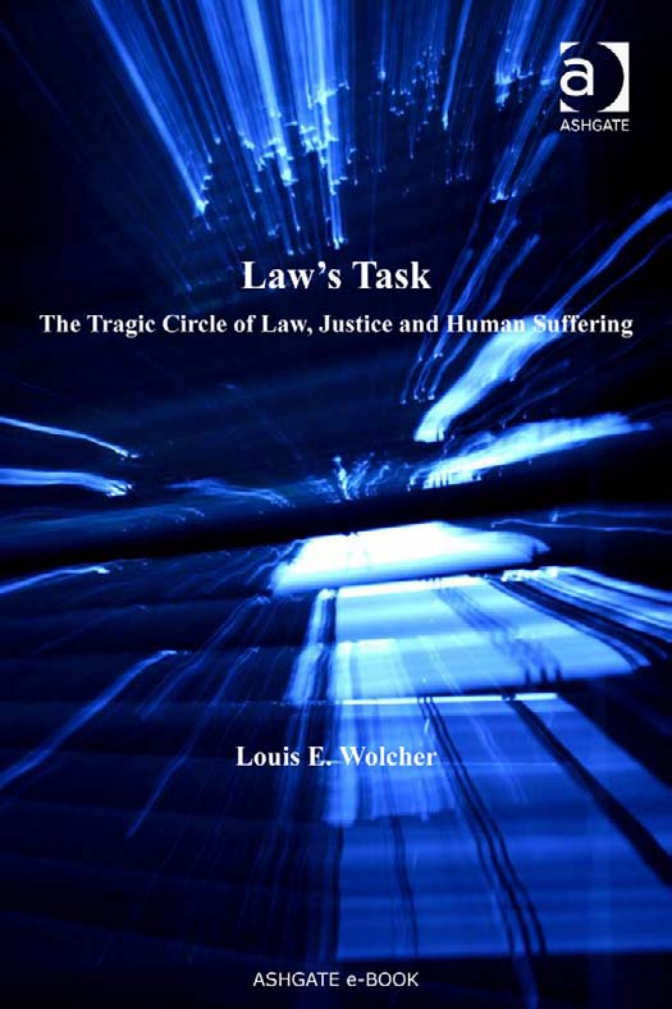
ASHGATE
Law's Task
The Tragic Circle of Law, Justice and Human Suffering
Louis E. Wolcher
ASHGATE e-BOOK

LAW'S TASK

For Elizabeth and William

Law's Task

The Tragic Circle of Law, Justice and Human Suffering

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ASHGATE

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Series Editor's Preface

The objective of the Applied Legal Philosophy series is to publish work which adopts a theoretical approach to the study of particular areas or aspects of law or deals with general theories of law in a way which focused on issues of practical moral and political concern in specific legal contexts.

In recent years there has been an encouraging tendency for legal philosophers to utilize detailed knowledge of the substance and practicalities of law and a noteworthy development in the theoretical sophistication of much legal research. The series seeks to encourage these trends and to make available studies in law which are both genuinely philosophical in approach and at the same time based on appropriate legal knowledge and directed towards issues in the criticism and reform of actual laws and legal systems.

The series will include studies of all the main areas of law, presented in a manner which relates to the concerns of specialist legal academics and practitioners. Each book makes an original contribution to an area of legal study while being comprehensible to those engaged in a wide variety of disciplines. Their legal content is principally Anglo-American, but a wide-ranging comparative approach is encouraged and authors are drawn from a variety of jurisdictions.

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Preface

> At least we should learn to understand our fellow beings, for we are powerless to stop their misery, their ignominy, their suffering, their weakness, and their death.
>
> Robert Walser, *Frau Wilke* (1982, 121)

The Fellowship of Sadness

This book investigates the reciprocal relations linking human suffering to law and justice, and law and justice to human suffering. It concerns both the limits of the idea of just law and the potential limitlessness of our individual responsibility for the legalised suffering of others. In thinking about these themes, the book aspires to be philosophical in the purest sense of the word: a difficult journey of thought rather than a dogmatic theoretical solution, however well-intentioned, to the problems it considers. Many great thinkers have helped me along the way: the writings of Giorgio Agamben, Hannah Arendt, Walter Benjamin, Michel Foucault, Franz Kafka, Martin Heidegger, Emmanuel Levinas, Herbert Marcuse, Friedrich Nietzsche, Arthur Schopenhauer, Max Weber and Ludwig Wittgenstein have proven to be the greatest influences. But while I have liberally appropriated many of their best insights, this work is not really about them or their so-called 'philosophies'. Insofar as the problem of human suffering is concerned, I pick up the trail where they left off and do my best to follow (or take) it in another direction.

