buzzacott's genocide claim, but concentrated primarily upon the cultural heritage analysis. The Court held that the decision to nominate cultural heritage areas rested with the executive government as a policy question. Accordingly, such a decision was not justiciable by a "private citizen" (p. 675). A similar line of reasoning was adopted in relation to the genocide claim. Genocide was not a crime under Australian law and thus did not confer any basis to take action in relation done to any "harm" to the Arabunna peoples through the destruction of their lands (p. 676). Arguably then, for the Arabunna peoples, any loss of connection with traditional lands incurred through the actions of executive governance simply form part of the ongoing tide of history for which no individual or collective responsibility is ascribed.

The *Nulyrimma* action more directly raised questions of criminal responsibility and liability. The majority in *Nulyrimma* resolve the genocide claims by denying to Australian courts the jurisdiction to try cultural genocide as a "universal crime" under customary international law (pp. 628, 636–638). The majority does confirm the crime of genocide as a peremptory norm of customary international law. However while Justices Wilcox and Whitlam found that the prohibition of genocide was a non-derogable duty placed upon Australia under international law, legislation was required to "transform" this obligation into Australian criminal law (p. 628). By contrast, Justice Merkel, while holding that Australian courts have jurisdiction to hear universal crimes of genocide, ultimately found that the relevant executive acts did not constitute the crime of genocide. The actions

were simply acts of executive policy and as such do not, and perhaps a fortiori cannot, reflect the requisite intent to fall within the crime of cultural genocide (p. 671).

Criminal Responsibility and Cultural Genocide: Genocide and Intent in Nulyrimma

In *Nulyrimma*, Justice Wilcox notes,

> The essence of the crime of genocide is the commission of acts that are intended to destroy in whole or in part, a national ethnic, racial or religious group (p. 624).

He makes a further observation that,

> Anybody who considers Australian history since 1788 will readily perceive why some people think it appropriate to use the term 'genocide' to describe the conduct of non-indigenes towards the indigenous population (p. 624).

His Honour describes a range of factors that contributed to the destruction of many aboriginal people, including direct killing or forced dispossession. He concedes that it is possible to suggest that this conduct could fall within at least four of the categories of genocide as defined pursuant to the *International Convention on Genocide*.[19] Yet after expressing his sympathy for the trauma that such past conduct has caused aboriginal people, Justice Wilcox states,

> However deplorable as our history is, in considering the appropriateness of the term 'genocide', it is not possible too long to leave aside the matter of intent . . . (p. 626).

For Justice Wilcox a clear intention to destroy a cultural group is required for genocide. He cites the removal of Tasmanian aboriginal people to Flinders Island as one such example, together with localized, organized killings. These acts of clear intent however are not to be regarded as the biggest killers of Aboriginal people in the swell of the tide of history. Rather, it was the indirect effect of the introduction of European diseases coupled with the denial of access to traditional country that wreaked a greater devastation upon aboriginal people. This view quite ironically resonates with Arendt's analysis of history. Justice Wilcox makes the point that it is only with the benefit of hindsight [history?] that the link between acts of dispossession and the deaths of many aboriginal people can be ascertained. It is another matter altogether to suggest these outcomes should have been foreseen by individual squatters and that they are thereby responsible for the historical consequences (*Nulyrimma*, p. 626). So the consequences of the tide of history are phenomena that no individual squatter could have foreseen, and thus there is no intention, no liability and, ultimately no responsibility for that history.

The judgment further circumscribes the notion of intent within the history of Australian settlement. While individual squatters may have intended to kill individual aboriginals who were raiding their cattle, there was no intention on the part of white settlers to destroy the group as a whole, rather their, "main objective was to make settlement pay" (*Nulyrimma*, p. 626). The idea that non-aboriginal people did not intend to destroy aboriginal peoples as a group but merely wished to "make settlement pay" is a theme revisited in the later discussion of *Voss*.

This perception of Australian history though ignores the explicit policy favouring pastoral expansion and thereby aboriginal dispossession (Gaudron J in *Wik Peoples v. Queensland*, 1996) adopted by local legislatures dominated by squatting interests from the mid-nineteenth century onward.[20] In his analysis, Justice Wilcox largely relies on the first instance decision of Justice Crispin (*Re Thompson, ex Parte Nulyrimma and Others* 1998). Justice Crispin does make an explicit a causal link between,

> the wholesale destruction of Aboriginal peoples was related to an equally wholesale usurpation of their lands (as quoted in *Nulyrimma*, p. 626).

Yet there remains an insistence that the usurpation was in conflict with official government land settlement policy and law.

> In the case of a dispossession of land and destruction of peoples that occurred over several generations and stemmed from many causes, it is not possible to fix and individual or institution with an intention to destroy the Aboriginal people as a whole (*Nulyrimma*, p. 626).

Thus the swell of the tide of history engulfs aboriginal people while at the same time cleansing any one individual, government, and arguably any one nation of responsibility. In conclusion on this point, Justice Wilcox emphasizes the need for an intention to destroy a group as being central to the crime of genocide – and something that "... may have been overlooked by those who instituted the proceedings before the court."

The need for an explicit destructive intent before there can be a finding of genocide is also highlighted in Justice Merkel's judgment. In a statement seemingly at variance with his earlier denunciation of the moral scope of law, Justice Merkel observes that, "the end or goal which law serves will be better served by treating universal crimes against humanity, as part of the common law in Australia." Further, a decision to incorporate crimes against humanity, including genocide, as part of Australia's municipal law,

> at the end of the twentieth century, satisfies the criteria of experience, common sense, legal principle and public policy (*Nulyrimma*, p. 668).

Despite finding the crime of genocide to be a part of the common law, that designation is not applied to the relevant acts. Instead, he agrees with the first

instance decision, where Justice Crispin held that the formulation of the Wik 10 point plan was part of the continuum of legislative policy development and thus protected from review by the courts as part of parliamentary process. Further,

> the role of members of an Australian Parliament in supporting and voting for a valid law could not possibly constitute criminal conduct in Australia at any event (*Nulyrimma*, p. 671).[21]

Thus the conduct could not constitute genocide as it was a,

> political endeavour by the Commonwealth government to strike a balance between various competing interests in respect of land which was actually or potentially the subject of a native title claim. (*Nulyrimma*, p. 670).

Finally, Justice Merkel warns of the dangers of, "demeaning what is involved in the international crime of genocide" (p. 671). Deep offence or substantial harm to cultural groups caused by government conduct is not genocide as it lacks the requisite intent to destroy –

> While understandably, many Aboriginal people genuinely believe that they have been subjected to genocide since the commencement of British sovereignty over Australia last century, it is another thing altogether to translate that belief into allegations of genocide perpetrated by particular individuals in the context of modern Australian society (Nulyrimma, p. 671).

Defining a Sense of Responsibility for History

What is apparent from *Nulyrimma* is that the formulation of the crime of genocide is tied to a conception of responsibility that is peculiarly "European" in character. Moreover, the sense of responsibility implicit to these legal findings bears the hallmark of the twentieth century western conception of the "individual." Law construes genocidal intent and thus criminal responsibility in terms of those actions and failures to act whose consequences can be readily foreseen as ones that are destructive of a culture and a people.[22] The understanding of what is criminal and morally reprehensible, it is argued, is set by European individualistic concepts of moral responsibility and foresight and therefore cannot extend to a collective responsibility for "history." No-one is to be held accountable for the unintended consequences of individual acts of isolated violence or even executive policy supporting such acts. Such acts cannot encompass, "a responsibility for another people."[23] The factors of race and bureaucracy that Arendt identified as integral to European colonialism and the rise of the nation state in the nineteenth century are clearly evident here.

The claim that the limitation of responsibility for cultural violence in law assumes a peculiarly European conception of the individual and moral capacity requires further substantiation. This substantiation is sought by reference to another

legend of the settlement of Australia and the imaginary of the Australian nation – that of *Voss*.

Voss, the Limits of a Common Humanity and a Limited Humanity

Like the legends of settlement history told by judges, the story of *Voss* also concerns itself with a "desire" to possess the country. This narrative though is set at the beginning of the swell of the tide of history over the Australian continent. The novel depicts an early encounter of European civilization with the interior of the Australian continent and with the aboriginal peoples who inhabited that "desert" land.[24] Patrick White, remakes the character of Leichardt, a German explorer, into an antihero figure whose quest into the interior of Australia is driven as much by his own search for self as his desire to the possess and be possessed by the "alien" interior of Australia. Indeed, the themes of alienation and possession run strongly through White's novel, working on several planes (Raddatz, 1991). First, there is the alien nature of the desert interior of Australia that must be possessed. Secondly, there is the alienation of "white" and "black" cultures, and finally the alienation, but ultimate possession of an individual self. This suturing of alienation and possession reaches its final culmination in violence, loss and death in the Australian desert (White, 1957, pp. 414–419) – the ultimate end it would seem of those with a desire for complete possession of, and by, the Australian land.

Writing at roughly the same time as Hannah Arendt's explorations into the "soul" of the German nation following the holocaust, Patrick White investigates the character of the European "soul" in another setting.[25] Leichardt, once eulogized in nineteenth century Australian poetry as a Victorian-era romantic hero (Priessnitz, 1991), becomes Voss. Voss is the flawed, ultimately limited version of the human; the archetypical individual of the twentieth century engrossed in his own internal journey. White invests the story of Voss with metaphorical meaning building on familiar themes in Christian mythology. Voss is at times an apocalyptic visionary who makes the sacrifice in the desert which achieves the salvation of his humanity (White, 1957, pp. 400–404). At other times, he is an individual who, "makes himself the object of his own will" (Robinson, 1985), ignoring the suffering of others in his own pursuit of salvation, even at the cost of physical destruction (White, 1957, pp. 368–371).

The failings of "the individual" as exemplified by Voss are most clearly explored as part of the precipitation toward violence between Aboriginal peoples and European civilization. The novel provides the metaphorical context of a flawed humanity and the failure to reach a point of common humanity; the failure of one race to take responsibility for another. This apocalyptic vision illuminates the

encounter between European and Aboriginal cultures. These themes are evident in the passage from the novel describing the death of Palfreyman. The ornithologist is the only person in Voss's expedition not protected by his desire for material possession or under the sway of the visionary fanaticism of Voss.

> Over the dry earth he [Palfreyman] went, with his springy, exaggerated strides, and in his strange progress was at peace and love with his fellows. Both sides were watching him. The aboriginals could have been trees, but the members of the expedition were so contorted by apprehension, longing, love or disgust that they had become human again. All remembered the face of Christ that they had seen at some point in their lives, either in Churches or visions, before retreating from what they had not understood, the paradox of man in Christ, and Christ in man. All were obsessed by what could be the last scene for some of them . . . Palfreyman continued to advance. If his faith had been strong enough he would have known what to do, but as he was frightened, and now could think of nothing except, he could honestly say that he did love all men, he showed the natives the palms of his hands. These of course would have been quite empty except for the fate that was written on them.
>
> The black men looked, fascinated, at the white palms . . . All including the stranger were gathered at the core of a mystery . . .
>
> Then one black man warded off the white mysteries with terrible dignity. He flung his spear. It struck the white man's side and hung down, quivering. All movements now became awkward. A second black . . . rushed forward with a short spear or knife and thrust it between the white man's ribs. It was accomplished so easily.
>
> "Ahhhhh" Palfreyman was laughing, because he still did not know what to do
> With his toes turned in.
> But clutching at the pieces of his life.
> The circles were whirling already . . .
> "Ah Lord," he said upon his knees, "if I had been stronger." . . .
> Then Judd had discharged his gun, with none too accurate aim, but the muscular black was fumbling with his guts, tumbling.
> Voss was shouting in a high voice.
> "I forbid any man to fire, to make matters worse by shooting at this people."
> For they were his (White, 1957, p. 364).

This passage suggests an inevitability to the violence that occurs between the two cultures – the spearing of the white man and the retaliatory gun shot that kills the unidentified aboriginal. The failure to achieve a common humanity between the two races, together with Palfreyman's inability to transcend his limited humanity seem to impel the two groups toward violence. Further, Voss's limitations as an individual and his ultimate failure to take responsibility for more than his own individual "fate" mean he cannot save "his people" nor take "responsibility" for the consequences of his own pursuit of "destiny." Indeed the very act of appropriating aboriginal people as his own, is indicative of a wider flaw based, not on materialistic possession, but of his more engrossing possessive desire, of land and people.

In the novel, the potential for violence is clearly dependent on racial separateness. The impossibility of communication between the two cultures, the white mysteries that must be warded off, heightens the sense of inevitable violence; with that inevitability occurring along cultural fault lines (Raddatz, 1991). The horror of the violence is acknowledged, but also its relentlessness. Both groups seem powerless to avert the deaths. The Palfreyman incident is significant also in terms of the gathering momentum of the "tide of history." Indeed, Voss while denouncing an overt racist position makes an appeal through his "leadership" for governance to "protect" the aboriginal peoples. This appeal to "bureaucracy"; to policy and common humanity is ineffective. After the death of Palfreyman, Voss's command as leader is challenged by Judd (White, 1957, pp. 368–369) – the character in the novel who most clearly represents hard-nosed materialism in its acquisitive desire of the interior of the continent (White, 1957, pp. 367–368). It is, after all, Judd who kills the Aboriginal under pressure of self-defence and as part of the more pressing imperative of needing to make settlement pay.

The Violence that Sits at the Heart of Australia

The fatalistic account of the onset of violence between European and indigenous cultures is reminiscent of the "tide of history" as employed in legal accounts of settlement – the violence there is also seen as inevitable and inexorable. The inevitability and horror of the history are acknowledged, yet there is no possibility of ascribing an ultimate responsibility.[26] Similarly in *Voss*, the limited human impelled by forces simultaneously of his own making, but portentous of larger visions and desires, cannot avert what seems to be the groundswell of fate; an inevitable and inscrutable violence.

White, despite the explicitly spiritual dimensions of the novel, avoids any attribution of moral blame for the culturally based violence. Perhaps he cannot make such attribution, and remain consistent with the nihilistic vision of *Voss*. Yet, beyond the level of individual characters, the novel *Voss* conveys the impression that it is European civilization that is more at risk in its encounter with the alien heart of Australia and its peoples than the aboriginal peoples who will suffer the incursion of white violence into their country.[27] It is European civilization that meets its apotheosis in the desert. There is much less sense of an indigenous peoples' culture threatened with a coming devastation.

The form of European culture that is threatened, though, is not so much the bland materialism of the settler society with its policy of pastoral expansion, but a more luminary understanding of the possibilities of civilization. Voss, the apocalyptic visionary who meets his death at the hands of a black youth in the Australian desert,[28] is clearly distinguished from those more solid and stolid settlers who fund the expedition in the hope of "making settlement pay." Despite the distinction made

between those Europeans who "would make settlement pay" and those possessed of more luminary qualities, White, still maintains aboriginal black culture as the "other" to white civilization.[29] *Voss*, as an imaginary narrative of Australian history at one level reviles the violence that European materialism brings to colonized peoples, yet at another level the violence seems an inevitable "process" of settlement. In *Voss*, violence and cultural difference sit at the heart of the Australian continent, and what, with the passage of the tide of history, was to become the nation. Ultimately the novel, like many narratives of native title law, does not deal effectively with the view that it is indigenous culture that is more at risk in the contact between Aboriginal and European that comprises the tide of history.

That tide of history is driven by materialism; the possessive gaze of settlement as exemplified by the group of Voss's followers who eventually mutiny, refusing to follow a more visionary but nihilistic path in favour of a return to "the fat paddocks" (White, p. 368). Even where the threat of obliteration is turned inward, in the character of Voss himself, it is not possible for white civilization and culture to take responsibility for the violence that is projected outward. We are left then with the tide of history that limits the responsibility that any one individual or any one race bears for any other. As the archetypical mid-twentieth century anti-hero, Voss remains limited in his capacity to institute structures to prevent the violence. He cannot foresee, and thus be held accountable for the consequences of his own pursuit of individual fulfillment and the journey of exploration that in its wake would bring the acts of settlement violence that judges later would characterize as the tide of history.[30]

CONCLUSION

The foregoing discussion has outlined the manner in which the colonial history of Australia has been informed by broad factors of race and bureaucracy that were evident in European colonialism preceding the rise of the modern nation state. Central to the operation of these forces was a denial of responsibility for acts of violence integral to the foundation of the nation during the phase of "settlement" in Australia from 1788 onward.

In legal stories, individual acts of culturally based violence and collective acts of bureaucratic settlement "policy" are retold as being comprehended within the tide of history. The legal imaginary avoids the implication of responsibility for those unforeseen consequences that history now reveals. Law thus recasts the acts of settlement violence through its adoption of the legend of the tide of history that washes away the aboriginal link to country. The *Nulyrimma* judgments provide a clear illustration of a legendary function for law where the use of "intent" limits

responsibility for past actions and present day "settlement" policy. The limitation of responsibility to individualized conceptions of criminal intent also serves to negate the claim of cultural genocide and thus, "the responsibility that one race might bear for another." This limitation makes it impossible even to contemplate the responsibility that an executive government or even a nation might bear for the tide of history that washes away the foundation of indigenous peoples' cultural existence. The tide of history works to obliterate the aboriginal cultural history in the Australian landscape but also to deny the legitimacy of this cultural expression as a form of "inheritance" that contests the unitary foundation of the Australian nation state in law.

Similarly in *Voss*, the imaginary of the meeting of white and black cultures in the interior of the Australian nation space is described in terms of an inevitability of violence that arises where two races with two very different conceptions of possession meet. These differences are germane to the failure to identify a point of common humanity and "responsibility." The consequences of this cultural contact in *Voss* cannot be averted by European civilisation, intent as it is, upon its own redemption or material substantiation. Voss, the epitome of an individual afflicted with the limitations of "humanity," cannot forsee the consequences of this contact; brought about in part by his own attempt to possess, and be possessed by, the land.

Finally, to link these ideas back to a broader analysis of the formation of the Australian nation state, its inter-relation with racial constructs, and the denial of culturally based violence. The persistent trend is to limit "responsibility for history" within Australian common law. Australian law thereby fails to take account of culturally based violence within its own national and legal space. The insistence upon a tide of history as devoid of individual conceptions of intent is basic to the denial of "responsibility for another people." Such an insistence is given further support by the bureaucratic/executive characterization of the relevant "acts" and policy that provides the context for more individualized incidents of violence in the process of making settlement pay. These legends of settlement history thereby ignore the crucial cultural differences in how land is perceived and how the relationship between inhabitants and country is conceived.[31] These differences are important for understanding why for indigenous people those acts that wash them away from country may well be regarded as cultural genocide, while for non-indigenous people they form the tide of history.

NOTES

1. See the discussion of Australian history and genocide by Justice Wilcox in *Nulyrimma v. Thompson and Buzzacot v. Hill* (1999, pp. 624–625).

2. *Mabo [No 2]* was the pivotal Australian case which first recognized Aboriginal and Torres Strait Islander rights to land, some 200 years after white colonization.

3. See the comment of Justice Gummow in the hearing of the appeal in *Yorta Yorta* to the effect that the *Native Title Act* (NTA) forms part of the tide of history. Gummow J in the *Yorta Yorta* transcript (23/5/02 M128/2001): "So 'tides of history' does not help you in construing 223(1) [of the Native Title Act 1993]. It itself is part of the tide of history as far as I am concerned."

4. The NTA was introduced after *Mabo [No 2]* and later amended after the controversial *Wik* decision which found that native title rights were not extinguished by grant of a pastoral lease. Pastoral and other forms of statutory leases cover a large portion of the interior of Australia. The Wik 10 point plan in the words of one Indigenous leader – Mick Dodson – delivered, "a bucket load of extinguishment" for native title rights.

5. In *WA v. Ward* (2002) it was held that the NTA was the primary determinant of indigenous rights to land (pp. 16–17).

6. These regimes rather than confirming Native title rights validate and confirm extinguishment of native title, see NTA (ss 13A, 15–23 and 83).

7. For a discussion of the extent to which Mabo is an origin story see Fitzpatrick (2002). See also the discussion by Justices Deane and Gaudron in *Mabo [No 2]* (pp. 104–109): "As time passed, the connection between different tribes or groups and particular areas of land began to emerge. The Europeans took possession of more and more of the lands in the areas nearest to Sydney Cove. Inevitably, the Aborigines resented being dispossessed. Increasingly there was violence as they sought to retain, or continue to use, their traditional lands. An early flash point with one clan of Aborigines illustrates the first stages of the conflagration of oppression and conflict which was, over the following century, to spread across the continent to dispossess, degrade and devastate the Aboriginal peoples and leave a national legacy of unutterable shame."

8. Pauline Hanson was the founder of the "One Nation" political party, a conservative right wing group that adopted explicitly racist policies. The One Nation party policy platform included opposition to the decision in *Wik People* (1996).

9. The importance of nomination to the World Heritage list is that a range of legal protections pursuant to the now superseded *World Heritage Properties Conservation Act* 1983 (Cth) could be implemented to prevent activities which derogated from the world heritage values of the "property" see ss 8, 11 *World Heritage Properties Conservation Act* 1983 (Cth).

10. The view that the native title cases represent a particular incorporation of "history" into legal memory is discussed generally in Godden (1997, p. 124). See also the discussion by Justices Deane and Gaudron in *Mabo [No 2]* (p. 104) to the effect that the foundation of a nation was predicated upon the absence of the recognition of Aboriginal existence and most particularly the claims to land.

11. "The concept of inheritance, applied to the very nature of liberty, has been the ideological basis from which English nationalism received its curious touch of race feeling ever since the French revolution" (Arendt, 1958, p. 17).

12. That unitary origin is expressed as the skeletal principle of the doctrine of tenure and that all land is held of the Crown. See generally *Mabo [No 2]* per Brennan J (pp. 43–47).

13. For a discussion of the manner in which British imperialism promoted an aloofness of administration as a "more dangerous form of governing than despotism and arbitrariness" see Arendt (1958, pp. 207–218).

14. A recurring theme throughout Arendt's work is the idea that where a common humanity is denied and people are seen as "less then fully human" then it provides, ". . . a 'temptation' to pay less attention to the deeds of persecuting governments . . ." (1958, p. 294).

15. Arendt was concerned with the genocide of Jewish people and other cultural groups under the Nazi regime (1958, pp. 389–418).

16. As a side note, it is somewhat disappointing that Arendt in 1958 should accept the conventional [legendary?] understanding of the history of Australian colonization as explicable on the basis that Australia had little history or law prior to British occupation. She characterizes the process of colonization as, "a comparatively short [period] of cruel liquidation because of the natives numerical weakness . . ." (p. 187; see more generally 185–188).

17. For many Indigenous peoples, Australia remains a colonial state rather than "post colonial." On this point see Watson (1997, p. 56).

18. See the examination by Julie Evans (2002) of how the rule of law, regarded as central to English conceptions of law, was perverted by conceptions of race in colonial Australia. In effect the protections afforded to "all English men" as encompassed by that ideal, were denied to aboriginal people through the imposition of summary justice to try aboriginal people in a number of the colonies. Evans makes a concluding point that these developments were integral to the rise of a national consciousness that ultimately resulted in the federation of the Australian colonies in 1901.

19. Australia is a party to the convention. See generally Saul (2000).

20. See Evans (2002) who argues that as control of settlement policy passed from the British Colonial Office to local executive governments with increasing degrees of self-government in colonial Australia, more explicitly racist settlement policies were adopted.

21. Interestingly, the positivist idea that law is valid simply through it being laid down through a proper parliamentary process fails to engage with natural law questions about the moral validity of such laws. These issues were explicitly raised by jurists such as Hart and Fuller following the Nazi genocide. For a discussion see Morrison (1997, pp. 316–321).

22. In the twentieth century, the rise of negligence-based conceptions of responsibility, based around foreseeability, demonstrates these ideas more clearly perhaps than "intention" within the criminal law. See generally Cane (2002). Nonetheless, it is argued here that an analogous form of limitation of responsibility is apparent in criminal law given the separate requirements for an "act" and the need to demonstrate a knowing intent of the consequences of the "act."