The present work accepts no comfort from the conventional neo-Hegelian claim that the rule of law is ultimately progressive – that given enough time the law, if only we leaven it with a sufficient portion of 'human rights', will work itself pure. It also chooses to suspend all belief in the prospect of a resplendent justice-to-come that would somehow redeem the long, sordid history of inter-human violence in all of its myriad forms, whether lawful or unlawful. The dead cannot be made un-dead; the hungry, the homeless and the oppressed will always have been hungry, homeless or oppressed no matter how much their condition may improve; a tear that falls once will have fallen for all eternity. Of course, to believe in these existential truisms too much can lead to a morbid obsession with the past, which is why Holocaust survivor Elie Wiesel has conceded that for people like him there can be such a thing as 'too many memories'.[1] But to believe in them too little is also dangerous: it can lead to the delusion that it is possible to end present human suffering by running away from a now-time that we will *never* escape, so long as we are alive, towards a glorious future that, like a mirage, keeps on receding into the distance with every step we take.

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1 'Giving Memory Its Due in an Age of License', *New York Times*, 28 October 1998, B1.

This book endeavours to take stock of the tragic aspects of law and justice without blinking or equivocating, on the ground that the human world is, or should be, a sort of fellowship of sadness. Sadness (from the Latin *satis*, meaning 'enough') about what everyone else calls necessary or justified suffering is never a waste of energy: it is an ethical imperative. One who is sad enough in this sense is capable of wondering why the welfare of the few (or even the many) should overwhelm the pain of the many (or even the few) so completely that the latter become invisible to history. Why, for example, were Solon's laws and the golden age of Athenian democracy they enabled worth the blood, tears and eternal anonymity of even a single Greek slave (cf. Marcuse 2007, 114)? As I see it, intellectual honesty, not to mention a decent regard for the mutilated humanity of history's innumerable losers, requires philosophy to think this sort of question down to its roots.

To accomplish this task, the thinking enacted here must steadfastly maintain its autonomy from the usual ways of discussing the political and moral dimensions of law and justice. The reason is plain: conventional discourse represses the fundamental fact that all human beings, without exception, always experience suffering in one form or another. Before the human being becomes what any of its classical philosophical definitions say it is – *zoon logon echon* (the living being endowed with speech), *zoon politikon* (political animal), *animal rationale* (rational animal), *homo economicus* (economic man), or *homo sapiens* (wise man) – it is always already *zoon pathos echon*: the living being that suffers. The bond of suffering unites us all; *this* bond, at least, is a universal. Everyday talk about law also roundly denies what Nietzsche (1927b, 966) calls 'the terrible wisdom of Silenus', which makes non-existence look preferable to existence in this ephemeral world of 'chance and misery'.[2] Convention represses the thought that life is bound up with suffering in order to explain or justify why legal institutions respond only to certain kinds of anguish, while at the same time ignoring, tolerating and even inflicting other kinds. To be sure, the knife that slices law's portions from the still-twitching body of human suffering always stands ready to justify its resulting work product; but, like Bartleby the Scrivener (Melville 2004), it would 'prefer not to' acknowledge or defend the fact that it is, first and foremost, an *instrument of cutting*.

2 In *The Birth of Tragedy*, Nietzsche (1927b, 961–2) gives the following account of the ancient Greek myth that contains the wisdom of Silenus:

> King Midas hunted in the forest a long time for the wise *Silenus*, the companion of Dionysus, without capturing him. When Silenus at last fell into his hands, the king asked what was the best and most desirable of all things for man. Fixed and immovable, the demigod said not a word; till at last, urged by the king, he gave a shrill laugh and broke out into these words: 'Oh, wretched ephemeral race, children of chance and misery, why do ye compel me to tell you what it were most expedient for you not to hear? What is best of all is beyond your reach forever: not to be born, not to *be*, to be *nothing*. But the second best for you – is quickly to die.'

The Reciprocal Nature of Harm

The resulting oblivion to so-called necessary suffering runs deep in traditional legal theory. The latter tends to interpret the general concept of a legal entitlement – the very premise of the rule of law – as a rose without thorns. But of course, most entitlements (like most roses) really *do* have thorns. For example, the law's readiness to protect by force what it calls 'mine' can, in any given case, make the overall situation it calls 'yours' into a living hell, as when a loving parent loses a child in a bitter custody dispute, or a petty thief serves time in a prison where the authorities accept inmate rape as a fact of life. The economist Ronald Coase (1988, 96) labels the general principle that is illustrated by these examples the 'reciprocal nature' of interpersonal harm-creation:

> The traditional approach has tended to obscure the nature of the choice that has to be made. The question is commonly thought of as one in which *A* inflicts harm on *B* and what has to be decided is, How should we restrain *A*? But this is wrong. We are dealing with a problem of a reciprocal nature. To avoid harm the harm to *B* would be to inflict harm on *A*.

The point is not that the rule of law produces no positive results in people's lives, or even that its costs in human suffering do or do not metaphorically 'outweigh' its social benefits. Like Coase, I am merely drawing attention to the simplest and most basic feature of what the ferociously anti-utilitarian legal philosopher Ronald Dworkin (1986) likes to call 'law's empire': namely, that one person's legally enforceable entitlement *eo ipso* constitutes another person's legally enforceable exclusion. In sum, the rule of law anoints winners and creates losers – and therefore causes *someone* to suffer – no matter what it does or who it favours.