23. This phrase echoes Arendt's view of race and bureaucracy as instrumental in denying responsibility for another peoples (1958, Chap. 7).

24. The word desert works on a number of levels. The "desart" status of the Australian continent was regarded as the justification for the designation of the continent as a terra nullius and a "settled country." See generally Mathew et al. (1995, pp. 10–14). It is also used with metaphorical significance in terms of the apotheosis of western civilisation in the wilderness of the desert.

25. The final destruction of Voss is at the hands of Jackie, an Aboriginal youth once a member of the exploration party, although the path to this culmination is one set inevitably by Voss himself (White, 1957, pp. 417–419).

26. See earlier discussion of Justice Wilcox's judgment in *Nulyrimma*.

27. The theme of the alienation of the Australian continent and the attempt to semiotically appropriate the continent in European terms is an oft-repeated one in Australian literature.

For a discussion see Priessnitz (1991); see also generally on semantic appropriation, Ryan (1996, Chap. 2).

28. A similar theme of the decline of white civilisation in its contact with "less civilised" cultures was given prominence in Conrad (1967).

29. Conrad adopts a similar, but perhaps more explicitly racial stance, to describe the assault of European civilization, upon colonized people. In *Heart of Darkness* he describes King Leopold of Belgium's assault upon the African Congo where there was cultural genocide on a massive scale. Arendt also notes this episode in her discussion of the colonial and imperial foundations of European nation states (1958, pp. 189–191).

30. In the novel, a search is made for Voss and his party and this expedition further opens the interior to "settlement" (White, 1957, pp. 449–445).

31. In this regard Detmold argues that, "[a]t the bottom of the desires there was a vast difference of perception of what land was and what it was to desire it; these differences reflect more immediately in the differing conceptions of legal title than desire itself does, and constitute a much greater problem of lawful reconciliation. When this issue is expanded to embrace all aspects of the relationship of humans in community the size of the problem of law and difference is encompassed: it is nothing less than the whole of our cultures which constitute our communities of difference" (1993, p. 160).

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10. CARTOGRAPHY, PROPERTY AND THE AESTHETICS OF PLACE: MAPPING NATIVE TITLE IN AUSTRALIA

Alexander Reilly

INTRODUCTION

New and converging technologies in administration and mapping have enabled property rights to become disconnected from the facts of occupation and possession of land. By the time native title was recognised in the *Mabo* decision (1992) the primary representation of land tenure was in digital cadastres[1] created and controlled by Federal and State bureaucracies. Native title was immediately cast as a spatial question. The location of native title rights was determined within the confines of a map of existing legal interests in the land. In this paper, I consider how the spatial orientation of property has affected the nature and expression of native title rights in Australia.

Since the time of first British settlement of Australia in 1788, maps have been used increasingly in the service of the State to define the spatial dimension of property (Baigent & Kain, 1992, pp. 307–318). Maps allow space to be rendered geometrically providing a precision and orientation to property rights. Spatial representation reinforces the jurisdiction of the law to determine the nature of property rights. As Harley put it, "the rules of society and the rules of measurement are reinforcing in the same image" (1989, p. 6). Furthermore, the spatialisation of

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property rights enables the transfer of land to be achieved without the inefficiency of demonstrating relationships on the ground. By the time the existence of native title was declared in *Mabo*, the relationship between property law and cartography was well entrenched, and not surprisingly, cartography became central to the process for claiming native title rights.[2]

There is a tension between the role cartography plays in the native title claim process and the foundation of native title rights in Indigenous laws and customs. Indigenous laws and customs are based on relationships of people and their "Country"[3] that exist within a system of logic which predates cartography.

> Aborigines did not create maps before the coming of Europeans. As they themselves say: 'We don't need a paper map – we've got our maps in our heads.' (Myers, 1986; Rose, 1996; Sutton, 1995, 1998a, p. 363; Verran, 1998).

However, the recognition of native title is only possible to the extent that it does not impinge upon existing common law and statutory rights.[4] Thus, the recognition of native title depends on a successful translation of laws and customs into rights and interests within the system of land tenure.

In considering the relationship between cartography and native title, the paper draws on existing theoretical considerations of the metaphorical and rhetorical power of maps (Harley, 1989; Monmonier, 1993; Woods, 1992). Cultural theorists have used spatial metaphors, and maps in particular, as an analytical tool to explain concepts in their theories. Following Baudrillard, the paper questions the extent to which the representation of native title has come to replace the relationships on the ground that are the foundation of title in a process of "simulation"(1994). As Foucault used spatial metaphors to think through the dimensions of power, the paper interrogates the relationship between cartography and the legal concept of jurisdiction (1977, p. 68). The work of Gilles Deleuze and Felix Guattari focuses on the shifting and contingent potential in maps.

> The map is open and connectible in all its dimensions; it is detachable, reversible, susceptible to constant modification. . . .. It can be drawn on the wall, conceived of as a work of art, constructed as a political action or as a meditation (Deleuze & Guattari, 1987, p. 12).

The paper argues that this potential in maps points to a similar potential in the law to challenge existing notions of property, particularly given the already close association between cartography and the representation of property rights. Most specifically, the paper discusses a literal relationship between cartesian cartography[5] and the law in the representation of native title as a property right. There is a natural association between the measure of property and cartography. In this, the paper draws on the work of De Sousa Santos who explores a relationship between the power of the map to represent and order relations spatially and the

power of the law to order relations politically. In *Toward a New Common Sense*, De Sousa Santos describes both maps and laws as

> ruled distortions of reality, organised misreadings of territories that create credible illusions of correspondence (1995, p. 458).

Maps distort social reality to establish orientation. Laws distort social reality to establish exclusivity (1995, p. 458).

The paper considers a distinction between the concepts of "place" and "space," how cartography constructs our relationships to places spatially, and how these constructions both impact on and reflect the nature of property rights. It explores a growing connection between property and cartography and how this was manifest in the colonisation of Australia. By the time Indigenous land rights were recognised in *Mabo*, cartography and law were so joined that native title was inevitably reduced to a spatial concept. The paper then considers how maps have been used around the native title claims process, recognising a tension in their use as an administrative aid to the quantification of native title on the one hand, and as a metaphoric and discursive aid to the "performance" of relationships to land on the other. The paper compares two maps of Australia created in 1994, two years after the declaration of the existence of native title. One is a map of Land Tenure, which provides a digital coverage of land tenure information,

> to serve the needs of Commonwealth authorities . . . in the process of reconciling Aboriginal land issues.[6]

The other is a map of "Aboriginal Australia," which displays traditional Aboriginal tribal boundaries. The paper discusses cartography as both reinforcing the jurisdiction of the law, and as a means of resisting the conceptual limits the law places on native title rights. Overall, it is hoped that the paper challenges the conceptual limits of property generally, and of native title in particular.

PROPERTY, MAPS AND A SENSE OF PLACE

The legal process of transforming relationships to land into a cartographic form brings into focus the distinction between space and place, and what it is about these concepts that ought to be reflected in property rights. At its most generic, a place is a portion of space occupied by someone or something. To be in a place is to be at a particular location in a landscape or terrain. The location is stable and stationary, and movement from that location to another takes one from one place to another. Two people cannot occupy the same place simultaneously. Just as a snapshot of a chessboard reveals the exact position of the pieces at any point in time, with each

piece occupying its own square, so it is with people. In separate considerations of the concept of place, Michel de Certeau and Edward Casey agree on this meaning of place, but attribute to it very different significance. For de Certeau, the fixity of place means it is a lifeless and static phenomenon (De Certeau, 1984, p. 117).

> From the pebble to the cadaver, an inert body always seems, in the West, to found a place and give it the appearance of a tomb (De Certeau, 1984, p. 118).

For Casey, it is the "sedentary" quality of place that contributes to a sense of "well-being" (1993, pp. xi and xii; 1997). Place provides us with a sense of our origin, and a sense of where we are going (Casey, 1993, p. xi). Reaching an identifiable place (preferably one we can call our own) provides an end point for a journey. This enables us to make sense of the journey and, more importantly, to secure us against perpetual movement. On the other hand, De Certeau emphasises that by providing a beginning and an end to a journey, place predetermines the journeys we can take, fixing them in location and time. There can be no sense of place without the contrasting void of space. And there can be no sense of space without places to move through and around. For de Certeau, a place comes alive through the events and practices that occur in the space within and around it (1984, p. 123). The chessboard is a space for the dynamic interaction of the pieces during a game of chess. Only when the final act of checkmate freezes the pieces in their final position is the game at an end, and the pieces once more reduced to the fixity of place. For Casey space is a void; vacuous and silent. He constructs space as an absence of place, and not as an opportunity to engage in creating meaning.

There are contrasting interactions between space and place. A journey through space can either be controlled or fashioned by the (fixed) places it moves through, or a journey can reveal places along the way. In this regard, de Certeau draws a distinction between "touring" and "mapping." A tour is determined by the revelation of places. "If you turn left, you will come into the living room." A map, on the other hand, presents a pre-existing set of observations. "The living room is next to the bedroom" (De Certeau, 1984, p. 119). On a map, discoveries have already been made (Rabasa, 1984). This distinction between touring and mapping is encountered in the native title claims process. Aboriginal people often describe their relationship to land in terms of their movement across land. So, for example, how far one hunts goanna is revealed by the requirements of the hunt and not by predetermined boundaries of a hunting area.[7] The extent of rights to the sea are determined by how far one can see, and not in terms of a determinate distance from the coastline.[8] The law, on the other hand, is concerned to pin these movements down to specific locations.[9]

The tension between Casey and de Certeau is most evident in this distinction between touring and mapping. Without the possibility of moving between and

through places, and interacting with them (touring), a deeper sense of place is absent. So the sense of "place" that Casey explores cannot be separated from the contexts of time and space. On the other hand, if places do not have a deeper significance than their "tomb-like" quality of positioning, any journey between them is no more than a sterile and predictable movement through space. On a map, places are depicted using symbols. A symbol might be able to *locate* the place with a high degree of accuracy, but provides at best a very crude idea of commitments to the place. Furthermore, fixing the location of a place denies the possibility of it being elsewhere.

Property rights are conceived of in terms of both place and space. Gray describes property as a

> relationship of social and legal legitimacy existing between a person and a valued resource (Gray & Gray, 2000, p. 95).

So conceived, the "place" of property is in the dynamics of the power relationship, and its spatial extent is the successful exercise of power in a defined area. The foundation of a right to land is, then, the control one exercises over the land through use and occupation (Gray & Gray, 2000, p. 228). Other property theorists draw a distinction between use and occupation of land as a lived and grounded phenomenon, and the representation of property rights. Property is in the form of the relationship to land (such as rights the property holder may exercise with respect to third parties) rather than the substantive relationship between a person and the land. Thus, a freehold title describes particular rights (of exclusive possession) over a particular area of land (defined in the title deed). The right to exclusive possession exists regardless of the existence of physical or emotional commitments to the land. Ownership in this sense says nothing about one's sense of place, only one's potential to exercise power over a defined space.

Alain Pottage has traced a change in the measure of land in England from reliance on local knowledge and memory to the creation of a register of titles and the cartographic representation of boundaries. He describes the movement as being from "organic and practical memory" to an "administrative archive" (Pottage, 1994, p. 361), and from "land to paper" (Pottage, 1994, p. 363). His study highlights the increasing abstraction of the identity of land for the purposes of its transfer and devolution, and suggests that the changing mode of representation of property changes its very nature. Maps went from being a background description (Pottage, 1994, p. 368), to being the most authoritative representation of land for land tenure purposes. Once the map was of central importance, relationships on the ground must, when necessary, conform to the representation of property rights as depicted on the map (Pottage, 1994, p. 384). Pottage's analysis describes an increased spatialisation of property at the expense of commitments to places.

Maps transform places to which we have particular commitments into spaces where those commitments can be oriented in a broader field of commitments. The abstract nature of property allows for schematic representations of its extent (Gray & Gray, 1998; Pottage, 1998). There is now an easy and highly developed relationship of property (on the register of titles) and its cartographic representation (on the digital cadastre). So closely aligned is property to its cartographic representation that it is now hard to imagine other ways of officially representing rights to land. Maps of land tenure orient the commitments to land expressed in property rights into a small scale, highlighting their location over their nature. The orientation that is gained in space is accompanied by a degree of loss in a sense of place. Pottage's analysis suggests that over time property relations have become more fixed, leaving little room for the revelation of new rights through tours of the land.

MAPPING AND COLONIALISM

The British claimed sovereignty to the eastern half of the Australian mainland, and simply "settled" it, without even knowing the extent of occupation of that territory (Reynolds, 1992, p. 11). Maps of the new colony reinforced its designation as "terra nullius" through a series of movements between space and place. Surveying involved measuring out individual land parcels in "metes and bounds," staking out allotments and describing the location of boundaries through narrative and pictorial representations (Williamson, 1984a, p. 9). Surveyors created their own property boundaries. These were added physically to the land in the form of marks emblazoned on trees, or of wooden stakes driven into the ground. The boundary indictors generally disappeared within several years of placement. Most are now completely gone (Williamson, 1984b, p. 110). With the markers gone, surveyors' plans and field notes were the only evidence of original surveys. For conducting subsequent surveys, these representations of land were the primary source documents (Toms et al., 1988, p. 34). Therefore, the first surveys laid the foundation for the primary importance of paper representations of land in the determination of property rights. Not long after first settlement, expansion into interior regions preceded surveys of those regions, and property rights were granted on unsurveyed lands. Many of the extensive pastoral lease boundaries in Australia were determined solely by cartesian coordinates. As mapping became more accurate and efficient, cadastral maps were used as the means of representing title to land and cartographic coordinates replaced points on the ground as the primary determinants of boundaries (Toms et al., 1988, p. 34).[10]

Since the 1980s, land tenure information in Australia has been contained in digital form on Geographic Information System (GIS) databases of the

Commonwealth, States and Territories. Title boundaries are represented using fixed coordinates that can be located on the ground using Global Positioning Satellite (GPS) technology. The transition from the authority of original surveys and survey marks to the authority of the digital cadastre has accelerated with the rapid advance in digital technology in the past 20 years (Bentley, 2002). To determine the boundary of a pastoral lease, whether it has been surveyed or not, it would be necessary to obtain information of the coordinates of the boundary of the lease from the digital data base, and go out to the land with a GPS unit.[11] As the digital cadastre becomes more and more comprehensive, disputes over boundaries are limited to technical questions such as the most accurate or appropriate scale and projection for the map, and how the data sets of the States should be aligned. This is in contrast to boundaries reliant on memory, in which there is room for contesting stories of connection to the land (Pottage, 1994, p. 364).

For the purpose of mapping, what is "unknown" is transformed into what is "empty" prior to the "discovery" of the land (Fitzpatrick, 2000, p. 12). The land can then be (re)covered, explored and brought into being through the naming of geographical and other features (Carter, 1987; Fitzpatrick, 2000, p. 12). However, the allocation and demarcation of property rights does not create a sense of place in the void. Place requires personal commitments and historical attachment. Occupation following the allocation of Crown grants to land may lead to the development of a sense of place, but this is not inherent in the concept of property (Pottage, 1994, p. 363). A cadastral map, such as the map of Land Tenure, does not therefore replace the void. It simply breaks the void into smaller and more manageable areas.

Although the original allocation of grants from the Crown were not associated with a sense of place, early European views of the landscape attributed to it forms that were familiar, and thus created the illusion of emplacement. Angela Melville discusses three aesthetic tropes of the sublime, the grotesque and the picturesque which transformed the foreign landscape into a familiar form. The "picturesque" is a compromise between nature and culture. Within it, economic activity can be brought to bear on the landscape and contribute to its domestication (Melville, 2002). Through the process of settlement, possession and use of land, the colonists developed a sense of "place" on the land. However, Helen Verran argues that, at least in terms of the allocation of property rights, this sense of place is circumscribed by a focus on the familiar quantifiable elements of the relationship to land.

> Moderns own land through the mediation of number. Number constitutes an ordering recursion, a logic, which translates qualities taken to be in the land (1998, p. 246).

For Verran, the meaningfulness of land (ontic commitments) and explanations of its origins (epistemic commitments) are reduced to a concern for quantification, in

contrast to Indigenous relationships to land which are based on highly developed epistemic and ontic commitments (1998, p. 246). The only hope for negotiation between pastoralist and Aboriginal people is for land titles to be conceived of in terms of these deeper commitments. In such a process of negotiation, maps must be conceived as a tool for the performance of these commitments to places on the land, and not simply as a tool for the accurate measure of the land (Verran, 1998, p. 250). Verran's advocacy for a new understanding of commitments to land, and a new form of cartography in presenting these commitments challenges the law to develop new approaches to ownership.

By creating a "similitude of reality" (Harley, 1989, p. 4), cartesian cartography has reinforced the legal task of identifying and managing the extent of property rights. However, John Harley argues that despite an increase in the technical proficiency of map-making, cartography remains a culturally specific technology (1989). The representation of detail on maps of land reinforces epistemic commitments to a particular form of relationship to the land. And so it is with cadastral maps which have long been used in the service of the state to determine the extent of resources, to impose land taxation and to record property ownership (Baigent & Kain, 1992, p. xvii). The primary concern of cadastral maps has been to quantify land for these legal and political purposes. Harley laments the reduction of cartography to a technical exercise of measurement. Maps used to be much more than this. On a medieval map, the pictures on the verso were as important as the spatial dimensions of territory (Harley, 1989, p. 11; Veran, 1998, p. 250). For example, Evelyn Edson describes the variety of connections to places that medieval map-makers attempted to capture in their pictorial representations of landscape (1997, p. viii). Harley argues for a new approach to cartography that restores the "metaphor and rhetoric in maps" (1989, p. 3). For Harley this requires a deconstruction of the map at various levels. At the first level, there needs to be a recognition that the rules governing the technical and cultural formation of maps derive from particular epistemic commitments that have marginalised the "art" in maps (1989, p. 4). At the second level, borrowing from Derrida's deconstruction of the text, Harley argues for a new reading of the map as a text. Maps use a particular iconography, scale and projection that mask innumerable alternative readings of the areas represented on the map. For both Harley and Verran, the key to liberating representations of space in terms of its quantity is to re-imagine the map as a performance of the space.

Is a similar re-imagining of property rights possible? Could our ontic and epistemic commitments to land be aligned more closely to property rights in that land? Rather than understand land tenures as the definitive legal relationship to land, could they be understood as one of a number of legal relationships? Such a re-imagining has an appeal in an investigation of our sense of place. The

recognition of native title in *Mabo* resisted narrow interpretations of property. Traditional laws and customs cannot be reduced to traditional forms of land tenure. In fact, the understanding of property rights as a question of measurement and administration contributed to the failure of law to recognise Indigenous relationships to land in the first place. Justice in relation to land rights, as invoked in *Mabo*, required a reflection of epistemic and ontic commitments to place. Just as ownership contributes to a sense of place, a sense of place ought to be reflected in ownership. Finally, outside any reformative project of favouring one version of property rights over another, the discursive practices surrounding the use of maps in native title suggest that there is a plurality of relationships to land outside the digital cadastre that express a form of "ownership." These practices point to the possible direction of law reform.

CARTOGRAPHY IN THE MEASURE OF NATIVE TITLE

The Land Tenure Map

In response to the *Mabo* declaration of the existence of native title, the Commonwealth government requested that the Australian Surveying and Land Information Group (AUSLIG) produce a map of land tenure in Australia "for use in the process of reconciling Aboriginal land issues."[12] The Land Tenure map provides an authoritative view of property rights in spatial and digital form. The Land Tenure map represents three categories of land: public lands (vacant Crown land and Commonwealth and State reserves); private lands (freehold and leasehold land); and Aboriginal lands (comprising private freehold and leasehold and reserves held by or on behalf of Aboriginal communities). The data were sourced from pre-existing cadastral maps and plans of the Commonwealth and the States, and from government gazette notices. The information was current as of July 1993 when Commonwealth, State and Territory mapping agencies had checked and cross-referenced the accuracy of information on the map.[13]

The creation of the map of Land Tenure in 1994 was possible because of the stage that had been reached technically, in the methods of creating and synthesising digital data, and administratively, in the place of cartography in the register of titles. The map of Land Tenure was the starting point for the consideration of the spatial dimensions of native title. Its small scale (1: 4,700,000) suggested that native title was a national rather than a local issue. In this sense, it highlighted the sovereignty of the Crown, and reinforced that the assertion of sovereignty was not open to reconsideration. Also it was possible to tell from the map where native title had been extinguished by grants of the Crown that were inconsistent with the continued

existence of native title without the need to travel on the land and to learn of the commitments of people to their "Country."

The pressing question following *Mabo* was the extent to which existing property relations would have to accommodate native title rights. The map of Land Tenure answered this question in definitive terms in relation to the spatial limits of recognition. The boundaries of existing property rights are presented as immutable. The map confirms the authority of the Crown to make grants of land and expresses a confidence in the technology of mapping to represent these grants as land tenure information (Pottage, 1994, p. 365). The presentation of land tenure in cartographic form confirms the extent of the colonial appropriation of space. Land tenures are granted of the Crown, and native title, to the extent that it exists, can only be accommodated within areas where inconsistent grants are not already present.

These cartographic limits were imposed by the law. The capacity of the common law to recognise Indigenous commitments to land through the concept of native title is circumscribed within clearly defined epistemic limits. Native title must *fit within* the existing system of Australian property rights. Therefore native title, and in particular its spatial dimensions, may bear little resemblance to the system of Indigenous laws and customs upon which it is based. This has surprised many claimants, but for lawyers it is axiomatic. The common law, and its doctrine of estates and tenures has sole jurisdiction to determine the extent of property rights in Australia. The register of titles provides a mechanism for the identification and transfer of property rights. To find a place within the taxonomy of property rights, native title must be presented in a form that can be located alongside and compared with other forms of estates and land tenures.

Nevertheless, the declaration of the existence of native title shook up the Land Tenure map. There was at least the potential to claim native title on vacant Crown lands which made up 12.5% of the territory in Australia. The remaining empty space was potentially filled with a new form of interest, inhibiting the easy expansion of new grants from the Crown into these areas. The confirmation of the possibility of claiming native title on pastoral leases in *Wik Peoples v Queensland* (1996) had a graphic impact on the Land Tenure map. It created the possibility of a co-existence of interests over a further 40% of the Australian mainland. The neat blocks of colour which indicated divisions between types of interests in the land were no longer an adequate representation of the extent of property rights. The co-existence of native title and pastoral leaseholds could only be shown in *layers* of land tenure information, requiring a new dimension for the cartographic representation of property rights.

In response to *Wik*, the Prime Minister held up the Land Tenure map on national television with vacant Crown land and pastoral leases covering 78% of the territory of Australia coloured in brown.[14] This gesture appealed to people's

insecurity about their place on the land. The spatial representation left no room for alternative senses of place. The impact of native title, the Prime Minister suggested, was to *displace* existing rights. The Land Tenure map facilitated this hyperbolic performance of the impact of native title.

The Map of Aboriginal Australia

Descriptions of Aboriginal connections to Country testify to a deep sense of place (Muecke et al., 1984; Myers, 1986; Rose, 1996; Verran, 1998). There is a symbiotic relationship between people and the land. Land is evoked into being through the Dreaming, and the Dreaming makes sense of present connections to Country (Rose, 1996). Aboriginal people also have a strong sense of space. Creating a "map," Sutton states, "is an act of asserting one's associations with land" (1998b, p. 399). Places are given a spatial dimension through tours of the landscape (Strehlow, 1947). In art work, Aboriginal people represent their Country schematically, and they have a strong sense of orientation in song and dance. In terms of place, Indigenous connections to Country provide a sense of purpose and well-being, but risk being reified and fixed in the past. Native title translates Aboriginal relationships to land into a form of property right. The designation of native title as a property right and the requirement for its cartographic representation in the Native Title Act transforms it into a spatial concept. Native title is the space where legal rights associated with relationships to Country have not been extinguished (Mantziaris & Martin, 2000, p. 9; Pearson, 1997; Strelein, 2001).