Unlike Coase, however, I do not think that the only problem confronting those who are responsible for enacting law and justice is how to set up society's legal institutions in such a way as to maximise the chances of avoiding 'the more serious harm' in any given case. After all, it is tautologically true that more serious harms and less serious harms are both kinds of *harms*: they belong to a genus – human suffering as such – that logically and ethically precedes its division into species the emotive names of which (e.g. 'less serious' and 'more serious') are calculated to comfort those who do the dividing. It seems to me that thinking about law solely in terms of its vaguely conceived 'net benefits' – or even in terms of its actual (or hypothetical) numerical benefits as weighed against its actual (or hypothetical) numerical costs – amounts to a shocking ethical evasion.

For one thing, no honest and responsible weighing of pain against gain is possible unless one tries to understand the full *human* dimension of what is being weighed. To understand in this way is a serious emotional and intellectual challenge, for it requires deep empathy as well as critical reason. The ubiquitous technocratic criterion of 'willingness to pay' and 'willingness to accept', employed with great skill by Coase and many other proponents of modern cost-benefit analysis (see Zerbe 2002), conveniently sidesteps this difficulty. This criterion merely identifies and measures the number of dollars that some people are willing and able to pay to avoid suffering and then compares it to the number of dollars that other people

(i.e. rights holders) are willing and able to accept as payment for not inflicting that suffering. However usefully abstract and simplifying this procedure might seem to those who have the power to make or validate political and legal decisions, it can no more help us comprehend the brutal phenomenal reality of individual human suffering than staring at a bus ticket can help us comprehend the reality of a bus ride. The recently deceased American poet William Matthews (1995, 3) once wrote: 'there's someone's misery in all we earn'. Even discounting his claim by half, it stands to reason that there are many sad stories just waiting to be discovered behind the banknotes hidden in our billfolds. Among other things, this implies that any ethically respectable would-be balancer of pain against gain must first undertake a long and emotionally difficult investigation of the dark and sorrowful side of human experience, where bucketfuls of tears fall quietly every hour of every day.

More importantly, the usual weighing-and-balancing way of proceeding arbitrarily elevates the justification of abstract legal arrangements into the only problem worth thinking about in legal theory. Those who walk this path do not pause to consider the possibility that they, along with everyone else, might be *personally* responsible for what happens (and does not happen) each and every time they exercise a legal privilege, enforce a legal right, or obey a legal duty. If real, flesh-and-blood human beings like you and me are not empirically (and therefore ethically) responsible for keeping the presently existing social world going, then who is?[3] In short, thinkers who dwell on law's (or a particular law's) abstract justifications fail to ask a question that is as disquieting as it is simple: What if Louis XIV was right and the law is not primarily an 'it', a 'them', or even a 'we', but rather in each and every case a 'me'?[4]

Human Rights and Economic Liberation

Take human rights. As Levinas (1994, 74) has observed, any attempt to fully specify or realise human rights involves reason in a persistent contradiction, since 'the freedom of the individual is inconceivable without economic liberation, but the organisation of economic freedom is not possible without the temporary but temporarily unlimited enslavement of the individual'. Recalling Anatole France's famous aphorism about how the law, in all its majestic equality, forbids rich and poor alike from sleeping under the bridges, begging in the streets, and stealing bread (Bartlett 1980, 655), we might define genuine economic liberation as actually having the ability – and not *just* the formal legal opportunity – to satisfy one's basic human needs and wants. In 1936, in the middle of the Great Depression, Franklin Delano Roosevelt famously stated, 'Necessitous men are not free men'.[5] Bracketing

3 Cf. Berger and Luckmann (1967, 128): 'What remains sociologically essential is the recognition that all symbolic universes and all legitimations are human products; their existence has its base in the lives of concrete individuals, and has no empirical status apart from these lives.'

4 In a remark before the French parliament in 1651, the Sun King famously said, '*L'état c'est moi*' ('I am the state') (Bartlett 1980, 312).

5 The statement appears in Roosevelt's speech accepting the Democratic Party's nomination for a second term as President in its 1936 convention. The speech as a whole can be found at the

all debate about the macroeconomic wisdom of the modest steps towards universal economic liberation that were attempted by the New Deal, surely this much is beyond any reasonable doubt: no one who has ever been desperately poor, hungry and homeless – or who is capable of empathising with those who have – could fail at least to *understand* the meaning of Roosevelt's aphorism.

Cases illustrating Roosevelt's meaning are literally too numerous to count, although many of them are almost too grisly or depressing for me to describe in detail here. For example, certainly the scarred bodies of those millions of the Third World's poor who have sold their body parts for cash or food in the worldwide organ trafficking trade do not symbolise these people's 'freedom' except in the most crabbed and cynical sense of the term.[6] To pick another example, closer in proximity to this author's home, consider what happened recently to many middle class homeowners living in Southern California. Legally speaking, the concept of formal equality of opportunity gave everyone in Los Angeles the right to try to hire a private security company called 'Firebreak Spray Systems' to spray their homes with fire retardant during the fall of 2007, when horrendous wildfires swept through much of the surrounding area. With funding for public fire departments drastically reduced during the past few decades, this would have been a good bet for just about everyone living in the fire's path. But at an average cost of $19,000, this high-end insurance service was far beyond the reach of most Angelinos, some of whom had to watch as their houses 'went up like candles' (in the words of one private fire fighter) while the company's operatives saved only the nearby homes of those who could afford to be members of its elite 'Private Client Group'.[7] As in the story told in the Book of Exodus (12:7–13) about the slaughter of the firstborn Egyptians, only those who could afford to smear the lamb's blood, so to speak, of a pricey private rescue contract on the side posts of their houses were not smitten by fire that night.

Having the actual ability to satisfy one's basic needs and wants – including, presumably, 'owning' a decent chance of saving one's house from an inferno – is certainly what Levinas had in mind when he claimed that individual freedom is inconceivable without economic liberation. But if this is so, then what does he mean by 'enslavement of the individual'? A reader who is unfamiliar with Levinas's work might hear in these words only echoes of the sort of reactionary critique of government that condemns in advance any public programme aimed at rescuing the poor, the unlucky or the foolish, on the ground that the concept of 'social justice' is an oxymoron that must inevitably lead, step by step, to the creation of an oppressive nanny state with totalitarian tendencies (see Hayek 1978). Although it is true that Levinas was acutely aware of the cruelties that can be (and have been) committed by even the most benevolent and socially just government bureaucracies, this is not the only (or even the primary) sense in which he used the phrase 'enslavement of the

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following website: http://www2.austincc.edu/lpatrick/his2341/fdr36acceptancespeech.htm.

6 See the website http://vachss.com/help_text/organ_trafficking.html, a useful clearinghouse that provides links to scores of online resources about the international organ trafficking trade.

7 These facts were reported at the time by the *Los Angeles Times* and *Bloomberg News*, and are conveniently summarised in Klein (2007).

individual' in relation to the idea of economic liberation. He also knew that the so-called free market can and often does feel like enslavement, too, and that the coercive apparatuses of law make the experience of bondage possible, in little ways and big.

Most economic liberals would probably concede that there are many regrettable (and regrettably persistent) instances of poverty, tyranny and injustice in today's world and that global capitalism is not wholly free of blame for at least some of these. However, such liberals undoubtedly would also rejoin that humankind as a whole is freer, healthier and more prosperous now than it has ever been in recorded history. If it is possible (and morally licit) to speak of such an entity as 'humankind as a whole', then this rejoinder is correct. A triumphant and hypercompetitive global capitalism does seem to deliver the goods to this strange mega-being – this globally averaged Leviathan – letting 'it' live longer and enjoy more material prosperity than 'it' ever did before.

Thus, on the one hand the unfathomably complex web of concrete historical relations that most people casually label 'capitalism' probably does deliver the goods better than any other known economic system, however unevenly and however much cultural and environmental havoc it may wreak along the way. On the other hand, however, since no social system can actually function without the ongoing assistance of real, live human beings, that which is called 'global capitalism' needs willing and/or compliant individuals to keep it going. It must have soldier ants and worker ants: (*a*) swarms of politicians, lawyers, judges, government bureaucrats, police officers and corporate property owners who rigorously monitor and enforce a worldwide regime of interlocking property rights, and (*b*) a general population of worker-consumers who have been conditioned to accept the existing social world, and everybody's situation within it, as both natural and inevitable.

Jacques Derrida (1994, 13) rightly reminds us that we still have much to learn from the thinker called 'Karl Marx', notwithstanding his many political errors, for there really is an important sense in which 'we are all Marxists now', as Peter Singer puts it.[8] In particular, Marx (1959, 255–6) famously created the concept of 'alienation' (*Entaüsserung*), or 'estrangement' (*Entfremdun*g), to describe the foregoing human tendency to naturalise and accept as inevitable whatever social arrangements happen to prevail at any given moment in history. As everyone knows, but is constantly forgetting, alienation is the process by which the tangible and intangible creations of real individuals, acting cooperatively as social animals, come to dominate their producers as alien forces existing outside of them. Once loosed into the world by the concrete, day-to-day activities of human beings, these forces come to have origins and ends of which their producers remain ignorant, and which seem to pass through a series of phases and stages that are independent of any human willing or doing. In the loss of their own creation and subsequent bondage to it, alienated human beings truly become the object of their object.

8 'On the level of thought rather than practical politics, Marx's contribution is … evident. Can anyone now think about society without reference to Marx's insights into the links between economic and intellectual life? Marx's ideas brought about modern sociology, transformed the study of history, and profoundly affected philosophy, literature, and the arts. In this sense of the term, admittedly a very loose sense, we are all Marxists now' (Singer 2000, 3).