In the doctrine of terra nullius,[15] a particular socio-political absence was merged with geographical absence. This merger allowed depictions of Australia as an empty land prior to British settlement to reinforce the stated terms of the assertion of sovereignty over the land (Carter, 1987; Ryan, 1996). With the rejection of terra nullius in *Mabo*, representations of Aboriginal tribal boundaries took on a new significance. Previously, research into tribal boundaries was of anthropological interest only. Norman Tindale (1930–1954), Roland and Catherine Berndt (1939–1980s) and others collected Aboriginal crayon drawings and other representations in "map form" (Sutton, 1998b). On the basis of these and the accumulation of other ethnographic materials, a number of "national" maps of tribal/language groups have been created. In 1974, Norman Tindale produced a series of maps of Aboriginal language groups throughout Australia (1974). These maps have been important reference points in the determination of native title claim boundaries. In 1992, Davis and Prescott produced a work that purported to provide definitive boundaries for Aboriginal tribal groups in Australia (Davis & Prescott, 1992).[16] Finally, in 1994, at around the same time that the Land Tenure map was

created, the Australia Institute for Aboriginal and Torres Strait Islander Studies (AIATSIS) produced an encyclopaedia and an accompanying map of 'Aboriginal Australia', which

> represented all the language and tribal or nation groups of the Indigenous people of Australia (Horton, 1994).

The 379 tribal groups cover the land mass of Australia in a patchwork of coloured areas. There are a few small grey areas in which it is stated there is "no published information available."

A comparison of the Land Tenure map and the Horton map of Aboriginal Australia is striking. The maps represent the extent of colonisation and a new expression of resistance to it. Just as cartography is used in the service of the State in the Land Tenure map, it is used to resist the radical denial of Aboriginal land rights in the map of Aboriginal Australia. The Land Tenure map provides information on the forms of tenure, but not on the identity of those who own them. The map of Aboriginal Australia provides an indication of the identity of the tribal/language group with interests in the land, but does not identify the types of interest they possess. Both maps were produced on an AUSLIG base map at a scale of 1:470,000, and identical lines of latitude and longitude pass through the maps. Each map presents a particular view of the space within the Australian territory. The Land Tenure map provides a snapshot of current land tenure information at the beginning of 1994 in three categories: public land which, it states, "is owned by the Crown," private land and Aboriginal land, which includes Aboriginal freehold, leasehold and reserve land. The information is current as at mid-1993, when Commonwealth, State and Territory mapping agencies last cross-referenced the information. The implication is that the information will continually change. New land tenures may be given out, altering the mix of land tenure types. The map of Aboriginal Australia purports to depict relationships to land that are timeless. The information is both archival in nature, and an indication of the potential of contemporary claims to connection. The location of the tribal/language areas were determined according to factors of "culture, language and trade."

Both maps represent information on the map template that is not directly relevant to their primary purposes. Both maps include capital cities and major towns. Both have information on water courses, though on the map of Aboriginal Australia these are more extensive.[17] The background to the Land Tenure map includes major roads, railways, and stock routes. These are absent on the map of Aboriginal Australia. The Land Tenure map shows State boundaries and names, whereas the map of Aboriginal Australia shows "Regions" which are established using

> the watershed basins as a template, and then superimposing the characteristics and relationships of each tribal group (Horton, 1994, p. 936).

The representation of "Regions" adds to the sense of the map of Aboriginal Australia as a "national" map, made up of not only tribal/language groups, but of a federation of regions. The designations of "State" and "Region" converge in the area of Tasmania, which is represented as both.

At the margins of the maps or on their versos, there is contrasting information. On the Land Tenure map there is the Australian Coat of Arms and a set of tables with information of the coverage in square kilometres of the different forms of land tenure. The map of Aboriginal Australia is accompanied with a disclaimer that it "indicates only the general location of larger groupings of people." It also states in red with a fluorescent yellow background that the map is "not suitable for use in native title and other land claims." There is evidently a consciousness that the map presents a new and contested layer of information about rights to land.

The maps are as significant for their silences, as for what they say. Neither map testifies to the extent of use or physical occupation of the land. The maps represent the location of spaces and not the connection of people to places. The spaces are reduced to generalized forms. Individually, the maps give no sense of contested space. They appear as a fixed and stable representation of the way things are. And yet, there are considerable anxieties underlying the representation of connections to land on both maps. In the Land Tenure map, there is the spectre of a debate among surveyors about whether title to land can be represented adequately on a map, or whether it must be a task performed primarily on the ground (Toms et al., 1988). The map of Aboriginal Australia contains an anxiety about the appropriateness of presenting Aboriginal territory in terms of language/tribal boundaries. Cartographic mapping is an introduced technology (Sutton, 1998a, p. 363). It becomes of interest to Aboriginal people as a response to questions of land rights, both nationally and internationally. But is a degree of autonomy lost through adopting cartography in the pursuit of land rights? Is there not something powerful in the more fluid and less tangible relationship to land in the Dreaming?

The identical scale and projection of the maps allows for a direct comparison to be drawn between native title as a new form of property right, and of traditional Country, and for the question of the extent of native title rights to be quantified with accuracy. But it also limits land rights to a particular cultural jurisdiction. Land rights are a national question, within the language of Cartesian cartography (with the Prime Meridian running through Greenwich, London). Only claims asserted in the language of space and territory are recognisable. The culture of the map is determined by and reinforces the extent of law's jurisdiction. In law, jurisdiction demarcates the law's sphere of competence (Dorsett, 2002, p. 34). In Australia,

> the common law . . . consolidated its jurisdiction by asserting it uniformly and evenly across legal space (Dorsett, 2002, p. 35).

The common law "supplant[ed] other sites of adjudication and authority" and became the exclusive jurisdiction for the claim of rights (Dorsett, 2002, p. 32). By representing the terrain spatially, as a divisible commodity upon which notional lines could be placed to represent areas of responsibility and control, cartography facilitated the creation of exclusive and uniform jurisdiction. This role of cartography is evident once again in native title. The law reinforced its singular power to "speak for" rights to land by establishing a direct relationship between native title and cartography in the *Native Title Act 1993*. For a native title claim to be registered, section 62 of the Act requires that the external boundaries of claims and the boundaries of existing land tenures within a claim area be represented on maps of the area. The Act assumes that applicants or their representatives have an understanding of mapping techniques, and the ability to transpose the area claimed to a map of the area. More fundamentally, it assumes that, where claim boundaries follow traditional boundaries, these boundaries can be presented in a determinate linear form. To receive any recognition of native title rights, then, Indigenous Australians must be prepared to model the presentation of their relationships to land to fit the criteria of land tenure representation.

In the native title claims process, claimants have used maps in presenting their claim in ways that both reinforce and resist the law's notion of property. At times, native title boundaries follow land tenure boundaries, ATSIC electoral boundaries, roadways, stock routes and State borders (Turner & Brooks, 2000, p. 114). At other times, they follow traditional boundaries. GPS units have allowed the extent of sacred sites, dreaming tracks and other information from Indigenous systems of knowledge to be plotted with accuracy on maps of claim areas. Where claim boundaries follow traditional Country, they privilege physical over geometric space and transgress the straight lines of existing land tenure boundaries. Behind the creation of any native title boundary that follows the contours of traditional Country, there is the spectre of the impossibility of creating a determinate boundary at all. Native title has introduced the concept of overlapping claims. Zones of overlap are eliminated by agreeing a single boundary line, or they result in the creation of joint claims to the overlapping area. Where joint claims are lodged, the determination of internal boundaries remains in the control of the claimants themselves (Jones, 2002).

Mapping of native title boundaries has created various technical issues, some of which are unique to native title. Indigenous boundaries reflect a relationship to the ground. Therefore, they shift as that relationship changes. The extent of a sea boundary might be defined as being as far as the eye can see. But this will vary depending on whether the viewer is aloft a coastal tree, or standing at the high water mark, or whether the viewer has the sun in his/her eyes. In the end, though, the law requires that boundaries be fixed. One of the law's innovations has been to

fix boundaries "arbitrarily" where the evidence does not indicate a precise position for the boundary.[18]

Whereas the form of the representation of native title boundaries has been highly constrained by the legal requirement for a definite external boundary, cartography has played a very different role in facilitating the explanation of connection to land within those boundaries. For example, the ease with which the notion of co-existing rights on pastoral leases could be displayed cartographically (especially in digital form) challenged the law's notion of the exclusivity of legal estates. Also, to support their oral testimony of connection, claimants have taken maps representing existing legal interests to the land (such as the map of Land Tenure) and superimposed their own interests onto them.[19] So the scale and projection of topographical maps might be retained, but a rich tapestry of new iconographic details employed to account for claimant interests. Community locations and holiday time walking routes appear in colourful lines, thicker than the highway and territorial boundaries, and more prominent than rivers, mountains and homesteads. Aerial photographic images are marked with artificial symbols and contours to remind the viewer that there are relationships to the land of significance that the photograph does not reveal. Claim maps both use and subvert the traditional distinctions between natural features, formal grants and improvements to land. They subvert the hierarchy of what is seen and what is considered a property interest in the land by applying to it a new cartographic vision. The way cartography resists the constraints of the law highlights law's struggle with its limitations – the uniformity of sovereignty and jurisdiction, and narrow conceptions of property.

Despite the imaginative use of maps, the potential scope of native title is limited to what the common law is "capable" of recognising. The fundamental place of mapping in the native title claims is to translate Indigenous relationships to the land into a form that the common law can recognise. The law is capable of reading cartographic maps, and so is receptive to evidence of traditional laws and customs presented in this form. Hence, there is great power in marking places of special significance on a map. But what of traditions that do not mark the land? What of relationships or connections that are not experienced spatially or territorially, or if they are experienced in this way, are not capable of being represented on particular territory, even metaphorically? In other words, what happens to relationships to land that are outside the competence of the map. Are they also outside the jurisdiction of the law?

Native title lawyers deal with these types of relationship by drawing a clear distinction between native title and traditional laws and customs. Only the former are subject to the vagaries of legal extinguishment. Traditional laws and customs continue outside the jurisdiction of the law though with no legally recognised space to support their continued existence. There is a direct analogy between the

law's jurisdiction and what is relevant in maps of native title. Where native title is extinguished, it disappears from the Land Tenure map though the relationships to the land underlying the claim to title may still exist. Cartography like jurisdiction is an exercise of power. There is a danger that what is left off the map (or outside jurisdiction) disappears or is assimilated over time. Cartography adds a structural dimension to this assimilation (Gordon, 1964).

Under the native title claims process as it is currently conceived, there is no room for contesting the spatial dimensions of native title. The measurement of title, though difficult and sometimes arbitrary, must be taken. It is delimited by its legal definition, and the technological requirements of computer-based mapping. Once on the map, Indigenous relationships to land are reduced to a form that the law can read and assess in its own terms. Although maps are at the service of all in the native title process, their main proclivity is to reinforce the translation of Indigenous places into a form that can be measured and assessed according to the digital cadastre. The rhetorical imperative of certainty and final resolution surrounds the determination of native title claims. Maps facilitate certainty through the reduction of the social and political landscape. The detached measurement of the map hides its epistemic commitments to the distortions of scale, projection and symbolisation. Maps pursue certainty within these distortions. The law harnesses the power of the map to administer property rights and makes the commitments of cartography its own. There is a danger that, in doing so, the law forgets that its own commitments are not only spatial. Property rights also derive from senses of place, such as well-being, labour and a sense of origin. This is no more evident than in native title claims. Although the law can eliminate a sense of place from property through its spatialisation, it might, in the alternative, revisit its epistemic commitments to property, and as Harley argues for maps (1989, p. 4), return the "art" to the law.

NOTES

1. A "cadastre" is a map of land tenure.
2. Section 62 of the *Native Title Act 1993* (Cth) requires that external boundaries of claims be presented on a map of the claim area.
3. It is common for Aboriginal people use the term "Country" in contrast to "land." Deborah Rose describes Country as "a place that gives and receives life. Not just imagined or represented, it is lived in and lived with" (1996, p. 7). The concept of land, on the other hand, does not have the same connotation of emotional and spiritual connection.
4. *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 45 (Brennan J).
5. Unless the context suggests otherwise, "cartography" refers to cartesian cartography. Cartesian cartography refers to cartography based on mathematical coordinates.

6. AUSLIG, Land Tenure Data User Guide (Commonwealth of Australia, 1994), 4.

7. *Ward v Western Australia*, transcript of proceedings before Lee J, Federal Court of Australia, 18 September 1997.

8. *Yarmirr v Northern Territory* (1998) 82 FCR 533 [70] (Olney J).

9. Most specifically, in s 62 of the NTA. There are a great many examples in the transcript of native title proceedings of claimants and lawyers understanding relationships to land differently, many of which are related to the distinction between touring and mapping. For an example, see Reilly (1998, 2003).

10. There will always need to be some fixed points on the ground, as a reference for the grid of coordinates, otherwise the grid would lose any association with the ground. But besides these reference points, boundaries are determined according to coordinates based on a predetermined projection of the earth onto a flat space.

11. The GPS readings following the coordinates on the land tenure map are a more authoritative measure of the extent of title than the position of fences on the ground.

12. AUSLIG, Land Tenure Data User Guide (Commonwealth of Australia, 1994), 4.

13. AUSLIG, Land Tenure Data User Guide (Commonwealth of Australia, 1994), 33–34.

14. John Howard, 4 September 1997, as replayed on ABC "New Dimensions," broadcast on 3 June 2002.

15. *Mabo v. Queensland [No 2]*(1992) 175 CLR 1, 41 (Brennan J). It was this extension of the doctrine that Brennan J purported to revoke in *Mabo*.

16. Prescott and Davies, *Aboriginal Frontiers and Boundaries in Australia*(1992) was heavily criticised by Peter Sutton and others in Sutton (1995).

17. The "watershed basin" was used as a template and the tribal/language groups were superimposed on that base.

18. *Commonwealth v. Yarmirr* [2001] HCA 56 [78] (Gleeson CJ, Gaudron, Gummow and Hayne JJ); (1998) 82 FCR 533 [98] (Olney J).

19. The following description of the use of cartographic maps is based on maps used in the claim of the Miriuwung and Gajerrong peoples, reported as *Ward v Western Australia* (1998) 159 ALR 483. When I state that "claimants" have used cartography in this way, I mean claimants in conjunction with their legal advisers and government mapping experts.

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11. gods and humans

Nasser Hussain

In order to mark the beginning of the fifteenth century, a group of prominent Muslim theologians and jurists assembled to draft a document that systematically laid out the rights and duties of all human beings according to the dictates of Islam. The year of Christ was 1981, and the occasion was formally the International Islamic Conference, held that year in Paris. The document that these jurist produced seems at first an odd one, titled The Universal Islamic Declaration of Human Rights (Universal Islamic Declaration, 1988). Odd as the document so pointedly invokes the famed 1948 United Nations Universal Declaration of Human Rights (Universal Declaration, 1999). But perhaps such an invocation is not odd at all, for the document is first of all a symptom of and a response to two massive contemporary facts. The first is the ubiquity of human rights talk. It is certainly proof of the success of this discourse as a normative and normalizing force that no-one can speak of universality or ethics or even the most drab topic in international relations without paying homage, only sometimes qualified, to the idea that all humans have rights. The second fact to which the Islamic declaration responds is the suspicion if not outright insistence that the religion of Islam in unsuited to this new order of civilization. Amongst the jurists themselves there is a sense that clarification is needed of the relation of Islam to the global (to say nothing of globalizing) discourse of human rights. This much is readily conceded by the drafters, who felt

> impelled by the forces of the contemporary world scene to formulate the Islamic position in relation to human rights (Weeramantry, 1988, p. 122).

Not surprisingly, such a position involves dethroning the sovereign subject (entirely different from its deconstruction) and proclaiming victory once again for God and his absolute sovereignty, even as it involves extending a governmental interest in

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the life of the individual, from the conditions of his cultural life (article 14) to the legislation of his leisure time (article17). However, in contrast to the Universal Declaration that never once mentions God or Creator, the Islamic Declaration insists that only God to be "the creator the sustainer, the sovereign the sole guide of mankind and the Source of all Law" (Universal Islamic Declaration, 1988, p. 176). A hasty reading would take this as a response not just to the Universal Declaration, which here is named and renamed, but the entire western tradition of rights and secular power after the death of God. This, however, would be a mistake, for it would overlook both the distinctly modern project of power that the Islamic Declaration articulates, and the peculiar construction of the U.N Declaration itself, the way it refers to and refracts the idiom of the famous eighteenth century revolutionary documents – the American Declaration of Independence and the French Declaration of the Rights of Man and Citizen. Thus in the Universal Declaration the repetition of the American phrase, "endowed by their creator," becomes simply "endowed with reason and conscience," with no one doing the endowing. In short, the omission of God from the Universal Declaration is an over determined decision and not one of a casual or inevitable secularism.

I will focus later on the regulated subject who appears in the Islamic Declaration and the absence of God in the Universal Declaration, but here merely insist that we avoid the initial mistake of either identifying these texts too completely with their respective metaphysical and theological traditions, or over – emphasizing their novelty, but in both cases eliding the essential condition of modernity that marks them both.

The condition of modernity is a large claim and so in the interests of clarity let me offer what I take here to be its constitutive markers. The modern project of power is essentially normative and increasingly minute in its operations. It is, as is well known, what Michel Foucault first called bio-power and later dubbed governmentality (Foucault, 1991). The centrality of the norm in the latter refers both to normativity as a conception of standards, and to a process of normalization, which appraises, regulates and relates diverse activities (Ewald, 1990). While such a project is usually associated with the nation state, it doesn't have to be so. The state is, of course, a principal and privileged interlocutor of this larger project, the point of translation of norms into a system of law and rights. And, indeed, despite the premature death knells sounded by critics and proponents alike of globalization, states remain the instrument of enforcing this larger vision, whether in the relation of centralized states to their circumscribed populations, or of stronger states to weaker ones in the international system. The normative project, however, is larger than the particular claims of any single state, or more precisely disables that claim form remaining merely a particular one, for this larger project also entails the demand that value of an order derive form its validity for all places,

whether by extension or by example or both. Thus the modern condition I refer to here articulates a distinct project of power (biopolitical) and a distinct principle of authority (universalism).

Certainly, the Islamic Declaration by so pointedly invoking and reworking the Universal Declaration extends an explicit invitation to compare, to judge, perhaps even to accept or discard. And to the extent that my effort here is to offset these declarations against each other, it could be said that I accept this invitation, but only I would add and insist partially, for my interest is not in evaluating the comparable merits or demerits of either discourse. I am not, thus, let me stress at the outset, remotely interested in whether or not, to what degree and through what compromises, Islam can or should accommodate human rights. Nor will I consider the loquacious critiques, repeated anew and as if new, of cultural relativism – at the very least because the example I have chosen as counterpoint to a human rights discourse, religious fundamentalism, neither makes nor lends itself to making a relative claim. Rather it makes another absolute claim. The task I have set for myself here, it is really a modest one, is to juxtapose these two discourses, to begin to unravel their assumptions and inner workings, in order to reveal not a similarity but a symmetry, and to try to name that confluence.

One could say that my topic participates generically in the subject of religion, law and politics, but it would be more accurate to say that I am interested in the changes in the mutually constitutive relation between them. This requires the adoption of a methodological insistence that the analytic categories of "politics" and "religion" be taken as only provisionally identifiable (one needs names, after all, in order even to rename) but that their historical variability be always kept in mind. It is a lesson Louis Dumont insisted we learn.

> I shall take it for granted that a change in relations entails a change in whatever is related. If throughout our history religion has developed a revolution in social values and has given birth by scissiparity, as it were, to an autonomous world of political institutions and speculations, then surely religion itself would have changed in the process (Asad, 1993, p. 27).

There is, in fact, a growing critical literature that attempts a critique that is not only structural but also inexorably relational – most notably, Talal Asad's *Genealogies of Religion* (Asad, 1993), Moshe Halbertal and Avishai Margalit's *Idolatry* (Halbertal & Margalit, 1992), and Hent de Vries' *Philosophy and the Turn to Religion* (DeVries, 1999). De Vries, in fact, neatly summarizes this critical project in general and his work in particular.

> These relatively new types of investigations, do not present themselves as theological or as religious . . . (rather) they show that citations from religious traditions are more fundamental to the structure of language and experience than the genealogies, critiques, and transcendental reflections of the modern discourse that has deemed such citations obsolete (DeVries, 1999, p. 2).

Attention to such a citational structure means as much locating the functional attributes of a theological discourse, such as the absolute, in a self-avowed secularism, as it does tracing the historicity of religious claims. In short, reading in a discourse the effects of that which it most self-consciously seeks to disavow. Such a theoretical orientation, then, informs my readings of the Universal Declaration and the Islamic Declaration, which I now offer in turn.

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The Universal Declaration of Human Rights in both its idiom and presuppositions echoes the famous eighteenth century texts of the American Declaration of Independence and the French Declaration of the Rights of Man and the Citizen, but with a difference: in the Universal Declaration there is a singular absence of any reference to God/Creator/Supreme being. A closer look, however, reveals an even deeper curiosity. The language of the Preamble and Article I exactly repeat the surrounding vocabulary of the eighteenth century texts even as it excises God as the central referent. Thus the Universal Declaration opts for the French "born free and remain equal" over the American "*created* equal," but chooses the American language of endowment without having anyone or anything doing the endowing.

It is, of course, by now not news to say that in the enlightenment project of the eighteenth century, man would finally replace God as the source and telos of all law. This historical eclipse did not as we know, however, eliminate the need for transcendental invocations. Arendt, that great reader of the human condition, regarded such a need as a marker of modernity itself. She argued in *On Revolution* that

> the trouble was – to quote Rousseau once more – that to put the law above man, and thus to establish the validity of man made laws, *il faudrait des dieux*, "one would actually need gods" (Arendt, 1990, p. 184).

This need has as much to do with the particular desired goals of modern revolutions as it does with the changing character of law and authority. The problem, to put it succinctly, was how to create lasting foundations without resort to foundationalist categories. For Arendt, this did not have to be the case as what was being created in the American Revolution was something quite contingent. She thus critiques the founders for a failure of nerve, as it were, for the inability to embrace the novelty of their actions, which for her lay not in the self-evidence of any truth but in that expression of political will, "we hold." Certainly subsequent critiques, such as Derrida's reading of the Declaration of Independence, which focuses on the ineluctable movement between constative and performative, on the question of whether the people are already free or free themselves in the act of declaring, allow us to be skeptical of Arendt's too seamless supposition of this "we" (Derrida, 1986). And yet I think Arendt's great insight is in relating the very contingency of

the action to the invocation of the absolute. That is, it is precisely because these are man made laws which nonetheless aspire to be valid for all time that the imprimatur of God, Robespiere's "immortal legislator," is needed to ensure the perpetuity of union. Such critiques of the work of the performative in the act of foundation and declaration are numerous and well known, thus I want to here emphasize a less remarked upon aspect of this genealogy: the incipient figure of humanity and its potential to unravel not only orthodox understandings of law and sovereignty but also the very structure of declaration. Here I am particularly intrigued by the Abbe Emmanuel-Joseph Sieyes, the prime legal theorist of the French Revolution.

Keith Michael Baker has written about a series of fragmentary notes found in the papers of the Abbe Sieyes, where Sieyes notes precisely this fact that declarations of rights in a western tradition worked not unlike barter arrangements, whereby the terms of the exchange of what Lord Coke famously called the primal reciprocal of "protection and allegiance" with the monarch were periodically revised (Baker, 1994). Despite its hagiography, this is patently clear in documents such as the Magna Charta. And this was a genealogy equally clear to the 18th century thinkers. Thus when Jefferson was appointed to draft the American Declaration of Independence, which had to "in the course of human events" not just revise but sever the barter arrangement altogether, he felt compelled to introduce a new element into the claim of sovereignty – the figure of humanity or in his language, all men.