A perfect example of alienation is the way people sometimes experience 'the law' as a mighty *thing* – a sort of 'Wizard of Oz' – that they must approach for justice, hat in hand, rather than as what it really is: the always-ongoing and ever-changing creation of *particular* human hands in *particular* situations. As the legal realists have taught us (and apparently must continue to teach us, over and over again), it is a profound existential truism that one particular legal case is never identical to another particular legal case: any noticed similarities or dissimilarities between them are always the product of finite human labour in a now-time the concrete contents of which are continually changing (see Stone 1964, 268–74).

Another example of alienation is suggested by my use of the generic noun 'capitalism' up to this point in time. By mistaken analogy to a proper noun, the word 'capitalism' can and does lead people to believe that there can be only one kind of capitalism in the world – the kind we have now – rather than many possible capitalisms, each one embedded in a different set of legal ground rules and institutional arrangements that, in turn, are themselves the possible products of myriad different political struggles and compromises. In short, nurturing a strong ontological belief in the existence of some*thing* called 'capitalism' is just as alienated – and just as deluded – as nurturing a strong ontological belief in the existence of some*thing* called 'the state' or 'the citizen'.

Now it is concededly the case that every known politically realised Marx*ism* in world history has proven to be a disastrous political, economic and/or moral failure, although in all fairness it ought to be remembered that Marx himself once said, to Engels, 'What is certain is that I am not a Marxist' (see Derrida 1994, 34). That said, however, there is no question that Karl Marx (1906, 185–96) *the thinker* got it right in his analysis of how strangers, and even acquaintances, are forced to relate to one another in the kind of economy that happens to prevail in most of today's increasingly 'globalised' world. Refracted through the omnipresent lens of a reified notion of property, each individual appears, to himself and others, as the owner of a particular quantum of 'human capital': an exchange value that can be bought and sold as a commodity – a 'human resource' – and that must be so alienated if the individual wishes to achieve social recognition.

The Performance Principle and *Homo Sacer*

In such an environment, the principle of 'performance' has come to hold complete sway over the organisation of economic liberation. First noticed and described by Herbert Marcuse (2007, 197), the performance principle is a variation on Marx's theory of exploitation. It is the belief (in Marcuse's words) that 'everyone has to earn a living in alienating but socially necessary performances, and one's reward, one's status in society will be determined by this performance'. In general, this means that you *are* only what you can *earn*.

The performance principle seems to have enacted, with a vengeance, Sir Henry Maine's famous nineteenth-century stipulation that all progress in the law is measured by the extent to which it has moved 'from Status to Contract' (1986, 141). Marketability has replaced lineage as the individual's new nimbus of social

recognition: the less money and prestige you are able to command from others – the less 'in demand' you are – the fainter your social halo glows. Indeed, it would appear that even God himself has affirmatively bought into the performance principle, after having stood inscrutably on the sidelines during capitalism's formative years (the sixteenth and seventeenth centuries) in Protestant Europe.[9] At least this seems to be the thesis of the popular 'Christian Art' painting, *Unending Riches*, which shows a hand-shaking Jesus fulfilling the promise of Proverbs 8:18–21 ('Unending riches, honour and success are mine to give') by helping one believing, clean-cut captain of industry strike a business deal with another.[10]

Gone or repressed, under conditions such as these, is the secular Enlightenment's once-inspiring dream of achieving truly *universal* human liberation in two related but distinct spheres: freedom from natural necessity (the struggle for material subsistence) and freedom from social necessity (the domination of man by man). Kantian humanism – the notion that everyone on earth belongs to a 'kingdom of ends' because they have an inner worth, or dignity, that has nothing to do with their relative market price (Kant 1996, 83–4) – appears quaintly old-fashioned in an era dominated by voracious multinational corporations whose activities are coordinated by government policies that seem primarily aimed at maintaining a secure business environment for investments. Nowadays Marx's faith in the possibility of realising a social utopia in which everyone 'will revolve about himself as his own true sun' (1964, 44) appears hopelessly naïve (at best) to those who accept or acquiesce in the performance principle as if it were an ineluctable law of nature.

Making economic power relations appear not only as relationships between things but also as the very rule of rationality itself, the performance principle assures that even the citizens of prosperous Western democracies feel the need to keep on labouring for the Man, chained to their computer terminals or their shovels, no matter how much (or little) they earn or how many (or few) goods they own. Thus, Levinas's metaphor of economic enslavement applies not just to the poorest of the world's poor, millions of whom really are held and trafficked as slaves, and all of whom know they must toil from dawn to dusk in order to survive. The typical middle class consumer also shuffles along the workhouse treadmill, living in order to work, working in order to consume.

Beyond all merely metaphorical economic enslavement, consider the paradox presented by news reports of two recent criminal cases involving desperate defendants who sought to achieve not economic liberation but sheer economic survival. In the fall of 2006, a 62-year-old Ohioan by the name of Timothy Bowers found himself out of work and unable to find a steady job. Worried about how he would make it through the next few years until he became eligible for Social Security, Bowers came up with a plan: he would rob a bank, hand the money to a guard and wait for the

9 I am referring, of course, to Max Weber's thesis (1976, 98–128) that early Calvinists were especially good capitalists because the sombre doctrine of predestination gave them a deep psychological need to find tangible signs in this world (e.g. business success) that an inscrutable God had chosen them for heaven in the next.

10 The painting, by the artist Nathan Greene, is listed as a best seller in the catalogue of Lord's Art, an online Christian art dealer located at the website www.lordsart.com.

police to arrest him. And that is exactly what he did, in the hope of being sentenced to prison: at least there his basic needs for food, shelter and medical care would be met. Bowers pled guilty and told the judge that a three-year prison sentence would suit him just fine; whereupon the judge obliged him.[11] Victor Lopez, a homeless man from San Diego, had a similar idea. In November of 2002, he robbed a gas station at knifepoint and then told the clerk to call the police; Lopez, who had no criminal record before his arrest, figured that a stay in jail was better than living on the streets during the winter. But the district attorney's office foiled his plan by refusing to prosecute him, saying: 'His intent was to get arrested, not to steal'.[12]

Impose the lesser misery of a prison cell or impose the greater misery of poverty on the outside: this was the choice that the rule of law had constructed for itself in these cases. There is a striking similarity between the juridical situation of Messrs Bowers and Lopez and the figure of *homo sacer* ('sacred man') under archaic Roman law. According to a second century treatise written by Sextus Pompeius Festus, 'The sacred man is the one whom the people have judged on account of a crime. It is not permitted to sacrifice this man, yet he who kills him will not be condemned for homicide' (Agamben 1998, 71). As the philosopher Giorgio Agamben (1998, 71–86) tells it, Roman law conceived of the sacred man as a 'bare life', akin to an animal life, rather than as a citizen or a human being. Here is a creature that the law has put beyond the pale both of the *ius humanum* and the *ius divinum*, the profane world of human society and the sacred world of the gods.

For Agamben (170), the modern symbol of *homo sacer* is the concentration camp, where a formal 'state of exception' from the law allows political power to confront, without any mediation, the bare biological life that is all the camp's inmates have left to themselves. From this he reaches the (perhaps) surprising conclusion that 'today's democratico-capitalist project of eliminating the poor classes through development not only reproduces within itself the people that is excluded, but also transforms the entire population of the Third World into bare life' (180). By this Agamben means that the Third World's poor have become mere pre-political *bodies*, for the most part, in the hands of those who can profit by bringing them 'democracy' and 'prosperity' by means and on terms over which they have no control. But one need not generalise the concept of *homo sacer* this far in order to notice that the pitiable figure of this old Roman creature also haunts the stories of Bowers and Lopez.

On ancient authority, even a willing sacrifice to the gods is supposed to have the right degree of 'perfection', or attitude, so that it can properly fulfil its role as a mean term connecting human life with divine life (see Sallust 1951, 207). By analogy to this principle, no modern American court could really punish (read 'sacrifice') these men for what they had done, since the lesser pain of imprisonment was exactly what they wanted (and sought) for reasons having nothing to do with the punitive law's stated goals of retribution, deterrence and atonement. On the other hand, if the law chose to return them to the streets it would also not be responsible (read 'be guilty of homicide'), even if they died there, since their degraded condition on the outside was not the law's 'fault'. In the precise legal context in which the rule of law found

11 'Just Asking to be Caught, Thief Solves Joblessness', *New York Times*, 13 October 2006, A16.

12 'Jail-Seeking Robber is Set Free', *San Diego Union-Tribune*, 3 December 2002, B3.

them, Timothy Bowers and Victor Lopez – who were guilty, above all, of the crime of extreme poverty – could claim only the bare life of a *homo sacer*. Theirs was a life that the law could choose merely to tolerate, in prison, or else to exile to skid row, where it would be liable to extinction by un-punishable 'natural causes'.

The facts of these two cases are not as unusual as one might suppose. Their sadness resonates in periodic newspaper accounts of other desperately poor people who seek out the relative 'comforts' of jail,[13] in editorials calling for the release of old and sick prisoners so as to spare taxpayers 'the exorbitant cost of caring for very sick inmates behind prison walls',[14] and in reports about the starvation deaths in Japan of urban welfare recipients who have lost their benefits.[15] But the real significance of these cases is not confined to the question of their empirical frequency in America and elsewhere. Rather, they are emblematic of a much deeper issue: they point towards a simple but profound ontological truth about the nature of law and justice as such. Although it escapes popular notice, the most basic and tangible task performed by the agents of law and justice is to *divide* the vast realm of universal human suffering into parts: the legal and the illegal, the just and the unjust, the inevitable and the avoidable, and so forth.