Sieyes argues that the notion of rights was too deeply implicated in the "contests of masters and subjects." For him, thus, the declaration of rights had till then been drawn up the way "one reaches a settlement before a notary" (Baker, 1994, p. 158). For Sieyes, the Americans had taken an important step in overthrowing a system instead of alleviating it, but had retained the spirit of suspicion and bartering and had now projected it onto a people's government. Sieyes and his declaration would be different. Shrugging off the weight of sovereignty and the terms of political representation, his document *would not posit but merely declare* the presence of a universal humanity. Sieyes then embodies for us a persistent desire in modern thought – Marx would do the same – in which as Laclau puts it "the elimination of all representation is the illusion accompanying total emancipation" (Laclau, 2000, p. 57). And if we can say of Sieyes and his comrades that they too had a failure of nerves, adding on "and citizen" to the rights of man, is it not this other history, this incipient and tentative appearance of humanity in the 18th century documents, which the Universal Declaration sets out to complete?

The omission of divine origin or referent in the Universal Declaration is taken to be proof of the secularism of the document and of the agreement (if that is what it was) that secularism, as Michael Ignatieff has remarked, would be the "lingua franca of global human rights" (Ignatieff, 1999, p. 58). Such an outcome, however,

was neither destined nor inevitable. The Human Rights Committee, appointed in 1947 to draft the Universal Declaration, spent a year debating and writing the text, which at its final presentation to the General Assembly in 1948 had gone through seven drafting stages (Morsink, 1999).

During the meeting of the Third Committee, two separate amendments, one Dutch and on Brazilian, were introduced, both proposing the introduction of a divine referent into the language of the text. The Brazilian delegation proposed the following change to Article I: "Created in the image and likeness of God, they are endowed with reason and conscience." The Dutch wished to insert "based on man's divine origin" into the first recital of the preamble (Morsink, 1999, p. 285).

Thus the Brazilian delegate, Belarmino de Athayde agreed with his Dutch counterpart that

> the majority of the world's population still believed in the existence of a supreme being, and thus felt sure that the reference to a man's being created in the likeness of God would be welcomed by an overwhelming majority of the peoples of the world (Morsink, 1999, p. 285).

If the Universal Declaration is viewed as a didactic document, it is difficult to disagree with this pragmatic consideration of what would be persuasive. And yet, de Athayde did not himself think that the reference to God was purely practical, but that it anchored these new claims in a transcendental force. Ultimately, these efforts to include a reference to the divine were abandoned and Article I assumed the oddly syncopated shape with which we are familiar today.

It is telling that once the arguments for including a divinity or a reference to creation had been lost, the debate shifted to the insertion of the word "born." Reconstructing the archival history of the document shows that this word too was not without its dissenters. For one thing, if what were being referred to was a physical life, the question as to the moment of its origin would immediately arise. Thus the Chinese delegation argued for the deletion of the word born precisely because with it "the question of whether human rights began at birth or at conception would not arise" (Morsink, 1999, p. 291).

I think that even more interesting for our purposes was the objection launched by the Iraqi delegation. Abidi, the Iraqi delegate argued that the drafters were too enamoured of the language of Rousseau and the French revolution, and thus the article, adding the proverbial insult to injury, was not only unclear but also unoriginal. His alternative was to word the article

> all men should be free and equal in dignity and worth, and should be entitled to similar treatment and equal opportunities (Morsink, 1999, p. 292).

It is indicative of the thinking around this inaugural definition of human rights that most delegates refused to omit the word born, the absence of which for them threw

the coherence of the article into disarray. It is not enough to bracket this debate, as Johannes Morsink does for example, by regarding it as a mere reassertion of an inherence theory of rights. For one thing, the word born with its inscription of physicality announces a new object; the normative order it inaugurates covers not just a new life of politics but the politicization of life itself.

Secondly, I would argue the function of the absolute shifts from divine to human. An understanding of this function and this shift can be parsed through an attention to two specific and interrelated meanings of "absolute": encompassing and distinct, but also in the more archaic – absolutum – unfettered and disengaged, sufficient unto itself. The first of these meanings points to a crucial connection between the eschatology of Christian doctrine and the structure of universal history. It is, of course, generally agreed that the universality of obligation and fraternity central to a human rights discourse has as at least one precursor in the catholic aspirations of Christianity. Thus Michael Perry in his article suitably titled as the question – "Is the idea of Human Rights Ineliminably Religious?" – points to the imperative in Matthew 5 to "set no bounds to your love, just as your heavenly father sets none to his" (Perry, 1996, p. 216). It is not my interest here to explore the contours of this genealogy but only to emphasize that what is crucial is *not just a theistic heritage but a monotheistic logic*. Thus for someone like Finkielkraut more apropos than the universal love of the apostles is the universalizing order in Leviticus:

> the sentence you shall pass shall be the same whether it be on native or on stranger; for I am Yahweh your God (Finkielkraut, 2000, p. 7).

Nor are we removed from the structure of this Judeo-Christian ethic in the construction of modern day ethics. This is certainly one of the reasons for the plural in my title, which partakes of a topical if not typical effort in criticism today to draw out plurality and dissension in the seeming fixity of the origin and development of concepts. But there is an additional reason for naming in the plural, for to call this paper "God and Humanity" would be immediately to commit it to a particular form of monotheistic thought and its transformation which makes both theistic and secular notion of a single humanity possible. Levinas, who is drawn upon a great deal these days with little regard for his distinctly theistic project is illustrative of just that structure:

> Monotheism is not an arithmetic of the divine. It is the perhaps supernatural gift of seeing that one man is absolutely like another man beneath the variety of historical traditions kept alive in each case (Levinas, 1990, p. 178).

My effort to draw your attention to the pervasive principle of one-ness, to the specifically monotheistic logic that is transmuted into the secular assertion of a singular humanity, is due to the fact that it is this first condition that makes possible

the notion of the absolute as sufficient unto itself. The necessarily tautological structure of the absolute is amply evident in theology – so much so that the only possible answer to the statement "God is" would be "God." But it is the latter quality that also allows us to demarcate with some accuracy how the definitional language of human rights operates under the rhetorical figure of tautology – ultimately humans have rights because they are human.

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The first thing to consider with the Islamic Declaration is on what basis one can even regard it as a representation of political or fundamentalist Islam. After all, unlike Universal Declaration, which explicitly posits and reflects the discourse with which we have associated it – human rights – the Islamic Declaration does not admit to any fundamentalist project. Indeed, readers of the project on Political Islam have not only questioned the wisdom of applying the term fundamentalism, one originally used to describe the claims of nineteenth and twentieth century American Protestant movements, to far off and diverse phenomenon, but also the adequacy of the term in describing the range of movements within Political Islam itself, which stretch from state based political parties to more transnational organizations (Euben, 1999, p. 16). But beyond this debate of naming, these readers do find commonality in these movements, to the extent that they all claim as their purpose and goal the establishment of an Islamic order. Thus Sidahmed and Ehteshani write,

> the common underlying feature of contemporary Islamist movements is that they believe in the cause of establishing an Islamic state or order (Sidahmed & Ehteshami, 1996, p. 9).

Indeed, my decision to offer you this document as an example of the theory of Political Islam really hinges on a single key phrase in the document, on its assertion of "an obligation to establish an Islamic order" (Universal Islamic Declaration, 1988, p. 177). It does not say where this order should exist, whether it is to be accomplished in the conversion of Muslim secular states such as Egypt or Jordan, or whether it is to be regarded as a universal structuring principle. Thus you will immediately notice that an interesting homology appears between the Universal Declaration, with the ambiguity it inherits and perpetuates between "man and citizen," and the Islamic Declaration, in which it is difficult to decide whether it is speaking for all Muslims or "for all mankind."

The structure of power in the Islamic Declaration between sovereign and subject, or more correctly between God and human, is distributed along the lines of an indivisible and sole sovereignty that belongs to God and "the vice regency or khalifa of man who has been created to fulfill the will of God on earth" (Universal Islamic Declaration, 1988, p. 176). Such a vocabulary of the sovereignty of

God and the vice regency of man may call to mind the theories of divine right of a western absolutism, of James I's reference to kings as "God's lieutenants upon earth" (James I, 1986, p. 107), but there are important and revealing differences that we must not overlook. While in a western divine right theory, God's sovereignty on earth is expressed in persons, in the discourse of Islamic fundamentalism the sovereignty of God is expressed through his word, or more precisely through the establishment of his laws. While the sovereignty of God finds its expression through human labor through vice regency, those who would make such an effort cannot be thought of as political representatives in any way. Indeed, from Maududi to Qutb and beyond, the theorists of Islamic fundamentalism are unanimous in their insistence that *humans must not will but only fulfill*. This formula finds legitimacy for the political actions of humans, or more precisely the actions of humans in the political sphere, by disavowing the political act of willing. Legitimacy in these theories is created in counterpoint to the putatively western theories of sovereignty – whether these are, and this is important, of monarchy, nationalism or democracy – for in all these systems humans have usurped the function of God (Euben, 1999, p. 59). Thus in the theory of Political Islam the task of establishing an Islamic order cannot involve interpretation or even a secondary positing but merely enforcement. At the risk of scandal, could not one say that the Islamic declaration does inversely and explicitly what we have already seen as implicit in the Universal Declaration? That is, it sets up a universal order of values by evacuating the contingency of a world of will and representation.

This is, of course, patently impossible, even by the avowed language of the declaration itself, which informs us that God's revelation offers only "an abiding legal and moral *framework*" (Universal Islamic Declaration, 1988, p. 176). Presumably the details would have to be worked out within the administrative structures of various regimes. Certainly, one could still say that the scope of the declaration is made possible by the very detailed and legalistic nature of Islamic law – indeed, the declaration proceeds to draw on the ample regulations in the revelation to exercise a distinctly, bio-political exercise of power, covering in detail the functioning of the economy, the distribution of wealth and taxes, and the regulation of work, leisure, health and family – but even there I would suggest that we attend to the particular conditions that change the reading of the revelations.

If there is an assumption in contemporary Islamic studies it is that Islam form its very beginning and by its very nature is a political and highly legalistic religion. This unchanging quality needs to be tested and ultimately discarded for it obscures the particularly modern condition of current Islamist movements. It is an assumption that Nizah Ayubi wisely insists we do away with. He argues that

> Islam is a religion of collective morals, it is not particularly a political religion. The main *Quranic* concept of the body politic (*umma*) . . . is not necessarily a religious one; nor did the Quran or the *Hadith* specify how governments should be formed or what they should look like (Ayubi, 1991, p. 120).

It is true that the *Quran* is replete with not just general moral directives but explicit regulations covering everything from diet to divorce. The collection of this "law" which makes up the *shari*a is aimed at the administration of the ideal Muslim polity. But the use of the word law here is misleading, for what is posited in sharia barely corresponds to our common conceptions of a positivist legality, to a system of command, obedience and prohibition. This is because all of Islamic law is subject to a range of qualifications, or more accurately to the following five qualifications: (1) obligatory or *wajib*; (2) recommended or *sunna*; (3) indifferent or *mubah*; (4) disapproved or *makruh*; and (5) forbidden or *haram* (Schacht, 1964, p. 121). Now you will notice that only the first and fifth off these qualifications correspond to the conditions of a modern law that creates obligations and posits prohibitions. But it would be difficult indeed, to find counterparts to the law of indifferent or *mubah*. Furthermore, the problem of Islamic law as law is further confused due to Islam's highly developed jurisprudence of duress or *ikrah*, whereby the effect of extremity is to not only remove the penal sanction but to make the opposite act obligatory (Schacht, 1964, p. 121). Thus although in dietary law pork is forbidden, in the case of imminent starvation the decision not to eat pork and thereby succumb to death would be a sin.

Much of this circumstantial legality, let us call it, is overlooked if not outright forgotten by Islamist thought. The legal and political project of Islamist movements almost exclusively focuses

> on the *hudud*, the canonical penalties of the *sharia* that cover only certain aspects of criminal law (Sidahmed & Ehteshami, 1996, p. 4).

Let me insist here that I am arguing, I hope, for something more than the familiar claim that fundamentalists "get it wrong" or that they "distort doctrine." Quite the contrary, could one not say that in approaching the jurisprudence of Islam is such a positivist manner, the theorists of Political Islam reveal themselves first as modern legal subjects, as subjects who have lived in states and legal regimes where law is first of all a binding command. I think it would be more accurate then to say not that the Islamist focus solely on the criminal law of *sharia*, as, in fact, they demand state enforcement of ritual prayer and diet and work etc, but that they treat all of the *sharia* as if it were the law of crime and punishment – as if it were equal to the sprit of the legislated commands and administrative procedures of the modern state. Thus and only thus, does Political Islam remind itself of a religion it perhaps never was in order to enter the game of modern politics.

Indeed, it is at the very least ironic that if the figure of the human draws on the structural attributes of the divine absolute in order to transcend the stranglehold of state sovereignty, the divine reappears in the Islamic Declaration only in order to underwrite the massive extension of power of that state or more accurately of bio power in general. God and human then begin to reveal themselves as complicit in a philosophical orientation larger than either figure, as secret sharers in a modern history that both seek to disavow.

It would be wise to end here but I cannot do so until I draw attention to a possibly fundamental flaw in this analysis. After all, it could be said that by drawing out the unitary and tautological structure of human rights discourse, I have only affirmed a charge that nobody sought to deny in the first place. Moreover, my effort to lay bare the deep and inexorable theological structure of the Universal Declaration is riven by my later embrace of contingency and representation. That is, I question the accomplished modernity of the Universal Declaration, only to turn around and charge it with not being modern enough. So rather than leave these charges standing as indictments, let me convert them into symptoms of modernity. Despite my historians style here, I think the task of criticism can no longer be a purely historicist one. That is, it is not sufficient to dismantle a universalism by placing it in a historical context, by showing it to be the contingent demand of a particular formation supposedly masquerading as a universal claim, for such an effort would entirely overlook the larger dynamic that shapes almost every demand now, would overlook, to quote Laclau, that "no particularity can become political without becoming the locus of universalizing effects" (Laclau, 2000, p. 56). What is required is the imagining of another dynamic of the universal and contingent, and it is with an example of that imagining that I will end here.

Perhaps the movement of this dynamic could be demonstrated by the very title of the Islamic Declaration. A reference to an Islamic Universal or to "Muslim human rights" could be dismissed as formal nonsense, but it could also be viewed more affirmatively as a productive cohabitation. Indeed, as Judith Butler has perceptively noted with regard to claims of lesbian and gay human rights or women's human rights, such compounds can be understood as articulations of a particular demand and a particular orientation –

> a strange neighboring of the universal and the particular which neither synthesizes the two nor keeps then apart (Butler, 2000, p. 39).

Here the relevant rhetorical figure is not tautology but catachresis: the deliberately unconventional use of words that creates a new turn of phrase. Indeed, catachresis is a particularly apt trope for our present purposes, for by stressing the unconventional reiteration of terms, it equally belies the conventional status of the first term – a process with particular resonance if the first term if the first term is a universal

produced as with human rights treaties through a convention. The claims of women's human rights or Muslim human rights accuse the universality of the human of an incompletion even as they draw on its affective energy. On a more concrete level, this means that unlike the more stern guardians such as Michael Ignatieff who view the extension of human rights claims to all manner of causes and identities as a devaluation of its currency and supposed affectivity (Ignatieff, 1999, p. 60), I embrace that proliferation and its attendant Declaration and Conventions.

Let me be clear here: I am not offering you these Declarations as parts of some accretive gesture towards a happy plurality. Indeed the Islamic Declaration is instructive here, for if the notation of an "Islamic Universal" points to the possibilities in the mad symbolic of catachresis, it also emphatically demonstrates its limits. Indeed, we met each of these contingent articulations on their way to another universality, understood either in terms of completion or a truer alternative. Yes, the invocation of catachresis does offer an opening, but there is nothing to say that what enters is precisely the universalizing normative of modern power. But perhaps to say that is to do no more than to point to the source and seal of our "unhappy consciousness."

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PART IV.
SCREEN CULTURE: SOVEREIGNTY, CINEMA AND LAW

12. UNWORKING DEATH IN "UNFORGIVEN": LAW, ETHOS, VIOLENCE

Thomas L. Dumm

> If death is not the gateway to another life, and if it is not going to have the contingent character of brute fact, then one's mortality is something that one has to project freely, as the product of a resolute decision. Death is therefore something to be achieved; it is a Work.
>
> Critchley (1997, p. 137).
>
> May the days be aimless. Let the seasons drift. Do not advance the action according to a plan.
>
> DeLillo (1985, p. 98).

LAW'S SHADOW

What may be another kinship of law and death? To suggest that death is a work may allow us (I hope misleadingly) to suggest, by way of something more than coincidence – but less than perfect parallel – that law is the very definition of absolute limit. In this sense law would be death's shadow, a shadow cast by the sun of life as it shines on death, a sun toward which Giorgio Agamben seems to have been moving in his recent writing. (1998) And yet, as if in presumptive rebuttal, Michel Foucault convincingly suggested years before Agamben's intervention, in a meditation on Maurice Blanchot, that "The law is the shadow toward which every gesture necessarily advances; it is itself the shadow of the advancing gesture" (Foucault, 1987, p. 35). Every gesture directs our attention away from the sun's light and toward the cave of the everyday, where the fire may come, when it comes and if it comes, from places otherwise.

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Foucault has taken care to show that there is no better way to describe the culmination of the law in its fullness than as the advance of transgression into the void of the outside, into the very non-place where the law awaits the transgressor. If it is to be the law at all, we must be before it. The law is always yet to become the place to secure our achievements, even or perhaps especially the achievement of death. And once we are past this anticipation of it, the law as a marker of finality is the defilement of a constitution that is prospective and not final, the closing of an open hand that may orient us toward that which is always as yet new and unapproachable. From a double yearning for a philosophy that responds to the Heideggerian call for a philosophically adequate relation to death – namely, in his terms, that we come to understand Da-sein in its fullness as having as a part of it the Care that forms its structural whole, and that offers some way of gathering to Being the potentiality-for-being, including the potentiality associated with the destining experience of death (Heidegger, 1996, pp. 228–229) – the law appears to be both unphilosophical and unpoetical, abruptly closing off the potentiality-for-being that still composes the unstill heart of the question of human existence itself.[1]

I begin in the middle of this undoubtedly difficult passage between law and death (difficult for law, for philosophy, and for what it means to try to be human) because the urgency of death coupled with its installment at the center of what it means to be human – that is, to be beyond brute fact – is the subject of crucial philosophical investigations in the wake of the quests of both Heidegger and Wittgenstein to concern philosophy with the very question of the possibility of human existence. Yet death, understood as the sign of a relation of absolute alterity to the other, as a non-identity that gives birth to an ethical relationship to the other who is never to be known, this death is also the object of extraordinary evasions in the legal culture with which I am most immediately concerned in this essay, that of the United States.

It is hardly as though death goes unmentioned in American law.[2] There are laws of death in the United States as there are wherever the law exists. But there was and may yet be a sense of American exception that would find the suspension of law and the beginning of an adequate accounting with death in the prospective movement toward an opening unbound by the burden of completion, held for the hope of something more amendable, an overcoming of founding with finding. (NYUA, 108–109) One might credibly claim that laws are written upon the negative foundation of deadness, that death is not only law's limit, but the soil from which it grows. However, this negative foundation is not and seemingly cannot be addressed directly by us for as long as we live, even as we reach toward it every day of our lives as they unfold in common and alone. The paradox of this role of death in relation to life as the double end of the relation is echoed in the law most loudly

when the law brushes against death, either in its always frustrated attempts to keep death at bay, or in its more successful attempts to deal death as an instrument of punishment. (So deep is the law in human endeavor, and so persistent are its failures, that we might find that among the oldest enduring human artifacts – stylus and doll, dog and shoe – we may also find the artifact of law, stuntedly growing out of death and habitating our lives.[3])

Peter Fitzpatrick suggests that the fact that death is law's horizon is productively ambivalent.

> Yet we cannot know or experience the horizon fully because it does mark our limit . . . So we are 'bound' to a seeming irresolution of the horizon as the condition and quality of our contained identity and the horizon as opening onto all that lies beyond an identity (Fitzpatrick, 1999, p. 119).

The phrase "beyond an identity" is a clue as to where we might be headed when thinking of the possibility of the shadow toward which our gestures are advancing. The pure being that is beyond an identity is only realizable as death. And yet the very *untowardness* – that is, the stabilizing or anchoring function, the foundational character of the law, is represented to us as the hope of our lives, as a means of resisting where we are headed. But maybe this shouldn't be the way to think of the role of law in relationship to death. Perhaps it is better for us to think about the law's productive ambivalences in the different ways that they inflect the culture of a given polity depending on that polity's appreciation of death. But this thinking becomes a complicated matter when we live in a polity in which law itself also plays a leading role in shaping the polity's appreciation of death. Nonetheless, I want to ask, are there other ways of unworking death, rather than the truncated law that does not begin to acknowledge its inadequacy in the face of death?

The traditional response to this question is explicitly religious in character. But this is not the only turn available, and there are others claims staked – in resistance to the demand to a return to belief – by those who have been most sensitive to the question of nihilism – namely, those who have responded to Nietzsche's call for an adequate response to the death of God. The turn to a new ethics announced by thinkers such as Derrida, Foucault, and more locally (for me), William Connolly and Stanley Cavell, suggests that the instrumentality of the law of death may in fact be provoking a set of responses that is otherwise than punishment, which is to say more than the law irritated, a path that may still be a road to Nowhere, but that is nonetheless something other than the nothing that would normally awaits us. Sometimes these respondents are pious in their thinking, and sometimes they are irreverent. They sustain heartening tactics of caring that may help us acknowledge death in such a way as to evade the certainty of the law of death.

WHERE IS THE WEST OF US?

In his most sustained reading of an Emersonian essay – "Experience" – Cavell represents the West as a destiny of philosophy, in all of the considerable ambiguity that such phrase might convey. Among other things, Cavell notes that "Experience" is an essay that entails confronting the pain of the death of a child and responds to that pain by giving birth to a new humanity. "Experience" begins in confusion and loss, and ends with the hope of a "transformation of genius into practical power." (Emerson, 1983: 492) Throughout, Emerson situates experience between past and future, in this way giving death (and his son) full due as a shaper of worlds. As Cavell puts it,

> The insight Emerson would earn is that the philosophical work of progress (call it realizing the world) is, in Freud's phrase, a work of mourning (NYUA, p. 26).

This work of the progress of philosophy is, in Critchley's terms, an unworking of romanticism, that impulse to unite poetry and philosophy through the use of the fragment as the methodological core for the establishment of meaning in open fields (Critchley, 1997, pp. 85 and 107–108[4]). Or, as Critchley puts its in commenting on romanticism's naïveté,

> The naïveté is the faith in fragments as the seeds of the future, in fragments as the possibility that the future might have a future, in fragments as the possibility of possibility. This is very little . . . This is almost nothing (Critchley, 1997, p. 117).

Critchley comes to Cavell's American revision of philosophy's vision with an open hand. His arrives with very little, almost nothing.

Where is he going? Or, to use Emerson's famous question, Where does he find himself? Here it might be worth noting that Cavell teaches that an important demand on the philosopher is to overcome disheartenment. This disheartenment comes from many places, and some of the most important places it comes from are presumably external to the demand of philosophy itself. But there is one philosophical place, a place Cavell has called his "nowhere," which *is* a consequence of philosophical skepticism and could turn the philosopher away from the most important questioning as a direct result of the passionate despair that accompanies the skeptic in all attempts to evade or overcome it. Cavell suggests that the various attempts to overcome skepticism may not be as valuable philosophically as is the effort to preserve skepticism as a moment or space through which we may live (QO, 5)[5]. Preserving the space of skepticism, or living our skepticism, as he puts it, may be said to be a project of unworking romanticism. In this sense, it may be a project as well of unworking the work of death. If such is the case then the deathboundedness of philosophical discourse is what is always yet to be unworked.