The principle of legality as such divides and imposes suffering regardless of the type of regime it serves. This is not to say that all political forms are equal, normatively speaking – only that every political arrangement in history has relied, to some degree or other, on legal operations to accomplish its goals. Another way to put this is to say that the rule of law, in the largest sense of the phrase, consists in many different sorts of 'rules of law', all of which divide and impose human suffering in one way or another. Tyranny and oligarchy legally divide and impose suffering to benefit those who rule; theocracy legally divides and imposes suffering to enact what it takes to be God's commands; totalitarianism legally divides and imposes suffering to acquire control over the minds and bodies of the masses; liberal democracy legally divides and imposes suffering so that the clever, the lucky and the rich can achieve social and economic domination over the mediocre, the unlucky and the poor. Once again, the point I am making here is not that regimes which disingenuously *use* legal norms to accomplish their immediate political objectives are morally indistinguishable from regimes which in good faith try to *follow* legal norms regardless of the political convenience of doing so. Rather, the point is that universal human suffering is the basic raw material that the agents of *all* legal systems in history have busily worked and reworked, attended to or ignored.

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13 For example, 'Homeless Among Mansions: Aspen Man Talks about Life on the Streets', *Aspen Times Weekly*, 11 February 2007; 'Homeless See Jail as Refuge', *St. Petersburg Times*, 25 December 1988, 1.

14 'Old and Sick behind Bars', *San Francisco Chronicle*, 27 November 2005, E4. See also 'As Prisoners Age, Terminally Ill Raise Tough Questions', *Wall Street Journal*, 29 September 2005; 'Defender: State Balked at Heart Surgery', [Delaware] *News Journal*, 27 September 2005.

15 'Starving Man's Diary Suggests Harshness of Welfare in Japan', *New York Times*, 12 October 2007, A1.

Law and Tragedy

On the one hand, the agents of law and justice – even those who serve the very best legal systems – always in fact are wading hip deep through a veritable tidal wave of human suffering as they go about performing law's task, whether or not they realise it. On the other hand, unless and until they happen to find themselves bearing the painful brunt of law's operations, most people overlook the large extent to which they participate in what Weber (1958, 117) calls 'the tragedy with which all action, but especially political action, is truly interwoven'. A tragedy occurs when, despite your best intentions and all of your careful planning, your actions cause bad things to happen instead of (or in addition to) good things. A tragedy is when the noble ends you seek are polluted, in whole or in part, by the intended and unintended consequences of the means used to achieve them. People who are oblivious or indifferent to tragedy resent being reminded of other people's pain; they prefer to dissolve the bitter spectacle of tragedy in a kettleful of stock abstractions such as 'justice', 'necessity', 'human nature', and 'efficiency'. Once the 'lesser' pain of some sinks beneath the 'greater' gain of the many, the tragedy of universal suffering as such disappears from sight. And as Wittgenstein (1983, 205) says, 'What the eye doesn't see the heart doesn't grieve over'.

The present work challenges law's scandalous indifference to the human tragedy that lies just below the surface of legal operations and the rhetorical flourishes that typically accompany them. It attempts to look the tragic effects of law and justice squarely in the face, so to speak, before the political and academic mavens of law and justice have begun to categorise and rationalise them. Brutally honest understanding is what I seek, not 'being useful' to the pre-existing secular theodicies of law and justice. And given that complete understanding is the goal, I have attempted to adhere to one of the most acerbic of all classical mottos as my primary methodological principle. As formulated by the Roman playwright Terence (1992, 74), the motto is: *Homo sum, humani nil a me alienum puto* ('I am human, nothing that is human is alien to me').

Lessing once asked, 'What is the use of use?' (Arendt 1968, 80). His question ought to be asked more often. Being of use to people, working for a just society, and living a morally decent life sound like laudable goals, at least in the abstract, but they also present a dark side: for those who pursue them most ardently, the gloriousness of the ends can, and usually does, obscure the inevitably inglorious consequences of the means. Terrorism is a case in point, since it demonstrates that fanaticism of any type can lead all too easily to the commission of ethical outrages. But beyond this immediately obvious lesson, the case of terrorism – or rather, the average Westerner's hypocritical *attitude* towards terrorism – shows itself as significant at a much deeper level.

Commenting on the moral status of terrorist acts, the philosopher Jürgen Habermas recently remarked: 'Nothing justifies our "making allowances for" the murder or suffering of others for one's own purposes. Each murder is one too many' (Borradori 2003, 34). Although this sounds like a fine and noble sentiment, the truth (i.e. the whole truth) reveals it to be profoundly disingenuous, just like most other finely expressed sentiments of its type. Even granting its correctness as applied to

a prototypically terrorist act such as the suicide bombing of a civilian restaurant or bus, it is almost impossible to read Habermas's statement in a more general way – for all it's worth, as it were – without feeling more than a little embarrassed by it. *Everyone* (and not just terrorists) makes allowances, all the time, for the 'necessary' deaths and suffering of other human beings.