Preserving skepticism entails what Cavell describes as a process of bethinking ourselves of our criteria for applying words to a world. (NYUA, 94) The question of the fitness of criteria that lay unresolved in Cavell's first major work, *The Claim of Reason*, deepens and broadens as he goes along his path toward (and against) romanticism, first in his increasing interest in the ways that acknowledgement opens up a way of interpreting knowing so as to allow for the possibility of foregoing knowledge so as to come to know (as addressed in his essay on Lear, in *Must We Mean What We Say?*), and culminating first in the attempt to move beyond the two worlds acknowledged by philosophy from Plato through Kant (NYUA, 95) to a making more fulsome transit between worlds by, in Emerson's terms, making affirmations of our skepticisms. This process raises the question of our questing for "newness," what might be called the pursuit of aesthetic modernism's Holy Grail. Cavell wants to show how, as a philosophical matter, this quest for newness can be realized, however incompletely, in the idioms of the ordinary. His question – "Is the idea of a new world intelligible to mere philosophy?" (NYUA, 94) – may tentatively be answered in the recognitions that come in those moments when we self-consciously turn toward the prospective, embraced as an unknown futurity that allows us to acknowledge our equally unknown pasts. The closest we come to the completion of experience, to the practical realization of our world, is when we recognize that "Every insight from this realm of thought is felt as initial, and promises a sequel." (Emerson, 1983, p. 485) It is in the moment of initiation that we may find that this promise also engenders a kind of being born again, that is, dying out of nature which means coming to be human, a process that repeatedly means reaching a point of conversion or turning away from the dead facts of what we think we know of ourselves, the fact of our death being but one fact among others, and realizing that death is a work that can be unworked.

It is between such a past and such a future – in the region of what Cavell once described as Thoreau's mysticism of the present, that the articulation of the unworking of death may unfold. This is a lesson of Emerson's "Experience," at least in the hands of Cavell, that leaves him clapping his hands in infantine joy, found for philosophy, successful in a language that succeeds enforced speech, allowing himself to speak freely, as if for the first time. (NYUA, 117–118) One may learn a similar lesson of unworking death from the epoch-ending Western movie "Unforgiven."

"DESERVE'S GOT NOTHING TO DO WITH IT"

"Unforgiven" (Clint Eastwood, 1992) is temporally framed by two scrolling narratives – one in the opening sequence and one in the closing, both superimposed

over a sunset or sunrise at a small house on a prairie, the latter repeating precisely the opening scroll's description of the film's main character, one William Munny out of Missouri, "a known thief and murderer, a man of notoriously vicious and intemperate disposition."[6] In the genre of the Western, a lone man, often with a mysterious past, rides into town, saves it from evil, and rides away ("Shane" being the quintessential version of this story). But does a *known* thief and murderer do so? A film that might be paired with "Unforgiven" as its opposite, "The Man Who Shot Liberty Valence," (John Ford, 1962) relies upon the device of the extended flashback to remind viewers of the specific historicity of a story that is told in a fictional state in a vague post Civil War era of settlement of the Western frontier. "Unforgiven," however, specifies the dates of deaths and events –1878, 1880 – and places where the drama unfolds, both on and off screen, Missouri, Nebraska, down to Texas, Big Whisky, Wyoming, and yet conveys a sense of being somehow out of time. A sort of carelessness with the geography – from plain to mountainous terrain and back, contributes a mythic element to the story, as does a Fury-like Greek chorus of prostitutes whose sense of injustice is what sets the tale in motion, immediately following the scrolling opening lines, that describe William Munny's marriage to a "comely young woman" and her death, not at his hand, but of smallpox.

One Delilah Fitzgerald, transported from Boston to Big Whisky to work as a prostitute for a man named Skinny at Greeley's (an ironic comment on Horace Greeley's famous slogan, "Go West, young man"), a local billiard hall owner (though the table itself was chopped up for wood during a blizzard some years earlier), makes the career-ending error of giggling when she sees the small penis of the cowboy whom she is to service. Enraged, he slashes her face with a knife, disfiguring her. Rather than hang the cowboy and his younger sidekick, who held her while she was attacked until he realized the enormity of what was happening, the local sheriff, Little Bill, decided, when shown the contract for services held by Skinny, to fine the cowboys instead, ordering them to bring horses to pay Skinny for his costs the following spring. Alice, the housemother of the prostitutes, is enraged. "That ain't fair, Little Bill," she says, and she organizes the prostitutes to raise $1,000 to have the cowboys killed.

Meanwhile, or more precisely the spring following the assault on Delilah, William Munny is visited at his farm, where he is raising his two orphaned children, by a young man who calls himself the Scofield Kid, naming himself after the revolver he carries. It is no secret of the plot that the kid is a fraud, filled with romantic images of gunfight glory, lying about the people he has killed. Aside from his youthful bluster, the kid is so nearsighted that he can't see clearly more than a few feet in front of himself. The kid has heard of the prostitutes' reward. He proposes that Munny partner up with him, having learned from his uncle that

Munny was, "the worst one, meaning the best." Munny hesitates, disavowing the past with the phrase "I ain't like that any more." But after the kid leaves, realizing that the hogs he is raising are dying of fever and that there is no money in the Munny household, he leaves his children and sets out to find his partner from the old days, Ned Logan, a black man who lives with his Indian wife, Sally Twotree. Munny repeats the kid's proposal, and suggests for the second time, that he is not like that anymore, but this is for money. Ned hesitates. Munny says, "We done stuff for money before, Ned." Ned replies, "We thought we did . . . " Ned asks what the cowboys did, and when he hears an exaggerated version of the horrible assault, replies,

> I'll be dogged. Well, I guess they got it coming. Of course, you know, Will, if Claudia was alive, you wouldn't be doing this.

The refrain, "I guess they got it coming," is later echoed by the kid. This is the calculus of justice that "Unforgiven" is to challenge head on.

On the trail, before joining the kid, Ned and Will reminisce about their bloody past. When Will talks about how evil he had been, he remembers one man in particular, whose teeth came out the back of his head when Will shot him through the mouth. Will says, "I think about him every now and again. He didn't do anything to deserve to get shot. Least anything I could remember when I sobered up . . . " Ned replies, "Well, you ain't like that no more." And moments later, after a long silence, "Well, like I said, you ain't like that no more." Munny replies, "That's right. I'm just a fellow now. I'm no different than anyone else." This is his third disavowal (though later he repeats this disavowal when he refuses to drink upon entering Greeley's for the first time, a pledge he breaks upon learning of the brutal killing of Ned. We might note, that in urging him to have some whisky, Ned says to Will, "Jesus, Will, you look like shit." This banality carries enormous weight).

What might we make of these three denials? The most famous denial in the New Testament is Peter's denial of Christ, which he does three times during the Passion, fulfilling the prophecy, "Before the cock crows twice, thou shalt deny Me thrice." Peter eventually becomes the Rock on which the Church is built. In a parallel, Will Munny is denying his earlier self, renouncing the evil older self, the intoxicated Dionysian murderer, even as he is riding to kill men again, in a inverted betrayal of that ecstatically evil self to which he will return albeit in a transfigured manner. Munny's redemption from his evil self is undertaken through the love of his now dead wife. This denial is inscribed in the tension of his name – Will and Munny. His will is frustrated and the compensation for that frustration was supposed to be commodious living with his wife. With his wife "passed on," and his will subsumed to her memory and (or as expressed in) the care of their children, he can see his return to killing not as a matter of will, but of money, an economic transaction,

automatic, entailing the thingness of existence, the reduction of labor and action into money. Ned's curiosity the morning following their heart-to-heart talk on the trail, before they join the kid, is about Will's sexual habits, and includes a question to Will about both masturbation and paying for prostitutes. Will's response "It ain't right buying flesh," captures the complexity of Munny's self-denial. It ain't right, but the buying and selling of flesh is precisely the world depicted throughout this film. As for using his hand, he does not respond, though this particular grasping may be the most unhandsome part of his condition (For a further observation concerning grasping, unhandsomeness and auto-eroticism, see NYUA, p. 86).

Hence William Munny goes to Big Whisky in the belief that he has already been born again, redeemed through the love of a good women, having overcome the ecstatic condition of the evil and drunken killer by humbling himself, even, in one of the comedic elements of the film, before his animals, being humiliated in the film at different moments by his hogs and then his horse. But even girded in this belief, he is to learn what it means to transgress a law he thought he had already got beyond.

I am passing over incredibly rich subplots and symbolic themes here – including the story of English Bob and assassination of President Garfield and its relationship to pressing issues concerning the question of sovereignty, the meaning of intoxication and the very name of Big Whisky, the role of the prostitutes as echoing that of the Eumenides in the *Oresteia* – to focus on Will and Munny, that is willing and money. Let us move to the bushwhacking of the second cowboy, the kid's moment of killing. This scene occurs after Ned, realizing he can no longer kill another man, splits up with Will and the kid, and says to Will as he is leaving, "The kid's full of shit." After Ned leaves – he later is captured by a posse and killed by Little Bill – Will and kid go to the cowboy's ranch house, and hide behind the outhouse, waiting for the second cowboy to come out defecate. While waiting, the kid doubts that the cowboy will ever come out, and mutters, "Holdin' onto his shit like it was money." The metaphor of money as excrement is thus firmly established in the grammar of the film (as though it needs to be).

The excremental need not only be the waste of money, the dead thing that was once life. It may also the be the fertilizer of (agri)culture, a product of the human that connects the human to the non-human. When Thoreau writes, "The better part of the man is soon plowed into the soil for compost" (1960, p. 8), he asks that there be a way of turning our waste into something else. How are Will Munny and the Scofield kid to respond to the call to turn themselves into something other than what they are, to do the work to unwork the work of death?

The cowboy comes to the outhouse, the kid shoots him, and he and Will ride to their rendezvous to be paid by the prostitutes. There, immediately before they learn of the death of Ned Logan, they have this key exchange.

Kid: Is that what it was like in the old days?
Will: I guess . . . I was drunk most of the time.
Kid: I shot that fucker three times . . . That was the first one I ever killed.
Will: You sure killed the hell out of that fellow today.
Kid: Hell, yeah. I killed the hell out of him. Three shots and he was takin' a shit (Weeps).
Will: Take a drink, kid.
Kid: Jesus Christ . . . It don't seem real. How he's never gonna breathe again. How he's dead. And the other one too. All on account of pulling a trigger.
Will: It's a hell of a thing, killing a man. You take away all he's got, and all he's ever gonna have.
Kid: Yeah, well, I guess he had it coming.
Will: We all have it coming, kid.

This conversation represents the heart of the theme of "Unforgiven." Munny knows and tells us that death is beyond justice, and yet not beyond life. That we all have it coming, that death is the horizon against which, to paraphrase Robert Cover's definition of law, the projection of a future onto reality fails, is the hard truth that may be acknowledged by the killer, a truth that cannot, however, be known. This gap is where the unworking of death is possible, not as a regeneration through violence, as the dominant genre of the Western teaches, but as an abandonment of any claim to the illusion of personal immortality.[7]

That we all have it coming not all that is said about death in "Unforgiven." The other lesson is expressed in the exchange that comes between Little Bill and Will Munny in the moment before Little Bill's death at Munny's hand. Munny has returned to Greeley's upon hearing that Ned Logan has died of a beating at the hand of Little Bill, the sheriff. (While resisting the demand that he confess, Ned calls himself by the pseudonym Ned Bigtree (as Sally Twotree's man, secretly asserting his manhood in his dying scene)) in order to try to keep Will's identity from becoming known). Ned, who has not killed anyone, is killed by the sheriff for his association with the killer, William Munny. When he arrives at Greeley's, Will's first question is "Who owns this shithole?" At the end of this violent sequence,

Little Bill: I don't deserve to die like this. I was building a house.
Will: Deserve's got nothing to do with it.

After killing Little Bill, Will Munny leaves Big Whisky in a raging storm, warning the townspeople cowering the dark that Ned must be properly buried and no prostitute is to be harmed or he will return and kill everyone.

Why does it matter that Little Bill is building a house? We might think again of Heidegger, and of Thoreau, and the desire to build a house as a suitable place where Being may dwell. Little Bill wants to finish his house (he is a terrible carpenter, the roof leaks, there isn't a straight angle in the place). Heidegger might applaud this desire, even as he sees the incompleteness of the house, its many flaws. But

Thoreau (and Emerson, and Cavell[8]) can remind us that no house that is suitable to human being is ever finished. Thoreau asks,

> Should not every apartment in which man dwells be lofty enough to create some obscurity overhead, where flickering shadows may play at evening about the rafters? (1960, p. 163)

Little Bill aspires to completion. Will Munny knows that completion is not what life about in its end. He also knows that the project of justice itself is suspended in the moment of the death of the subject. Death is death, is not a matter of just desert. The notion that the end of a life can be placed into a balance sheet of justice is like the childhood taunt designed to end the argument about who can think of the highest number by blurting "Infinity plus one!"

But the film does not end with this scene of extraordinary power and violence. Instead, we are returned to the house on the plain, and informed in the final scroll that some months later, Mrs. Ansonia Feathers, made the arduous trip to Hodgeson County to visit the final resting place of her only daughter.

> William Munny had long since disappeared with the children . . . Some said, to San Francisco, where it was rumored that he prospered in dry goods.

Thomas Keenan has noted that fables of responsibility unfold as moments of interpretive crisis (1997, p. 1). The fabulous character of writing, and this writing may include film for our purposes, stems in part from its retrospective character. The departure of William Munny from this film into a rumored (anonymous) prosperity as a dry goods merchant, a shopkeeper, may signal "Unforgiven's" resolution of the interpretive crisis into which the film throws us when it confronts us with the spectacle of undeserved death, yes, even the death we might have thought was well deserved, that of Little Bill, the lawman. The death of the lawman may be the death of the law that brings us death, and to be unforgiven may be the best that we can hope for from that law. When we are unforgiven we are also unsubjected to the law.

Munny's disappearance – hopefully to San Francisco, is also a departure from the mythical history of 1880 in Missouri, Wyoming, Nebraska and other regions of the Western mind, and into the real of the everyday, the unscripted, unknown ordinary, where unearned or not, we have other lives to live, as Thoreau remarked as his reason for leaving Walden (Thoreau, 1960, p. 214). That this thief and murderer, a man of notoriously vicious and intemperate disposition, should be able to live and prosper, unforgiven, is a sign of limit of the law of death in face of death. Thus the limit experience of death, its undeservedness, and its inevitability, denies, at its crucial moment of constitutive violence, the ability of law to shape the future. Instead, the unknowable but acknowledgeable ordinary provides us with resources to go on, to take the next step on the road to nowhere.

NOTES

1. Compressed here is an idea of philosophy associated most closely with some of the working of Stanley Cavell. I rely in this essay most explicitly on *This New Yet Unapproachable America: Essays After Emerson After Wittgenstein* (1989), *In Quest of the Ordinary* (1988), and *Conditions Handsome and Unhandsome* (1990), hereafter noted as NYUA, QO, and CHU.
2. The most obvious arena of such discussion is when death is the penalty, though the question of death permeates thinking about laws concerning criminal violence. Nonetheless, one might note that in the most important recent collection of essays on the death penalty, Sarat (1999), only one of ten essays, Peter Fitzpatrick's " 'Always More to Do': Capital Punishment and the (De)composition of Law" directly addresses the question of the meaning of death. I turn to that essay momentarily.
3. Hinted at here is project concerning everyday objects – involving shoes, pens, domestic animals, and mannequins – as a sequel to a book about the relationship of ordinary life to normalization (see Dumm, 1999).
4. This is my gloss on a much more comprehensive and careful treatment of the fragment as form.
5. For a further examination of Cavell's skepticism, see Dumm (1998).
6. At this point, I rely on notes taken of the video of the film. The version of the screenplay by David Webb Peoples is available at websites, and has its own legend attached to it. It contrasts somewhat with the shooting script in that Clint Eastwood, as director of this film, also dramatically streamlined the script, reduced the amount of obscenities in the dialogue, and changed the title from "The William Munny Killings," to "Unforgiven." Research assistance on the film history of Unforgiven was provided by Sam Charap.
7. The phrase, as well as the thesis concerning how the myth of the West has operated through American history to provide ideological renewal by way of a regeneration through violence, comes from Richard Slotkin's monumental study of the West. See especially, Slotkin (1992).
8. For a sustained comparison of Heidegger and Thoreau see Cavell (2000).

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13. SOVEREIGN CONTEMPT

Peter J. Hutchings

In starting to think about the events of September 11, 2001 (I give the year lest we forget the Chilean coup of that date in 1973), two quotations hovered above my thoughts. Perhaps not surprisingly, they both derive from the eve of that very different conflict – World War II – which is constantly invoked as a reference point for the current situation. Both are almost too well-known. First, Carl Schmitt:

> Sovereign is he who decides the exception (1985, p. 5).

Second, Walter Benjamin:

> '*Fiat ars – pereat mundus*', says Fascism, and, as Marinetti admits, expects war to supply the artistic gratification of a sense perception that has been changed by technology. This is evidently the consummation of '*l'art pour l'art*'. Mankind, which in Homer's time was an object of contemplation for the Olympian gods, now is one for itself. Its self-alienation has reached such a degree that it can experience its own destruction as an aesthetic pleasure of the first order (1973, p. 244).

For as much as Benjamin's words were called up by the compulsive repetition of those images of jets crashing into the Twin Towers, and by the pervasive sense that what we were seeing had been seen before in cinema, Schmitt's definition of sovereignty appeared to emerge with a renewed relevance from the very dust of those collapsed towers.

The paradox of border protection and other responses to the terrorist threat involves a transformation of the field of sovereignty. As the geographical extent of sovereign power shrinks – in the Australian example – the countervailing movement is towards a more intense control of the remaining territory. Contemporary sovereignty remakes law, reminding us that the mythos of English

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law – the ancient constitution – figures law as a check upon sovereign power. In the legal domain, the evasiveness of various actors (multinational corporations, non-state combatants) leads to a focus upon more fixed targets. The individual or, at least, some spectre of a subject without social ties – the very subject of the ideology of the American individualism embodied in the narrative codes of Hollywood cinema – is constituted as sovereignty's zone of intensity.

September 11 was an event which became cinema even as it was happening, was constantly referred to in relation to cinema – the references to disaster films and to *Pearl Harbor* (dir. Michael Bay 2001) more movie than event for most Americans – and the reactions to it are now reflected in the ideological modes so common to cinema, particularly the duel. Even, if not especially, the films which appear to question those tropes follow them closely, and reiterate their cinematic power. Parallel to this is the evocation of a legal mythos of sovereignty.

The practice of cinema, delivering aesthetic gratification to a technologized sense perception, screens, filters and constructs elements of the political and legal ideologies of contemporary state sovereignty, that hard to kill kingship. The current renegotiation of the dimensions of sovereignty is part of a larger refashioning of governance and the rule of law, and cinema figures forth that process in a number of ways.

At the level of content, this paper emerges from a consideration of a group of films – *Enemy of the State* (dir. Tony Scott, 1998), *The Siege* (dir. Edward Zwick, 1998), *Behind Enemy Lines* (dir. John Moore, 2001), *Black Hawk Down* (dir. Ridley Scott, 2001), *Spy Game* (dir. Tony Scott, 2001), *Collateral Damage* (dir. Andrew Davis, 2002), *The Sum of All Fears* (dir. Phil Alden Robinson, 2002) – that form a composite of some key issues: the tendency to expand the reach of states beyond their borders, together with a tendency toward the shrinking of national borders; and the ever more intense internal scrutiny of a state's own citizenry in response to perceptions of foreign threats. Dividing the films along the lines suggested by these contradictory, yet mutually reinforcing, tendencies, a continuum could be posited running from the surveilling security state extremity of *Enemy of the State*, through the uncannily prophetic *The Siege* (featuring terrorist attacks on U.S. soil, Al Qaeda-like CIA-trained terrorist cells, and the brutal imposition of martial law upon a totally-surveilled citizenry), to the externalized heroics of *Behind Enemy Lines* (set in Bosnia) and *Spy Game* (CIA dirty tricks around the globe).

As it turns out, none of these films were made after September 11, although they all look different because of it. Two of them were released in 2002. The cinematic spectacle of self-destruction became – momentarily – unpalatable. And then it was business as usual, as it had been for some anyway. *Collateral Damage*,

starring the now-Governor Arnold Schwarzenegger, seemed for a time to be unreleasable before going on to do good business. Given its cynical take on the U.S. government's involvement in terrorism, it was probably held back more for its politics than for its depiction of violence. *The Sum of All Fears* – shot before, but released after, 9/11 – blithely stages the nuclear bombing of a football stadium in Baltimore designed to kill the U.S. President and involving the deaths of tens of thousands of people who are personalized through a crowd montage moments before their deaths.

Less than nine months after 9/11 this was considered a releasable, action entertainment film for an audience who presumably enjoy the spectacle of their own destruction as long as the good guy wins. There are a number of perversely fascinating elements in this film – which I won't detail here – but one element does bear mention for its illustration of something discussed by Jean Baudrillard in his essay "The Spirit of Terrorism": its presentation of homely banality as a marker of virtue or innocence:

> As their most cunning trick, the terrorists even used the banality of American everyday life as a mask and a double play: sleeping in suburbs, reading and studying in a family environment, before going off one day like a time bomb (Baudrillard, 2001, p. 138).

It does this on two crucial, linked occasions. The film opens with the presentation of the Chekhovian pistol in the form of an Israeli jet carrying a U.S.-made atomic bomb which is shot down during the 1973 Seven Day War. The jet is shot down after the pilot bends down to pick up a photo of his wife and child, which has fallen from its place on the plane's instrument panel, and so doesn't see the approaching rocket. Even pilots who might be about to nuke Egyptian and Syrian ground forces are still just folks. Later, as the pace of the editing suggests that the football stadium is about to be bombed, the audience is subjected to detailed, personalizing images of the crowd who are about to be vaporized by the same bomb, twenty nine years later. After the blast, the film concentrates its pathos upon the rescue of the president, and the worthy death of the CIA Director, played by Morgan Freeman, on the basis of the tried formula that audiences only relate to individual tragedies, in the same way that the rescue of a family dog took precedence over the deaths of millions in *Independence Day* (dir. Roland Emmerich, 1996): a film which presents one of the apogées of Benjamin's aesthetic of self-destruction, and whose ideological patterns merit further consideration after 9/11.[1]

There isn't the space here to treat all of these films in detail, and so I'll discuss *The Siege* before going on to consider *Behind Enemy Lines* on the way back to a further discussion of sovereignty.

THE SIEGE

The Siege opens with news footage of the bombing of military dormitory barracks in Dhahran, Saudi Arabia (on June 25, 1996). Whatever the genesis of the screenplay may have been, the release of a film some two years after the actual event which inspired some of its story is remarkably quick by Hollywood standards (where the average development time of any project is three years). An interesting film on its initial release, it now screens like a premonition, or a blueprint. The fictional alleged perpetrator of the bombing – which was actually the work of Al Qaeda – Ahmed bin Talal is secretly kidnapped by U.S. forces, and taken to the U.S. The drama which then unfolds involves the operations of a network of terrorist cells – all trained by the CIA to destabilize Saddam Hussein – demanding bin Talal's release through an escalating series of bombings in New York City culminating in the destruction of One Federal Plaza, the imposition of martial law in Brooklyn, and the detention of all Arab-American adult males in makeshift camps set up in sports stadiums.

The film is structured around a number of triangulations, the primary triangle involving the representatives of three state agencies: the FBI (in the person of Agent Anthony Hubbard, played by Denzel Washington), the CIA (Elise Kraft, a.k.a. Sharon Bridger, played by Annette Bening), and the military (Major General William Devereaux, played by Bruce Willis). Like the recent pronouncements which now seem to be echoing this film, General Devereaux's announcement that:

> This is an attack. This is a time of war. The fact that it's inside our borders only means that it's a new kind of war (dir. Edward Zwick, 1998, 1:08:05)

doesn't extend its own logic to consider that what is inside the borders is also a new kind of state. If the film's narrative triangulations produce more than one duel, it is nonetheless a standard action-image film (SAS') organized around the duel.[2] Hubbard vs. the terrorists; FBI vs. CIA; U.S. military vs. the FBI; Hubbard vs. the hubristic Devereaux; law vs. the sovereign. The complex instability of the triangle is thus resolved into an agonistic simplicity in which law, as represented by the FBI, opposes itself to the emergency measures taken by the sovereign, the U.S. president and Commander-in-Chief as represented through the military. The catalyst for this confrontation is, finally, beside the point of the real drama involving the negotiation of the nation as U.S. cinema has done since *The Birth of the Nation* (dir. D. W. Griffith, 1915). In a film with an African-American protagonist, Arab victims, and a white villain, the reference to Griffith's racist ur-film is hardly incidental (and is of a piece with director Zwick's liberal revisionism in his 1989 Civil War film *Glory*). Late in the film's second act, Devereaux tortures and executes an Arab-American, and so falls under the law's interdiction after the

final terrorist cell has been destroyed. Thus, for all its attempt to fashion a different kind of American tale, *The Siege* offers a familiar story of law's resistance to, or curbing of, sovereignty, one familiar from deep in English legal history, right down to the French name of the villainous general Devereaux opposed by the old English Hubbard.

The conceptual simplifications which finally resolve the film's conflicts have neither vanished from reality nor been subject to sustained critique. Assumptions of an identifiable enemy, capable of being hunted down and exterminated by a combination of police, military and intelligence agencies persist, while the film's vision of a triumphant multicultural resistance to anti-Arabic, anti-Islamic state racism seems as much a fantasy in the post 9/11 U.S. as it does in post-Tampa Australia.

At the level of the legal struggle which the film allegorizes, it would appear that the re-empowered sovereign is in the ascendant. George Bush's Executive Order on "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism" places torture and summary execution outside of the law. Like the Howard government's border protection legislation, Bush's executive orders and legislation such as the USA PATRIOT Act, are instances of sovereign power posed as law, of that form of law which undoes legality itself: emergency law.[3] In the same way that Kant disregarded the legality of emergency law – it is illegal because it legislates upon the grounds of the exception as if it were the rule – the critiques of emergency law reveal the lie of all emergency laws *as* law: that the "law" is specific to a particular time and circumstance, which is to say that this law is no law at all (being more like a practice of equity), yet all the more powerful for its illegality. Sovereignty is here shown to have contempt for law *per se*. Legality, here, is not the extension of sovereign violence – an extension sanctified by both reason and faith – but the cloak concealing the king's dagger or smart bomb. Law, as emergency law, wields the assassin's knife in the sovereign's service. The further sovereignty of contempt is seen in the ambit of these emergency powers: all states, and all princes, come under this outlaw legality.

BEHIND ENEMY LINES

Now we move further behind enemy lines, tracking the reductive individualism of the duel into the field of American unilateralism and exceptionalism. In a manner comparable to *The Siege*'s sincere attempt to explore the complexities of the new nature of terrorist conflicts, *Behind Enemy Lines* at least gestures toward some awareness of the contemporary nature of armed conflict. Set in Bosnia, with some basis in fact, its protagonist is a U.S. Navy aerial navigator, ready to resign out of

frustration with the limited sphere of action offered by these new forms of conflict. As Lt. Chris Burnett (Owen Wilson) puts it early in the film:

> Everybody thinks they're going to get the chance to punch some Nazi in the face at Normandy. And those days are over – they are long gone. (pause) I used to think I was going to get a chance to do it. And now I'm eating jello (dir. John Moore, 2001, 0:08:15).[4]

Although this is one of the dicta to be disproved by the narrative, it is quite an intelligent comment upon the film's own fantasy, and that of all post-9/11 "Pearl Harbour" responses. There are so few opportunities to punch Nazis in the face because modern warfare lacks real enemies (and all of the energy involved in casting Saddam Hussein or Osama bin Laden as the new Hitlers only underlines that desire for old-fashioned enemies and conflicts). As Gary Ulmen puts it, in a comment linking the altered nature of war to the altered nature of the state and its sovereignty,

> War *has* escaped from state control, but the reason is that the state is becoming historically obsolete (2001, p. 174).

In a film set in Bosnia there are still things that look like states, yet Burnett's observation still stands and is even more relevant in the war on terrorism, which must construct a target that looks like a state.

> The War on terrorism, as a counterterrorist war, with an unclear objective and a potentially ever-shifting opponent, cries out for confrontations with actual states so as to resuscitate a geopolitical order that recuperates versions of state authority and legitimacy that insurgent political violence calls into question. Today's counterterrorism strives to shore up state power by effecting states as the exclusive provenance of legitimate violence (Trover, 2002, p. 19).

The combination of a NATO-led police action and a fragmented former state establishes the situation of sovereign impotence which the film's plot must resolve. Not long after bemoaning the lack of opportunities for Nazi punching, our hero finds the action he's been seeking, and gets the chance to figuratively punch out a Nazi, when he flies over a supposedly demilitarised zone, witnesses a mass grave being covered over by Serb troops, and is shot down. After seeing the murder of his pilot, he flees across hostile territory, unable to be rescued because of the intricate politics of ongoing peace negotiations. Burnett's commanding officer Admiral Leslie Reigert (Gene Hackman) chafes under the control of a French NATO superior, until he finally intervenes and personally (and improbably) supervises the rescue of his "boy."

Shot like a Navy recruitment film – with the extensive co-operation of the U.S. Navy – by an Irish director with a background in TV advertising, *Behind Enemy Lines* is an extraordinary compilation of U.S. fantasies about itself and the new world order.

U.S. exceptionalism is individualized, and Hollywood narrative codes make this appear completely natural. Burnett and Reigert are the exceptionalist individuals prompting and resolving the action: they decide on the exception which takes them outside the bounds of military law. Structurally, the film's engagement of an audience with its rogue hero solicits an identification with, and desire for, Reigert's eventual intervention. The father rescues his reflectively errant child.

The film repeats the narrowness of their concerns by displaying no interest in the consequences of the forbidden rescue action – except to relate the value of the flight surveillance evidence of the massacre in the arrest and conviction of the Serb leader Miroslav Lokar (Olek Krupa). The narrative validation of a rescue action that was supposed to have the effect of disrupting a peace process is that it found a Nazi to punch (quite literally in the early cut of the film which featured an ending in which Interpol officers were given the chance to punch the Serbian war criminal Lokar in the face with a gunbutt). The number and identity of the massacred dead – the pretext for the action – are also elided, banished to a minor element of a gruesomely evocative *découpage*. Their ethnic and religious identity – the dead are Moslems – can only be deduced from the film: it is nowhere stated.

This is the film which started my thoughts about the contempt of the sovereign. Hollywood's agonistic, action-image codes position the individual protagonist as a sovereign figure, deciding, seizing upon, responding to the exception. Sovereign contempt is, thus, deeply encoded in much of Hollywood cinema, which makes the cinematic references to September 11 all the more disturbing since those attitudes are so deeply embedded in cinema and so dangerous in reality. Sovereign contempt is now the basis of U.S. foreign policy, as expressed in the new doctrine of pre-emption, which involves:

> defending the United States, the American people, and our interests at home and abroad by identifying and destroying the threat before it reaches our borders. While the United States will constantly strive to enlist the support of the international community, *we will not hesitate to act alone, if necessary, to exercise our right of self-defense by acting preemptively* against such terrorists, to prevent them from doing harm against our people and our country . . . (U.S. Government, 2002, p. 6; emphasis added).

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Baudrillard's response to the aftermath of September 11 argues that:

> the concept of freedom, a new and recent concept, is already being erased from customs and consciousness, and . . . liberal globalization is taking the exact opposite form: that of totalitarian globalization, absolute control, and *the terror of safety. Deregulation ends up with as many constraints as those of a fundamentalist society* (2001, p. 142).

Is the postmodernity of 9/11 that of a premodernity with modern characteristics? While the state dissipates – at the direction of those who govern it, for the benefit of unimpeded capital flows (running through conduits constructed by collective efforts and investments) – and the social resembles something of the anarchy of pre-state tribalism (identity politics, niche marketing), sovereign power appears to be consolidating itself as either a consequence of this situation, a symptomatic response to the crisis affecting its own authority, or as its own last gasp. Time is out of joint (as it is in all transitional, revolutionary periods). The structural contradictions affecting the contemporary world are not new, merely exaggerated and transformed.

The corollary of this touches on law. Law presents itself as a limitation upon sovereign power even as, and because, it codifies that power's forceful expression and manifestation. The eclipse of the state and of sovereignty might entail the eclipse of law, however this same era features the increasing recourse to law as one of the remaining master codes (morality having been relativised out of existence) facilitating the interests of the predominant economic interest. Another way of putting this would be to argue that law's pre-eminence screens the dissolution of sovereignty rather than representing the final triumph of law over the king. That is if the new kind of king – a camera eye – doesn't render law's victory over that form of kingship rather moot.

NOTES

1. For a pre-9/11 elaboration of these issues, see Rogin (1998).
2. SAS' is Gilles Deleuze's algorithm for the action-image, a film structured around a situation (S), an action (A) in response to that situation, and a transformed situation (S'). See Deleuze (1986, pp. 141–159).
3. See Schmitt, "Emergency law was no law at all for Kant" (1985, p. 14).
4. For all of its graphic, anti-war brutality, the TV mini-series *Band of Brothers* (2001) is – by comparison – a compelling nostalgia trip, recreating a simpler – but never innocent – America, and a world in which conventional warfare was still possible.

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14. ONE *RECHT* TO RULE THEM ALL! LAW'S EMPIRE IN THE AGE OF *EMPIRE*

William MacNeil

1. FORGING LEGAL FICTION AND FACTION: THE *WEREGILD* OF INTERTEXTUAL JURISPRUDENCE

This article[1] is offered up in the spirit of what the High Kings of Gondor might call a *weregild*.[2] That is, I hope, in this article, to clear a debt: a debt, long overdue, much like that owed by the Armies of the Dead to Isildur's heir, Aragorn son of Arathorn. I reference *The Lord of the Rings: The Return of the King* (Tolkien, 1994) because this article is, in the main, about Tolkien and his *oeuvre* as an astonishing instance of what might be called *lex populi.* But this article attempts more than just another cultural legal reading of a popular literary and cinematic phenomenon.[3] What, in fact, it proposes is nothing less than a practical demonstration of what it means *to read jurisprudentially*. In so doing, I hope to repay some of the theoretical debt that jurisprudence (and law-and-literature) has incurred, and owes so clearly to literary criticism, cultural studies and Continental philosophy. For far too long jurisprudence has been content to absorb the lessons of these other disciplines' versions of textual theory – of the play of the sign, the dissemination of meaning, the deconstruction of *logos* – without propounding its own *topoi* let alone interpretive paradigms. Such *topoi*, of course, jurisprudence has in abundance: in notions of a "higher justice"; in concepts of law's connection with morality; and, especially, the law's role in inaugurating "the social."

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It is this last *topos* that concerns me most here; indeed, this article will read Tolkien's *The Lord of the Rings* as a text of state construction, a blueprint of sovereignty (see Section 5). That interpretation arises not only by reading the text *intratextually* (i.e. collating accounts in the appendices, and cross-referencing them with those in the text proper), but also by reading *intertextually*. That is, by approaching *The Lord of the Rings* as in dialogue with another text of the millennial moment: namely Hardt and Negri's *Empire* (2000). Both these texts I argue (in Sections 3 and 4) are engaged in a debate over the nature, role and status of legitimacy, of legality. Thus, they function as mediations of the law, which, in turn mediate each other. In so doing, they produce a reading – of *Recht*, of rights (see Section 4) – that might properly be called "jurisprudential." This, I would argue (in Section 2), is the strength of *mediating* the law through fiction (*The Lord of the Rings*) as much as faction (*Empire*). That is because it produces not just mutually illuminating readings, but an alternative intertext. That intertext synthesizes, sublates and goes beyond Tolkien and our two theorists, Hardt and Negri, and enables us, in turn, to look at "the legal" and "the literary" *otherwise* – as a site of discursive difference rather than binary stasis, of theoretical inquiry rather than socio-legal representation. In short, what the forging of legal fiction and faction produces is nothing less than the *weregild* of intertextual jurisprudence.

2. DARK LORD OR LAW LORD? THE RING AS *RECHT* IN *THE LORD OF THE RINGS*

Allegory is nothing new in Tolkien studies – despite Tolkien's own strictures against it.[4] Indeed, the temptation to allegorise Tolkien's masterpiece, *The Lord of the Rings*, seems to be almost as impossible to resist as the Ring itself.[5] For each successive generation of the text's readership has produced its own allegorical version[6] of the fellowship and its quest, emphasising, alternatively, either the beginning or the end of the trilogy. Readers in the countercultural 1960s and 1970s, for example, focussed on the beginning of the trilogy and the idyllic scenes set in the Shire, which stood in for and represented the commune, with the halflings' leaf – "Old Toby," so favoured by Gandalf (and Saruman!) – a code for that period's mind-expanding drugs (Walmsley, 1983, pp. 73–86).[7] While the previous generation, the original readership of the 1950s, looked to the end of trilogy and its dramatic battle scenes, which they couldn't help but read in light of their own wartime experiences, equating the Nazgul with the Nazis, Sauron with Hitler, Saruman with Stalin, etc. . . .[8]

I want to suggest yet another allegorical reading of Tolkien, one which stakes a claim for the law. I will argue that *The Lord of the Rings* – both the classic

Tolkien trilogy and the contemporary Jackson triptych – is nothing less than a *mediation of the law*: that is, a *legal fiction*, generally; and, specifically, an *allegory of jurisprudence*. My reading of the text, however, as a legal mediation, as a legal fiction – in short, as a jurisprudential allegory – neither begins in Hobbiton nor ends at Barad-dur. Rather, it provides a vista or panorama – a "bird's eye view" as it were, as if we were borne aloft by Gwaihir, the Windlord of the Eagles himself – of the entirety of Middle Earth, which could be renamed, at least by my lights, "the province of jurisprudence determined." For Tolkien's detailed topography provides nothing less, so this article will argue, than what might be called, with a nod to Judith Grbich, a "juriscape."[9]

Here, analogies could easily be drawn, for example, between the Elves and Natural Law; their departure, after all signals the disenchantment of their world, a metaphor, if ever there was one, for the secularisation of our own, in the wake of the *lex natura*'s retreat. Or take the Dwarves, and their fetishisation of mineral wealth: clearly budding *bourgeois*-liberal legalists in their substitution of mithril for money, and their reliance on bargaining, bordering on sharp practices. Or consider the Orcs, all "nasty, brutish and short": a rather obvious referencing of the Hobbesian "state of nature," prior to the forfeiture and amalgamation of natural rights (to kill and be killed) in the form of the Leviathanic state. Even the Steward of Gondor, Denethor, "mad, bad and dangerous" to know as he is, seems to hold office on trust – until the king's return, a kind of Lockean sovereign who is the equitable rather than the legal ruler of his realm. Wending its way through this nomological space, marking and mapping its juristic cadastres – its sacred sites of natural law (Rivendell, Lothlorien), its depths of liberal legalism (the mines of Moria), its armed camps of *omnium bellum omnium* (Cirith Ungol, Minas Morgul) and its stately halls of social contract (Edoras, the Tower of Ecthelian), subsuming as it supercedes them, accreting their multiplicity into One – is none other than that adamantine talisman of the *lex talionis*, that totalising trope of the text, the Ring of Power.

What, though, is the nature of the Ring's power, and how is that power connected to law, let alone jurisprudence? At first blush, there seems to be no connection, and the reverse obtains. The Ring's power seems to reside precisely in the fact that it *annuls* legality, enables usurpation and facilitates illegitimate force and control. At least, that is the Actonian fantasy of absolute power that "history," "legend" and "myth" – both in the trilogy's appendices and the first film's prologue[10] – ascribe to the Ring. But consider for a moment what the reader or filmgoer is not so told as much *shown*: namely, *how* the Ring works its magic, that is, functionalises its power. For the Ring does not so much invest its bearer with the possession of power, as exert *its power to possess* over the bearer. Frodo, to name the most obvious example, cannot throw the Ring away. His will gives way, and he capitulates to

the power of the Ring just as his mission is on the verge of fulfillment: "I have come," Frodo says, "But I do not choose now to do what I came to do. I will not do this deed" (Tolkien, 1994, p. 924). It is, instead, famously Gollum who turns out to be the instrument of the Ring's destruction. He gnaws it off Frodo's hand, finger and all, and perishes with it in the most "fortunate fall" in all of fantasy literature, a *felix culpa* which plunges him into the fires of Mount Doom (Tolkien, 1994, p. 925). Bilbo, of course, gave the Ring away – a terrible wrench for him, though, doubtless, one which saved him from a Gollum-like fate. But he still longs for the Ring, even in the serene security of Rivendell where, espying it on Frodo's neck, he undergoes, temporarily, a shape-shift of things that *could* have come:

> Frodo quickly drew back the Ring. To his distress he found that he was no longer looking at Bilbo; a shadow seemed to have fallen between them, and through it he found himself eyeing a little wrinkled creature with a hungry face and bony groping hands. He felt a desire to strike him (Tolkien, 1994, pp. 225–226).

And Gandalf won't even touch it, fearing to become "like the Dark Lord himself" (Tolkien, 1994, p. 60).

> 'No!', cried Gandalf, springing to his feet. 'With that power I should have power too great and terrible. And over me the Ring would gain a power still greater and more deadly' (Tolkien, 1994, p. 60).

Boromir, of course, is the first of the fellowship to fall under the spell of the Ring (Tolkien, 1994, pp. 389–390), and even Sam hears its siren call.[11]

But it is Galadriel, the Lady of the Wood, the queen of Lorien's Elves, the Galadhrim, and, surely, *the* incorruptible presence in the text who is most sorely tempted by the Ring, a temptation which points us in the direction of its *jurisprudential* significance. Consider Jackson's filmic representation of the "last temptation of Galadriel," herself changed – nay, transmogrified into something rich and strange, tantalising and terrible at one and the same time, by just the *possibility* of possessing the Ring. "In place of a Dark Lord you would have a Queen," roars a stentorian Galadriel, "Not dark, but beautiful as the dawn! Treacherous as the sea! Stronger than the foundations of the Earth! All shall love me and despair!".[12] The film's dialogue is faithful, for the most part, to Tolkien's tale (Tolkien, 1994, p. 356), but the cinematic representation of this scene, when compared to its textual sources, is much more dramatic, even overheated. Galadriel is left breathless from her fantasy of power, panting like some pagan St. Theresa, pierced by erotic ecstasy, saturated by *jouissance*. All of which suggests: that if the Ring activates anything it is *desire*, and its *law*. What's more, this *Law of Desire* that the Ring, not only initiates, but instantiates is, itself, driven by a *desire: a desire for law.*

That desire for law is announced right from the start of the narrative by its celebrated poetic epigraph – which Gandalf intones for Frodo while both are still in Hobbiton (Tolkien, 1994, p. 49):

> Three Rings for the Elven-Kings under the sky,
> Seven for the Dwarf-lords in their halls of stone,
> Nine for Mortal Men doomed to die,
> One for the Dark Lord on his dark throne,
> In the Land of Mordor where the Shadows lie.
> One Ring to rule them all, One Ring to find them,
> One Ring to bring them all and in the darkness bind them,
> In the Land of Mordor where the Shadows lie.

The reference to the Ring's "rule" (l. 6) is suggestive of Hartian prescription – the law as a system of rules – as much as Austinian command. And, even more curially, the Ring's "binding" nature (l. 7) evokes the *stare decisis* of judge-made law. Thus, the desire for law is woven into the very fabric of the text's language, the epigraph's subtextual "legalese" turning its paean to the Ring's power into something like a restatement of the philosophy of right. So Tolkien's verse could conclude not with the exclamatory refrain, "One Ring to rule them all" but my titular cod-Hegel, "One *Recht* to Rule Them All."

3. THE EVIL EMPIRE OF LAW'S EMPIRE: ISILDUR'S BANE AS *GRUNDNORM*

A rule-sceptic, however, could easily object to this reading of the Ring-as-*recht*, arguing that *recht* – or right – is the last thing on anyone's mind when they wear, or wish for the One Ring. Consider the two most driven and desiring of the Ring's seekers: Sauron and Saruman. Neither is concerned with legitimacy let alone law; indeed, if they are working against anyone or anything, it is the restoration of legitimacy, that is, "the return of the king" and his "just law" which will smite the wicked and reward the faithful. So why would they of all beings need to possess the Ring-as-*recht*? But it is precisely this paradox – of the lawless searching for the law, the illegitimate looking for legitimacy – which, I will argue, drives the narrative here, and contextualises my jurisprudential reading of *The Lord of the Rings* as very much one of the millennium. For this is an epoch which has been characterized by a particular *point d'anchrage* with strong juridico-political resonances: that is, "Empire."

"Empire" is emerging, much as "*eeevil* is stirring in Mordor," as *the* sign of our very interesting times, deriving, of course, from the tome of the same name by Italian anarchist, Antonio Negri, and American literary critic, Michael Hardt

(Hardt & Negri, 2000). As every (theoretically *au fait*) schoolboy knows, *Empire* is, currently, a cult hit among hip, happening global theorists, especially those of a critical legal or cultural stripe. This is as much the case as Tolkien's trilogy was, and *is* among the anorak-wearing, "dungeons 'n dragons" playing train-spotters, too irony deficient to be, as *National Lampoon* would have it, "Bored of the Rings" (Beard & Kenney, 1969). In fact, the readership may be one and the same, the latter text (Tolkien) an adolescent version of the former (Hardt & Negri), attracting, as readers, our younger selves, now adult and mature and "all growed up" but still *looking for the same story*.

Which brings me to my central point of comparison: that *Empire* and *The Lord of the Rings* tell similar if not identical tales. For example, in *Empire*, Hardt and Negri herald the emergence of a "new world order," as menacing as the "Darkness" which, warns Galadriel's ominous voice-over in the prologue to the film, has "crept back into the forests."[13] But this "nameless fear," this "Shadow" of whispered rumour comes not, according to Hardt and Negri, from "the East" (the Arab littoral, the ex-Soviet Eurasian landmass), but, rather, the West (Caucasian, Christian, Capitalist). And it takes the form not of the dark lord of despotism (either the imam or the *apparatchik*) but the *demos* of consensual sovereignty (whether it be Westminster, Washington, etc. . . .), conquering under the letter of the law rather than the jackboot of power.[14] What is this law? And, more to the point, what is the juristic spirit driving its letter? Hardt and Negri identify it as hybridised in origin, the mutated progeny of an unholy coupling, much like Saruman's "fighting Uruk-hai," half-orc, half-goblin. Deriving from a source just as diabolic as it is dual, this spirit of the law issues from two forces. On the one hand, the transcendent and centrifugal force of globalisation, forever transgressing borders, always crossing lines of demarcation;[15] and, on the other hand, the immanent and implosive logic of Capital, relentlessly producing, distributing and consuming, subjecting everyone and everything to its processes of pricing, profit, and commodification.[16]

Working, increasingly, in tandem throughout the post-war period, and now, since the *fin de siecle*, triumphant all but everywhere, this "double trouble" of Capital and globalisation, nonetheless, is missing and misses one vital item to complete its agenda for world domination – a remainder, a supplement, an indefinable "X." Or not so indefinable, as the case may be. For Hardt and Negri *name this lack*. And this singular nomination is what distinguishes *Empire* from all the standard-issue sociological analyses of global Capital – dumbed down versions of Ulrich Beck (Beck, 2000), Arjun Appadurai (Apparadurai, 2001), David Held (Held, 1995) – which have appeared with numbing regularity since the Fall of the Berlin Wall.[17] What is absent from these accounts[18] – an omission that Hardt and Negri draw our attention to, and seek to rectify – is Global Capital's lack of, and desire for nothing less than the Law itself. This is really the point of departure for our study

of Empire, they write, "a new notion of right . . . and a new design of the production of norms and legal instruments" (Hardt & Negri, 2000, p. 9). So it is that most superstructural of forces – law – that is the component necessary to ensure that Global Capital infrastructural machine is fully operational.

This is a dramatic reversal, of course, of the instrumentalist view of the law in the Marxist theory often inflecting "globalisation studies."[19] Hardt and Negri go well beyond this view, past even the postmodernisation of Marx – even his "derrideanisation" – in the work of, for example, Ernesto Laclau and Chantal Mouffe (Laclau & Mouffe, 1985). Indeed, *Empire* may very well mark the *post*-postmodernisation of the theory of Global Capital in that it announces not the end of the juridical metanarrative (asserted, especially, by Jean Baudrillard[20]), but, rather, its *return*. Nowhere is this return striking than when Hardt and Negri proclaim Empire's' jurisprude *du jour* ('that utopian and thus involuntary discoverer of the soul of imperial right (Hardt & Negri, 2000, p. 15)) to be none other than that *echt*-positivist, the bane of legal theory examinees everywhere, Hans Kelsen.

Kelsen is a peculiar choice of jurisprude for a pair of critical legal theorists, tracking the socio-legal phenomenon of globalisation, especially given the hostility of the Kelsenian "pure theory of law"[21] to "legal sociology."[22] But it is precisely Kelsen's claims to "purity"[23] – however, specious and impure they may turn out to be – that recommends his normative account of law to Hardt and Negri, and renders it, according to them so necessary for the project of "Empire." This is because Kelsen's well-known hierarchy of norms – the lower ones (local or domestic law) being validated by the higher (constitutions, international law), until reaching the overarching and all-inclusive *ur*-norm, the (in)famous *Grundnorm* (or "Basic Norm")[24] – effectively, *dematerialises the law*. Now dematerialisation would seem, at first glance, an odd jurisprudential manoeuvre for the leading Continental advocate of positivism. Not the least because it appears to depositivise the posited law, abstracting its apex, the *Grundnorm* or "Basic Norm," as a "presupposition" of "consciousness" (Kelsen, 1961, p. 116; Kelsen, 2001, p. 289). But, far from depositivising positivism, Kelsen strengthens it, even secures it *through* the very dematerialisation of the *Grundnorm*. For this dematerialising move renders the posited law, hitherto localised by command or rule, omnipresent in its normativity. But normativity, here, lacks any of the moral baggage of its competing legal universal – natural law – because Kelsen's "legal science" of norms is located, firmly, in the secular not the sacred,[25] the "consciousness" of the "jurist" (Kelsen, 1961, p. 116; Kelsen, 2001, p. 289) rather than the mind of God.

No wonder then Hardt and Negri hail Kelsen's "legal science" as such a harbinger. Because its notion of an absolutising "juristic consciousness" – itself "quilted" around the *point de capiton*, the *Grundnorm* or "Basic Norm," from which all other legal norms are derive their legitimacy – is *the very mind of* "Empire."

A mind that is systemic, connected and thinking as One – something like the Borg Queen in the *Star Trek* series.[26] The Borg are *a propos* any discussion of "Empire" and its juridical order because, against such an enclosed, self-validating system, "resistance is futile." For where is there a space to protest, what counter-hegemonic strategies are available and how are norms to be transvalued within and against "Empire's" all embracing, hermetically sealed "pure theory of law?" And it is precisely because the "pure theory" is so thoroughly stifling of dissent, so absolutely silencing of critique that proto-imperial Global Capital is "seeking . . . seeking" (Tolkien, 1994, p. 61) its *Grundnorm*, much like Sauron and Saruman are searching for Isildur's Bane, the One Ring. This is because Kelsenian law, as much as the lore of the Ring, promises a system so total that it makes alternatives not only unmanageable but unthinkable.

4. THE TWO TOWERS AS TWIN TOWERS: THE SHADOW OF GLOBALISATION

This set of analogies I am drawing here – the Ring as the *Grundnorm*, Sauron and Saruman as "Empire" *manque-a-etre* – may explain, in large part, Tolkien's current appeal, even vogue amongst the youth of the Left. This appeal is, of course, all the more bizarre, given Tolkien's own High Table Toryism, Little Englandism and Tridentine Roman Catholicism (Carpenter, 2002, 1997). But just as Milton was of the devil's party without knowing it, so too Tolkien may very well be on the side of today's romantic over-reachers, the anti-globalisation movement, whose tatted and pierced, dreadlocked and vegan shock troops reference in their appearance, and reproduce in some of their practices, *The Hobbit* (Tolkien, 1997). Think of mid-1990s British activist, Swampy,[27] burrowed into his own version of Bag End, literally a hole in the ground blocking the expansion of a Midlands motorway. So here is a generation not only raised on the Tolkien corpus, but who enact it, becoming their own walking, talking allegories of Middle Earth, and seeing the world through its typology of Dark Lords and White Wizards, eco-friendly Ents and tree-destroying Orcs. Is it any wonder that this new "New Left" taps into the imagination of the Old Right of organic (even Heideggerian) conservatism – clearly, Tolkien's politics, however incoherent he was on the topic –, because it provides such rich iconic fodder by which to demonise Global Capital as, at once, Sauronic and Sarumanic.

Here, however, the film is even more central than the text, because it literalises the figurative significance of Sauron and Saruman, throwing the trilogy's subtext of political economy into bold relief, representing, in its *mise-en-scene*, the emergence of proto-Empire in the form of Global Capital. Capital is most

vividly dramatised in the scenes set at Isengard, Saruman's domain, and its transformation from what might be called, in an inversion of Durkheim, "the organic" to "the mechanical" (Durkheim, 1964). While the text merely reports this movement through Gandalf's vocalization at the Council of Elrond, the film revels in the *focalisation* of this metamorphic process. Its camera swoops and soars, vertiginously, from the digitally-generated heights of the Tower of Orthanc (where Gandalf is held in captivity, frantically dispatching distress signals to, and through Nature's Kingdom – butterflies, birds, *etc.*...) to the infernal depths of Saruman's subterranean "dark, satanic mills." There, tunnels and mines are endlessly dug by orcs, forges and fires tirelessly tended by goblins, rendering this scene a site of frenzied and frantic production: in short, the space of Capital. And an advanced form of Capital at that, one which pushes its reifying logic to the limit, reproducing by the most literal of means, its own productive relations in the creation of the Frankenstein-like Thing of the Uruk-hai, a monstrous figure, spawned in the poisonous industrial ooze of Isengard.

What these scene at Isengard realize – or, better yet, *materialise* in the most Marxist sense of the word – is the objective not only of Saruman's but Sauron's agenda, the bondsman disclosing the design of the lord. For Sauron's project has been, until now, disconcertingly vague in its expansionism. *Why* is he expanding, and *what* is he expanding? Or to rephrase the question slightly: what is the ultimate goal of Sauron's will-to-power? It doesn't seem to be, at least at first blush, exchange – globalisation's privileged modality – because that is exactly what Sauron *does not do*. He takes but he does not give. There is only one Lord of the Rings', thunders Gandalf at Saruman, just before his dramatic eagle-engineered escape from Isengard, 'and he does not share power.[28] So Sauron, seemingly, defies exchange's logic of "give and take" and, in so doing, looks back, in his "smash 'n grab" expansionism to nineteenth-century social theories of "the primitive" (Weberian charisma (Weber, 1968)? Marx's Asiatic mode of production (Bailey & Llobera, 1981)?) instead of the twenty-first century, and its notion of the post-modern market. Indeed, Sauron is coded by the film, even more than the text, as an archaic figure. In a kind of Second Age "prequel," telescoping the history of Middle Earth prior to the War of the Ring, the film's prologue gives its audience what the text insistently denies its readers. That is, we are vouchsafed the obscene sight of Sauron incarnate, the embodiment of *male fides*. Ensconced in his fastness of Barad-dur, he stands, invincibly immense, impenetrably armoured and wearing on one steely glove, the Ring of Power, the

One . . . to rule them all . . . and to find them/(the) One to bring them all and, in the darkness, bind them (Tolkien, 1994, p. 49).

Curiously enough, the filmic emphasis on Sauron's pre-modern primitivism doesn't so much as atavise him as an archaic figure of the past, as propel him forward to contemporaneity. There he joins the current popular culture, as well as high politics pantheon of "radical evil": from Harry Potter's Voldemort[29] to "Dubya's" malign axis of North Korea, Afghanistan and Iraq. Which is why the representation of Sauron here must be read in conjunction with the film's non-canonic interpolations, especially the scenes set at Saruman's Isengard lair, Orthanc. Otherwise, Sauron might end up just another filmic "phantom menace," as if on loan from Dreamworks or Lucasfilm. Instead, the Orthanc scenes with Saruman supply a specific *economic* content to the Shadow's global form, thereby foreclosing any right-wing "culturist" readings, *a al* Samuel Huntingdon, of Sauron as "the Enemy" in the "clash of civilizations" – as either the Islamic or Orthodox East against the Latin West (Huntingdon, 1996). For, at Orthanc, Saruman is revealed as something more than just the White Council's most notorious quisling, because he is a *comprador* as much as collaborator, Mordor's economic agent as well as its favoured "sorcerer's apprentice" administering the logic of Global Capital and the triumphalist march of the Sauronic market.

So Middle earth, and its "free peoples"[30] stand poised to fall under the sway of Sauron's Barad-dur and Saruman's Orthanc, the "two towers" – or, rather, "twin towers" of world trade, linked by the communicative network of the *palantiri*, or "seeing stones." Circling these structures are the Ringwraiths, as airborne on their winged mounts as al-Qaeda was in its highjacked jets, only here they function as the praetorians of, rather kamikazes launched at Global Capital. Thus, "Empire" looms and, indeed, has come to Tolkien's "imagined community" (Anderson, 1983) fifty years earlier, but with a remarkable prescience of *own* era's "post-modern condition" (Lyotard, 1984) with all its talk of ends – the end of history, the end of ideology – and the *changes* introduced by digitality, the information economy, etc. . . . Jackson's *The Lord of the Rings: The Fellowship of the Ring* foregrounds this mood of change, citing a speech of Treebeard's in the text (Tolkien, 1994, p. 1017), which it then (mis)attributes to Galadriel and her opening voice-over, as the first bit of English (rather than Elvish) dialogue in the film: "The world is changed. I feel it in the air. I feel it in the earth. I taste it in the water."[31]

Or has it? Has the world changed at all? After all, Sauron's bid for global domination is not so much a change, even less, for that matter, an end or a beginning. Rather it is part of a pattern of cyclic recurrence: Always after a defeat and a respite' warns Gandalf in the text, 'The Shadow takes another shape and grows again (Tolkien, 1994, p. 50). But what recurs with Sauron is neither the pre-modern primitive (autocracy or autarky) nor the post-modern "plague of fantasies" (religious strife, ethnic conflict) but *modernity itself*, and its metanarrative of governance, "discipline and punish" (Foucault, 1979). Consider the form Sauron

takes in the text and, for the most part, in the film. "A great Eye," intones Saruman, "lidless and wreathed in flames"[32] which violates psychic as much as physical boundaries, its gaze penetrating the "I" of consciousness ("You cannot hide. I see you!" threatens the filmic voice of Sauron when Frodo dons the Ring, inadvertently, at "The Prancing Pony" in Bree[33]) at the very moment its armies are pressing upon the borders of Rohan and Gondor, even Lothlorien and Thranduil's realm. Consider the representation, here literary (but also filmic), of the Eye of Sauron getting an eyeful of Frodo, while atop, appropriately enough, Amon Hen's Seat of Seeing:

> At first he could see little. He seemed in a world of mist in which there were only shadows: The Ring was upon him. Then here and there the mist gave way and he saw many visions . . . everywhere he looked he saw signs of war. The Misty Mountains were crawling like anthills; orcs were issuing out of a thousand holes. Under the boughs of Mirkwood there was deadly strife of Elves and Men and fell beasts. The land of the Beornings was aflame; a cloud was over Moria; and smoke rose on the borders of Lorien . . . All the power of the Dark Lord was in motion . . . Thither, eastward, unwilling . . . (Frodo's) eye was drawn. It passed the ruined bridges of Osgiliath, the grinning gates of Minas Morgul, and the haunted Mountains, and it looked upon Gorgoroth, the valley of terror in the Land of Mordor . . . Then at last his gaze was held: wall upon wall, battlement upon battlement, black, immeasurably strong, mountain of iron, gate of steel, tower of adamant, he saw it: Barad-dur, Fortress of Sauron . . . And suddenly he felt the Eye. There was an eye in the Dark Tower that did not sleep. He knew that it had become aware of his gaze. A fierce eager will was there. It leaped towards him; almost like a finger he felt it, searching for him . . . (Tolkien, 1994, pp. 391–392).

This invasive and disturbing ophthalmic image – of an eye, situated within a tower, subjecting all and sundry to its ever-widening ken – cannot help but recall, and may very well instantiate that infamous, nineteenth-century blueprint for 24/7 surveillance, namely Jeremy Bentham's Panopticon (Bentham, 1995; Foucault, 1979). Now the Panopticon is more than just a failed design proposal; it is a metaphor for, as much as a model of, according to a certain historicist moment in post-structuralist thought, the regime of discipline and punish, and its strategies of "governmentality" (Burchell et al., 1991).

So Sauron's eternal recurrence does not look forward to "Empire," and its dispersed network logic, as immediately backwards to its condition precedent. That is, the centred disciplinary society (of scrutiny, of observation) which, in turn, is subsumptive of the previous order of punishment (of spectacle, of display), as well as proleptic of "governmentality's" policing of "security, territory, population" (Burchell et al., 1991, p. 20). Take, for example, the grim vistas briefly opened up by Tolkien's text of the Sauronic realm, mobilizing for war, well beyond the immediate field of vision of Frodo and Sam.

> 'Neither knew anything', 'of the great slave worked fields away south . . ., beyond the fumes of the mountain, by the sad waters of Lake Nurnen; nor of the great roads that ran away east

> and west to tributary lands from which the soldiers of the Tower brought long wagon-trains of goods and booty and fresh slaves' (Tolkien, 1994, p. 902).

Is there a more chilling vision in fantasy, or, for that matter, mainstream literature, of bio-politics – what Agamben might call "bare life" (Agamben, 1998, pp. 23–25) – and its "governmentalisation" through the all-seeing agency of the panoptic sovereign? I would say no, most emphatically. Which suggests that if *The Lord of the Rings* is a juridico-political allegory then it allegorises the *oeuvre* of the late, great Michel Foucault rather than Hardt and Negri's *Empire*.

5. GONDOR AS SCHMITTIAN SUPERPOWER: POLICING MIDDLE EARTH'S CRISIS

That said, however, I would like to advance the allegorical claims of another candidate for the throne of "Empire," the missing heir of which is none other than that prince-as-pauper, Strider, a.k.a. Aragorn, a.k.a., Elfstone, a.k.a. Elessar, whose return *as* the king, by the grace of God and Gandalf, will dominate and designate the last third of the trilogy. My argument here is, simply, that Aragorn's restoration is Hardt and Negri's "Empire" brought to textual life, and represented in the reconfigured Middle Earth – the Fourth Age, the Age of Men – that *emerges* at the end of the trilogy. I stress "emerges" because this representation of renewal – the White City as a kind of Celestial City – exists pretty much in the text's interstices: in select asides in the concluding chapters[34] and in remarks scattered throughout the appendices (Tolkien, 1994, pp. 1020, 1032, 1053). These asides take us well beyond the end of the narrative's diegetic reality, namely, the departure of Frodo, Gandalf and the High Elves from the Grey Havens for the Undying Lands in the West (Tolkien, 1994, pp. 1006–1007). In fact, the reader time-travels several hundred years into the future of Middle-earth. After the death of King Aragorn (Tolkien, 1994, p. 1072), the sailing of Legolas and Gimli (Tolkien, 1994, pp. 1055, 1072) and, most poignantly of all, the twilight years of Gondor's queen mother, Arwen Evenstar, in a now deserted Lorien (Tolkien, 1994, p. 1038).

Indeed, one of the considerable pleasures of Tolkien's trilogy is that it has a future as much as a past. This rich historical imagination is as functional as it is fun, not only tying up loose narrative threads (who did Pippin marry?[35] how may children did Sam and Rosie have?[36] whatever happened to the Red Book?[37]) but performing a significant structural role. Principally, by supplying an overarching thematic continuity for Middle Earth's conditions as well as characters. And the future condition of Middle Earth that emerges in these various postscripts is something very much like a vision of "Empire." That is, a network[38] of semi-autonomous

states – Ithilien, Dol Amroth, Rohan, the Shire – linked together by, and under the benign governance of Middle Earth's global hegemon, Gondor, itself, peaceful, consensual *and totally oppressive*.[39]

Oppressive? Gondor? Many, if not most of Tolkien's readers might well look askance at such an inference, and the seemingly scant evidence, giving rise to it. This is especially so when the text goes out of its way to hymn the praises of good King Elessar's reign, "of which many songs have told" (Tolkien, 1994, p. 947). After all, Aragorn's first act of sovereignty is one of amnesty granted to "the Easterlings that had given themselves up" (Tolkien, 1994, p. 947). Treaties and emancipation follow closely upon this: he "made peace with the peoples of Harad" (Tolkien, 1994, p. 947); and, as for the slaves of Mordor, "he released and gave to them all the lands about Lake Nurnen to be their own" (Tolkien, 1994, p. 947). But "crises" remain on the borders of "Empire," as much in Aragorn's Gondor as in Hardt and Negri's imperium; in fact, the state of "Empire" is one of on-going crisis, of the naturalization and normalization of crisis, all of which calls for the perpetual policing of crisis.[40] Gandalf has warned, in text, of trouble to come:

> 'the fall of Sauron will only remove one, admittedly great evil among many. Other evils there are that may come; for Sauron is himself but a servant or emissary' (Tolkien, 1994, p. 861).

The appendices confirm this state of affairs, especially those regarding the future of the Rohirrim, and, specifically, King Eomer's reign.

> (T)hough Sauron had passed the hatreds and evils that he had bred had not died, and the King of the West had many enemies to subdue before the White Tree could grow in peace. And wherever King Elessar went with war King Eomer went with him; and beyond the sea of Rhun and on the far fields of the South the thunder of the cavalry of the Mark was heard, and the White Horse upon Green flew in many winds until Eomer grew old (Tolkien, 1994, p. 1045).

So Rohan and its patron state, Gondor, both seem to operate, on a semi-permanent basis, in a Schmittian "state of exception" (Schmitt, 1985, pp. 19–20), governing by emergency measures which suspend the Law indefinitely in order to manage Middle Earth's "lesser breeds without the law."[41] Kipling is cited here purposively, his jingoism linking the race hierarchies of the defunct British Empire with those of Gondor's, because, interestingly, Middle Earth's "lesser breeds" are enraced along the lines of the old colonial colour bar. Those "beyond the Sea of Rhun" are "orientalised" (Said, 1978), as Edward Said might say, as either Semitic, Sinic or Slavic "hordes," while those to "the South" are the torrid zone's "negritude" (Senghor, 1976) embodied. And if these fringe-dwellers of Middle Earth are being brought into line, one might (or *can*) well imagine what has happened to the Orcs and Uruk-hai. Here, modernity's all-too-efficacious forms of racial science loom. For, doubtless, these "creatures" have met the same genocidal fate confronted by all

twentieth-century groups designated "subhuman": Jews, Romany, but, especially the Indigenous peoples of the globe, for whom, so clearly, they are stand-ins. Think of their filmic representation, especially when in "hot pursuit" of the fellowship. There, they are kitted out in Australian aboriginal face – and body-paint, and much is made of their Aotearoa/New Zealand Maori warrior ethic and fighting prowess. Not for nothing is *The Lord of the Rings* a movie triptych made in the "Land of the Long White Cloud" by a *pakeha* Kiwi.[42]

Thus, the *Pax Gondoria* embodies all the contradictions of "Empire." Particularly in the way its federated nations yoke together the old vertical hierarchies of the colonial era – white hegemons (Gondorians, Rohirrim), subaltern subjects (Easterlings, Southrons), and protected peoples (the Hobbits) – and map them onto the new, horizontal segmentations of post-colonial difference.[43] To that end, spheres of influence, and zones of autonomy[44] have been drawn up in the Fourth Age, largely along racial lines: The Shire, for example, is off-limits to men, by order of the king.[45] But these vertical and horizontal coordinates, in turn, are subtended by the mid-century totalitarian distinction, beloved of fascist societies: Are you a friend or an enemy? Are you with us, or against us? One of the *Volk*, or a subspecies fit only for extermination?[46]

So what Tolkien (and Jackson) exposes here is the obscene underside of "Empire," its peace keeping, revealed as nothing more than brute force, its "mystical foundations of authority" (Derrida, 1990), nothing more than military fiat. How then does "Empire," either Aragorn's or anyone else's, *come to be* as a *Rechtstaat*? That is *the* question which *The Lord of the Rings* and Hardt and Negri's *Empire* poses. Of course, we know, in point of fact, that the state, whatever arguments to the contrary it adduces, is born of violence: in Gondor's case, the defeat of Sauron and the occupation of Mordor. But, as a *Rechstaat*, as a state of legitimacy – which, after all, grounds Gondor's claim as *primus inter pares* in Middle Earth – where is the Law and its initiating gesture of *recht*? After all, no constitution is proclaimed, let alone a bill of rights. But these declarative acts of legality's independence are, according to Hardt and Negri, as unnecessary for "Empire" in the here-and-now, as they are for Aragorn's Gondor, because the Law – of legitimacy, of *recht* – has already been disseminated throughout the realm of right. How did this come about? Why did it? And, more immediately, when?

I would like to locate the moment of the *recht's* installation in the central narrative act of the text. What is this act other than the moment when *the Ring is cast away*? For what is the Ring – just to revisit, momentarily, earlier arguments in this paper – but a metaphor for *recht*, for the law. That law is to be understood, as I have argued, in the strictest of positivist terms: the Kelsenian dematerialisation of the law into normativity. To reiterate: this "legal science" of normativity installs the law everywhere as an abstracted ideal – the *Grundnorm*–, located in global "juristic

consciousness" because, to push Kelsen's logic, it is nowhere as an actual fact, having depositivised itself of the sovereign's command. But it here my argument, seemingly, breaks down, the analogy I have been drawing between the Ring and the *Grundnorm*, unravelling at this point. For while the Basic Norm is characterised by absence (of materiality, of the real), the Ring is presence itself, the *objet petit a*,[47] that "little piece of the Real" (Zizek, 1991, p. 30) – something like the minimal materiality of good consideration (a peppercorn?) in contract.

Which is why Sauron desires the Ring so desperately: as consideration that will seal his *novation* of the social contract, and impose his imperium on Middle-Earth. But it is here that Sauron's panoptic sight fails him, "misrecognising" (Lacan, 1977, pp. 1–7) imperial right as residing in the positivity of the Ring, rather than its predication on the *Grundnorm's* dematerialisation of the law. That is why Sauron can never be anything more than an "old pretender" to the imperial throne, because he is incapable of transforming the Ring into the *Grundnorm*. Instead of divesting the Ring of its materiality, he clings to its "thing-ness," searching everywhere for it. Which is why the Council of Elrond is the true architect of "Empire," because it opts for a strategy that is the opposite of Sauron's. Instead of pursuing and possessing, using and being used by the Ring, they vote to destroy it – not, as it turns out to thwart "Empire" but to facilitate its emergence through a universal *Recht* which everywhere because it is nowhere.

So when read conjointly and jurisprudentially, Tolkien's text completes Hardt and Negri's tome, and supplies the missing link between Kelsenian jurisprudence and the politics of imperial sovereignty.[48] In its riveting climax atop Mt. Doom, with Sam, Frodo and Gollum struggling over the Ring before its final destruction, *The Lord of the Rings* provides its readers with a vivid dramatization of the "primal scene" of state construction that Hardt and Negri only suggest: how "Empire" comes into being *through the law*, generally, and through Kelsenian "pure theory," particularly. Moreover, and this may be the real source of legal mediation's power, *The Lord of the Rings*, when read jurisprudentially, goes well beyond Hardt and Negri. The trilogy not only stages "pure theory's" site of state construction but critiques it. That is, Tolkien's text exposes the "juristic consciousness," within which the *Grundnorm* is embedded, as embodied, as personified. Who personifies "juristic consciousness?" Whose body is this?

Surely, it is none other than *the* critical intelligence of the text: that is, king-maker and wizard-breaker, Mithrandir to the Elves, or to Men and the Hobbits, Gandalf. By the end of the narrative, Gandalf is as a bearer, himself, of another ring – Cirdan's Narya (Tolkien, 1994, p. 1007) – and, as a great Lord from the West, dispatched by those cosmic Guardians, the Valar, to negotiate Middle Earth's transition to the Fourth Age by establishing – or, rather, restoring – its normative order. So behind all the mythopoeic flummery, Gandalf turns out to be someone

strongly resembling the Kelsenian legal scientist, his jurisprudence "purified" by the struggle with the balrog – the bane of legal sociology? –, transforming him from "Gandalf the Grey" into "Gandalf the White" (Tolkien, 1994, p. 484). The "whiteness"[49] of not only Gandalf's robes, *but Gandalf himself*, is very telling here, because it suggests the *kind* of body within which "juristic consciousness," and, indeed, the "pure theory of law" is enfolded: namely, the white body, the male body, the ruling class body. No wonder then that a carefully calibrated race hierarchy (as well as those of class and gender) is the "legal sociology" that obtains in Middle Earth. Because its legal science, its normative order, is, itself, a product of the *white mythology*[50] of Empire's positivist jurisprudence.

6. THE RETURN OF THE RING: RIGHTS, REVOLUTION AND THE FELLOWSHIP OF "THE MULTITUDE"

Which leaves this argument in something of an impasse, much like the fellowship's quest stymied by the impossible choices of Cadahras, Moria and the Gap of Rohan. Because if Tolkien's Middle Earth and, by extension, our own Earth of Hardt and Negri's "Empire," are subject to a pernicious, inequitable sociological order, closed off by normativity, indeed, vacuum packed by its *Grundnorm*, then the possibility of internal reform, let alone revolutionary transformation is rendered impossible. For how is Law's Empire to change, or be changed when all possibility of change has been foreclosed by Hardt and Negri's "Empire?" That is *the* paradoxical question that, ultimately, this paper proposes, and, for which Jackson's films may provide an answer, however provisional. I return to the scene of the fellowship's arrival, in the first film, in Lothlorien, and Galadriel's comforting words, to the weary travelers, that "hope remains."[51] Why does hope remain? Because, so she continues in private with Frodo: "even the smallest person can change the course of the future."[52] Galadriel's point is pertinent to the discussion of "Empire." For it is precisely the "little people" or "halflings," as it were, of Global Capital – those whom *Empire* calls "the multitude"[53] –, that Hardt and Negri turn to for revolutionary hope, as much as Galadriel does to the Hobbits.

That hope seems, at first, misplaced. Like the Hobbits, "the multitude" is as untraceable as it is insignificant. No longer an identifiable, organised industrial proletariat (Hardt & Negri, 2000, pp. 52–53), they are dispersed and decentred: diasporics[54] all, manning the "productive forces," be it the McDonald's chain in the Philippines or the sweatshops in Manhattan upon which the service economy of Empire so clearly rests. Nonetheless, Hardt and Negri insist, like Galadriel does

of Frodo, that it is its revolutionary potential or no one's who make a difference. For while "Empire" is reactive – that is, can only "strike back" – "the multitude" is proactive,[55] and capable of initiating real change.[56] Facilitating this change, enabling this initiative is a powerful and efficacious discourse, providing "the multitude" with a way in which to speak their needs, voice their desires and make their demands heard. That language is, of course, *rights* (Hardt & Negri, 2000, pp. 396–407).

Here Hardt, most certainly, betrays not only a jurisprudential but also a national bias, tying his notion of "counter-Empire" (Hardt & Negri, 2000, pp. 205–218) to a particular political and juridical order of rather dubious subversive potential. For it is, ultimately, the *American* Bill of Rights[57] and its peculiar constitutional history (of tolerating slavery, segregation, indigenous genocide, working-class exploitation, gender inequity, etc. . . .) that acts as – or *should act*, at least as a precursor of – the aspirational model of "the multitude." So the up-to-the-minute millennial and putatively Marxist Hardt begins to sound, here, very much like liberal American jurisprudence of the 1970s, channelling, even ventriloquising Ronald Dworkin (Dworkin, 1977) in their mutual valourisation of that nation's fetish, rights. But Hardt departs from Dworkin and his sort of rights chauvinism, to the extent that *Empire* acknowledges impliedly that, if rights are to have any purchase on "the multitude," if they are to have any transformative power, then they must be radically reconceived. Instead of the old autonomic rights of "negative liberty"[58] encoded in the U.S. Constitution as rights of speech, movement, privacy, etc. . . ., Hardt and Negri advance a model of "positive liberty,"[59] implying a system of public entitlements in its rights to a social wage (Hardt & Negri, 2000, pp. 401–403), the appropriation of space (Hardt & Negri, 2000, pp. 403–407), etc. . . ..

Now this sort of argument is something all critical legal scholars heard before – especially, those who cut their teeth in the 1980s on another fantasy trilogy, Roberto Unger's *magnum opus* and massively utopian, *Politics* (Unger, 1987). In that series, Unger argued for an ambitious and radical reformulation of rights discourse as part of his "super-liberal" project: market rights, destabilisation rights, security rights, etc. . . .[60] How is Hardt and Negri's essentially Ungerian dream of a revivified rights discourse to be realized? *Empire* is as vague about this process of rights reform, as it was about positivism's production of the state. So, once again, I turn to this paper's privileged mediation of the law, *The Lord of the Rings*, to point the way to a law of, and as mediation, that is, a reconfigured rights discourse. Tolkien's text, however, is more suggestive here than determinative, implying an answer only by way of negation, by way of what it does not say or do. For if throwing away the Ring installed a juridico-political order – the Law of "Empire," immunised from critique let alone combustion, because it had been dematerialized, then any move to reform or change the system implies, *a fortiori*, the law's *rematerialisation*. That

is, in order to deconstruct and reconstruct the law, critique needs, first and foremost, a *construction* to work with, a piece of the real to act upon: namely, the *posited law*. All of which means, when retranslated back into Tolkien's metaphoric terms, *the Ring of Power must be forged anew*! Such a reforging, however, would go well beyond the notion of "the One," and would restore, as Alain Badiou might put it, the concept of "the Multiple"[61] allowing for, and, indeed, ensuring a multiplication of rings and, through them, a pluralisation of Law. So, instead of "One Ring" – or *Recht* – "to Rule Them All!", the many, or "the multitude" *could rule themselves* through the One of a rights discourse, itself predicated on the *differance*[62] of difference. And it is that transformation of rights discourse – disseminated across the halflings of Empire – that would be, as Gollum himself might say, very *precious* indeed.

NOTES

1. This article was first presented as the final keynote address to the 12th Conference of the Australian Association of Law and Literature in December of 2002. Many thanks to the organisers, Dr Peter Rush and Dr Andrew Kenyon, both of the Faculty of Law, University of Melbourne. Thanks, as well, to Associate Prof. Alison Young (the "Galadriel of criminology"), also of Melbourne, for, as ever, her support and encouragement. Versions of this paper were given, throughout 2003, at the Galactic Jurisprudence Workshop, Brisbane, the Institute of Post-Colonial Studies, Melbourne and the Seminar Series, Socio-Legal Research Centre, Griffith Law School. Many thanks to the organisers, especially Ms Lynda Davies (Griffith), Mr Ian Duncanson (IPCS) and Prof. Richard Johnstone and Ms Pam Adams (SLRC). Thanks as well to the follwoing readers (or listeners) for their comments and feedback: Prof. Desmond Manderson (McGill), Mr Shaun McVeigh (Griffith), Mr Mark Rosenthal (Melbourne) and Ms Juliet Rogers (Melbourne). This article is dedicated to two friends and fellow Tolkienistas. First, to my favourite Ent, Mr Mark Rosenthal with whom I first saw the trailer for *The Lord of the Rings: The Fellowship of the Ring* on a wet, cold January arvo at a cinema in Leicester Square – hoom, hoom! And, second, to my colleague and fellow Aussie filmgoer and fan of the Jackson trilogy, Ms Janine Brown, the Arwen Evenstar of the Griffith Law School.

2. The reference to *weregild* occurs at the Council of Elrond in chapter II, Book Two of the *The Fellowship of the Ring* when Elrond's recounts to the assembly. Isidur's ostensible reason for keeping the Ring of Power: "This I will have as a *weregild* for my father" (Tolkien, 1994, p. 237). A *weregild* is, of course, an old Anglo-Saxon judicial remedy, a compensatory scheme, in the form of civil damages, for a criminal wrong (usually wrongful killing), see Walker (1980, p. 1296). Tolkien, as a pre-eminent scholar of Anglo-Saxon language and literature, would be well acquainted with this remedy.

3. All cinematic references in this article to *The Lord of the Rings* will be to: *The Lord of the Rings: The Fellowship of the Ring* (US/NZ: New Line Cinema, 2001), dir. Peter Jackson; *The Lord of the Rings: The Two Towers* (US/NZ: New Line Cinema, 2002), dir. Peter Jackson; *The Lord of the Rings: The Return of the King* (US/NZ: New Line Cinema, 2003), dir. Peter Jackson.

4. Tolkien writes in the "Foreword to the Second Edition": "As for any inner meaning or 'message,' it has in the intention of the author none. It is neither allegorical nor topical . . . I cordially dislike allegory in all its manifestations, and always have done so since I grew old and wary enough to detect its presence" (Tolkien, 1994, p. xvii).

5. So, e.g. there is Tolkien the allegorist of Catholicism (Pearce, 1998); Jungian psychology (in Matthews, 1975, pp. 25–43); feminist Freudianism (Partridge, 1983, pp. 179–198); Fascism (Plank, 1975, pp. 116–125); and Faustian pacts (Helms, 1976).

6. Though Tolkien, himself, would not necessarily have disapproved of these sorts of readings, his dismissal of allegory notwithstanding. He would have just relabelled these readings as "applicable" rather than allegorical. In support of this reading practice, Tolkien writes in the "Foreward": "I much prefer history, true or feigned, with its varied applicability to the thought and experience of readers. I think many confuse 'applicability' with 'allegory'; but the one resides in the freedom of the reader, and the other in the purposed domination of the author" (Tolkien, 1994, p. xvii).

7. Walmsley sees more than just coincidence in the publication of *The Lord of the Rings* and the first distillation of the psychotropic compound, lysergic acid diethylamide (LSD), both in 1954 (Walmsley, 1983, p. 74).

8. Tolkien, himself, anticipates and parodies this kind of (over)reading of War of the Ring as and allegory of WWII when he writes in the "Foreword to the Second Edition": "The real war does not resemble the legendary war in its process or its conclusion. If it had inspired or directed the development of the legend, then certainly the Ring would have been seized and used against Sauron; he would not have annihilated but enslaved, and Barad-dur would not have been destroyed but occupied. Saruman, failing to get possession of the Ring, would in the confusion and treacheries of the time have found in Mordor the missing links in his own researches into Ring-lore, and before long he would have made a Great Ring of his own with which to challenge the self-styled Ruler of Middle-earth. In that conflict both sides would have held hobbits in hatred and contempt: they would not long have survived even as slaves" (Tolkien, 1994, p. xvii). The war "applicable" to Tolkien was, by his own acknowledgement, and, as a recent study drives home, the Great War of 1914–1918 in which he served as a young officer (Garth, 2003).

9. For Grbich's own, richly evocative term, "feudalscape" see Grbich (2002, pp. 139–140).

10. In the film's prologue, Galadriel's voiceover speaks of the Ring's historical trajectory as one of "History" becoming "Legend," "Legend" becoming "Myth," see *The Lord of the Rings: The Fellowship of the Ring* (New Line, 2001). Jackson's script echoes Gandalf's words to Frodo in the text that with slaying of Isildur at Gladden Fields, the Ring "passed out of knowledge and legend" (Tolkien, 1994, p. 51).

11. In the Tower of Cirith Ungol, while rescuing Frodo, Sam is described as under the spell of the Ring he now bears: "Already the power of the Ring tempted him, gnawing at his will and reason. Wild fantasies arose in his mind; and he saw Samwise the Strong, Hero of the Age, striding with a flaming sword across the darkened land, and armies flocking to his call as he marched to the overthrow of Barad-dur" (Tolkien, 1994, pp. 880–881).

12. *The Lord of the Rings: The Fellowship of the Ring* (New Line, 2001).

13. For the "return of the Shadow," see Galadriel's prologue to *The Lord of the Rings: The Fellowship of the Ring* (New Line, 2001). Like Sauron, "Empire is materializing before our very eyes," write Hardt and Negri in their Preface, see Hardt and Negri (2000, p. 14).

14. "The problematic of Empire," as Hardt and Negri observe in one of the most telling passages in the text, "is determined in the first place by one simple fact: that there is world order. This order is expressed as a *juridical formation*" (author's own italics): Hardt and Negri (2000, p. 3).

15. So Hardt and Negri state, "Empire establishes no territorial centre of power and does not rely on fixed boundaries or barriers. Is it a decentered and deterritorializing apparatus of rule . . .," see Hardt and Negri (2000, p. xii).

16. "The transformation of the modern imperialist geography of the globe and the realization of the world of the market," note Hardt and Negri, "signal a passage within the capitalist mode of production . . . Capital seems to be faced with a smooth world – or really a world defined by varied and complex regimes of differentiation and reterritorialization." See Hardt and Negri (2000, p. xiii).

17. See, e.g. Ellwood (2001), Schirato and Webb (2003), and Steger (2003).

18. In all of the texts cited above, *ibid.*, Note 23, whole chapter are devoted to the globalization of the media, family, risk, economy, culture, technology, *etc.* . . . In none, however, is the law mentioned.

19. See, e.g. the otherwise excellent unpacking of the Canadian-Indonesian Bre-X debacle by Anna Tsing where she writes "CoWs are the magical tools of the national elite" (Tsing, 2001, p. 177). See also, e.g. Dierckxsens (2000).

20. Particularly when, in an interview with Slyvere Lotringer, he proclaims that, under the conditions of postmodernity, "there is no longer any law or symbolic order," rather there are only "rules," see Baudrillard (1988, p. 75).

21. "The Pure Theory of Law," observes Kelsen, "is a theory of positive law. It is . . . a science of law (jurisprudence) not legal politics" (Kelsen, 1967, p. 1).

22. Kelsen writes: "Legal sociology relates facts not validate norms but other facts as causes and affects. . . . Therefore not law itself is the object of cognition for legal sociology, but certain parallel phenomenon in nature" (Kelsen, 1967, pp. 101–102). And, earlier, he notes that "uncritically the science of law has been mixed with elements of psychology, sociology, ethics and political theory . . . adulterations . . . (which) . . . obscures the essence of the science of law" (Kelsen, 1967, p. 1).

23. So Kelsen argues " 'pure' theory . . . because it not only describes the law and attempts to eliminate from the object of this description everything that is not strictly law: its aim is to free the science of law from alien elements. This is the methodological basis of the theory" (Kelsen, 1967, p. 1).

24. For extended discussions of Kelsen's hierarchy of norms, including the *Grundnorm*, see Kelsen (1967, pp. 221–276), and Kelsen (1961, pp. 123–161).

25. As Kelsen notes, "The presuppostion of the Basic Norm does not approve any value transcending positive law" (Kelsen, 1967, p. 201).

26. For the first appearance of the Queen (played by British actress, Alice Krige), see *Star Trek: First Contact* (1996, U.S.), dir. Jonathan Frakes, prod. Rick Berman, starring, Patrick Stewart, Brent Spiner, Michael Dorn, Brent Spiner, LeVar Burton, Marina Sirtis.

27. For more details about Swampy and radical environmentalism, see the following website article, "England's Eco-Warriors," www.woe.edu.pl./2001/1_01/eco.html.

28. Spoken by British actor Sir Ian McKellan as Gandalf in *The Lord of the Rings: The Fellowship of the Ring* (New Line, 2001).

29. For a further development of this thematic, see MacNeil (2002).

30. The expression recurs throughout the film trilogy, and its original literary source is Treebeard's poetic catalogue of Middle-Earth's living creatures: "First name the four, the free peoples" – elves, dwarves, men and ents, to which hobbits are added (Tolkien, 1994, p. 413).

31. *The Lord of the Rings: The Fellowship of the Ring* (New Line, 2001).

32. *Ibid*.

33. *Ibid*.

34. For example, see Book Six, Chapter V, "The Steward and the King" in *The Return of the King* where the narrator augurs of King Elessar's reign, "In his time the City was made more fair than it had ever been, even in the days of its first glory; and it was filled with trees and with fountains, and its gates were wrought of mithril and steel, and its streets were paved with white marble; and the Folk of the Mountain laboured in it, and the Folk of the Wood rejoiced to come there; and all was healed and made good, and the houses were filled with men and women and the laughter of children, and no window was blind not any courtyard empty; and after the ending of the Third Age of the world into the new age it preserved the memory and the glory of the years that were gone" (Tolkien, 1994, p. 947).

35. His distant cousin, Diamond of Long Cleeve, of the Long Cleeve Tooks, see Appendix B (Tolkien, 1994, p. 1071).

36. Lucky number thirteen, see "The Longfather-Tree of Master Samwise," Appendix C (Tolkien, 1994, p. 1077).

37. Entrusted by an aged, widower Samwise, just prior to his departure for the Undying Lands, to his first-born, Elanor (known as "the Fair"), and an heirloom of her descendants, the Fairbairns of the Towers, see "The Longfather-Tree of Master Samwise," Appendix C (Tolkien, 1994, p. 1077).

38. So Hardt and Negri write: "Empire can only be conceived as a universal republic, a network of powers and counterpowers structured in a boundless and inclusive architecture" (Hardt & Negri, 2000, p. 167).

39. This conjoining of opposites is precisely the paradox that lies at the heart of "Empire," which Hardt and Negri define as committed, conceptually, to "a perpetual and universal peace" but which is, practically, "bathed in blood" (Hardt & Negri, 2000, p. xv).

40. So much so that Hardt and Negri designate Empire as a state of "omnicrisis." They write: "we can now see that imperial sovereignty, in contrast, is organized around not one central conflict but rather through a flexible network of microconflicts. The contradictions of imperial society are elusive, proliferating, and nonlocalizable: the contradictions are everywhere. Rather than crisis, then, the concept that defines imperial sovereignty might be omni-crisis" (Hardt & Negri, 2000, p. 201).

41. For this poetic paean to empire and God as an Englishman, see Rudyard Kipling's "Recessional": "If drunk with sight of power, we loose/Wild tongues that have not Thee in awe,/Such boastings as the Gentiles use,/Or lesser breeds without the Law – Lord God of Hosts, be with us yet,/Lest we forget – lest we forget!" (Ferguson et al., 1996, p. 1078).

42. Indeed, one could go so far as to say that *The Lord of the Rings* was a national project for Aotearoa/New Zealand. What with an estimated 1 in 60 of the population involved in production, and a cabinet minister whose sole brief was to liaise, on behalf of the government, in the marketing of the films, *The Lord of the Rings* rivals the old Soviet bloc in its state subsidisation.

43. As Hardt and Negri argue, "Empire manages hybrid identities, flexible hierarchies and plural exchanges through modulating networks of command" (Hardt & Negri, 2000, pp. xii–xiii). Indeed, one might go so far as to say that Empire is the "rainbow" coalition of identity politics (Hardt & Negri, 2000, p. xiii).

44. Exemplifying the way in which, as Hardt and Negri, note "imperial racist theory in itself is a theory of segregation, not a theory of hierarchy" (Hardt & Negri, 2000, p. 193).

45. In the timeline from Appendix B, 1427 marks the year in which, *inter alia*, King Elessar issues an edict that Men are not to enter the Shire, and he makes it a Free Land under the protection of the Northern Sceptre (Tolkien, 1994, p. 1071).

46. For the friend/enemy distinction in *Empire*, see page 13 where the enemy is, at once, "banalised" and "absolutised" (Hardt & Negri, 2000, p. 13). This distinction is, of course, Schmittian (Schmitt, 1996).

47. Literally, the "object (little) other." A term which shifts and changes in Lacan's *oeuvre* but remains fundamentally linked to desire, first as its object, then as its object-cause and, finally, what remains of the Real when symbolic integration has occurred. For a good overview of this concept, see the entry "*Objet Petit A*" in Evans (1997, pp. 124–126).

48. Which, incidentally, Hardt and Negri accuse Kelsen of failing to do. That is, of explaining how legal normativity gives rise to legal sociology. They write: "Kelsen conceived the formal construction and validity of the system as independent from the material structure that organizes it, but in reality the structure must somehow exist and be organized materially. How can the system actually be constructed? That is the point at which Kelsen's thought ceases to be of any use to us: it remains merely a fantastic utopia" (Hardt & Negri, 2000, p. 6). My central argument, of course, is that it is another "fantastic utopia" that points the way as to how this system is constructed, deconstructed and reconstructed.

49. For an unpacking of this concept, see Dyer (1997). For an explicitly feminist and race theorist deconstruction of "whiteness," see Moreton-Robinson (2000).

50. The term is, of course, Derridean (Derrida, 1982a, b, pp. 207–273). For a post-colonial extension of this term, see Young (1990).

51. *The Lord of the Rings: The Fellowship of the Ring* (New Line, 2001).

52. *Ibid*.

53. Athough the term, "the multitude" is introduced right from the start of *Empire* (Hardt & Negri, 2000, p. xv), see, especially, the last chapter of the text, "The Multitude against Empire" (Hardt & Negri, 2000, pp. 393–415).

54. This term references but also rebukes Homi Bhabha's tendency to sentimentalise diaspora (Hardt & Negri, 2000, p. 145), especially when one of the persistent desires diasporics have is for a *home* (Hardt & Negri, 2000, p. 155).

55. Indeed, according to Hardt and Negri, "the multitude called Empire into Being" (Hardt & Negri, 2000, p. 43).

56. So Hardt and Negri observe: "The creative forces of the multitude that sustain Empire are also capable of autonomously constructing a counter-Empire, an alternative political organization of global flows and exchanges" (Hardt & Negri, 2000, p. xv).

57. Hardt and Negri write: "... we can see that the United States is privileged in a more important way by the imperial tendency of its own Constitution. The U.S. Constitution, as Jefferson said, is one of the best calibrated for extensive Empire" (Hardt & Negri, 2000, p. 182).

58. For an explication of "negative" liberty – that is, liberty defined as negating the state's power to interfere in one's autonomic exercise of rights and freedoms, see Berlin (1969, pp. 122–130).

59. Again, another term drawn from Berlin, meaning a liberty that is predicated on a set of "positive" entitlements, provided for and supplied by (usually) some form of welfare state (Berlin, 1969, pp. 122–130).

60. See, especially, Part 1 of *Politics*, *False Necessity: An Anti-Necessitarian Social Theory in the Service of Radical Democracy*, Unger (1987, pp. 508–535).

61. For the introduction of this concept of "the multiple," see Badiou (2001, pp. 48–52).

62. For an introduction to this "sign of our times" – and its meaning of both differing and deferring (Derrida, 1982a, b, pp. 1–29).

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