To belabour the obvious, we make such allowances every time we approve (or fail to stop) a lawful execution, every time we vote to reduce (or fail to demand) social services for the poor, and every time we purchase a steak dinner, a personal computer or a new SUV at prices that would feed a hundred starving strangers for a week, a month or a year. More generally, it should be obvious to everyone that the war zones, refugee camps, prisons, shantytowns, sweatshops, orphanages, bordellos, nursing homes and emergency rooms of the world are filled to overflowing with tattered and damaged people for whom such allowances have been made. Considered from their point of view, every conventional theory of law and justice – however wise, good and globally useful it may appear to those who are less unfortunate – appears to be little more than an elaborate prolegomena to the infliction of pain.

The previous remarks are not meant to lay the foundation for some sort of self-righteous (and in my case deeply hypocritical) argument that buying fancy dinners, personal computers and new cars is detestable or immoral behaviour. To be honest, they are not even intended to assert what would be, in this context at least, an unbearably treacly and faux-saintly plea for a 'more compassionate' and 'socially just' world. If everyone in the developed world stopped buying fancy dinners, computers and cars, unemployment would explode, the suicide rate would increase, and a lot more children would cry themselves to sleep from having to hear their parents argue and fight about their ever-mounting debts. In short, experience teaches that the legal and political arrangements which human beings adopt always wind up hurting *someone*, no matter how 'just' they appear to those who are presently benefiting from them. Is this not the very definition of tragic sensibility: knowing that you're damned if you do and damned if you don't?

For those whose subjectivity is completely absorbed in the normalcy of the existing legal order, the tale of law's task is one of epic grandeur: a dignified and heroic quest for justice. As storytellers, these people partake in the same reality as the story they tell, and thus have a strong inclination to parrot the law's official hagiologies. Given the opportunity, they would gladly celebrate 'Law Day' every day. They think that the linguistic signs which express the norms of law and justice generally mean in advance exactly what they have received or interpreted them to mean. And if they hear enough legal sheep bleating back the opinion that legal norm X clearly means Y, these storytellers inevitably follow their herd instincts and go along.

When the time comes for these well-adjusted law-doers to apply their understandings – when they actually lay on the lash in the name of the law – they somehow manage to convince themselves that the ink stains spattered on the pages of law books are doing all the work, bearing all the responsibility. In other words, when they finally get around to *acting* in law's name, they choose to ride on the back of their own abstractions, like maharajahs on elephants. What is more, after the legal deed is done, these quintessential agents of law and justice find themselves able to go home, enjoy their suppers, play with their children, make love, and sleep

like babies. They can do all these things in good conscience because, in one way or another, they have inwardly celebrated the performance of their legal and moral duties with a lavation symbolising their personal innocence – just as Pontius Pilate is said to have done outwardly when he symbolically washed his hands of Jesus' blood (Matt. 27:24).

In contrast, only those whose subjective sense of life does not correspond to the norm – disillusioned outsiders or poorly adjusted insiders – can tell a truly tragic tale about the law's operations. Such people are not necessarily gloomy pessimists. Their willingness to confront honestly the tragic aspects of law and justice stems not from hopelessness but from an inner sense of struggle between what Marcuse (2007, 170) calls 'the delight of beauty and the horror of politics'. Politics, in the largest sense of the word, has produced countless horrors over the past hundred years, and only some of these horrors are widely known or remembered: from brutal wars to terrible famines; from US-sponsored assassinations of democratically elected leaders in Iran and Chile to state-sponsored murders of journalists who dare to report too many facts; from the Armenian genocide to Auschwitz and from Auschwitz to the genocides in Cambodia, Rwanda and Darfur; from the camps of the Gulag to the camps at Guantánamo and Abu Ghraib; and from the Tuskegee syphilis experiment to death by lethal injection.

Bertolt Brecht (1987, 330–31) wrote a didactic poem, entitled *A Bad Time for Poetry*, which somehow manages to capture perfectly the inner struggle between the beauty and the horror of life as it is lived under the conditions established by modern national and international politics. So long as one makes due allowance for the specific historical context in which it was written, the poem distils the essence of this struggle into five enduring lines. In translation they read:

> Inside me contend
> Delight at the apple tree in blossom
> And horror at the house-painter's [Hitler's] speeches.
> But only the second
> Drives me to my desk.

Although I, too, relish the delight of seeing an apple tree in bloom, this book is not about that or any other delight. *Zakhor* (Hebrew for 'remember') is the motto (or the curse) that forced this book's author to his desk. The disillusioned outsiders and poorly adjusted insiders mentioned above realise, at a level that is deeper than mere knowledge, that a billion tears fall and a million dreams are shattered in the matchless uniqueness of each and every moment. Along with Michael Löwy (2005, 34), they fear that '[s]o long as the sufferings of a single human being are forgotten there can be no deliverance'. If the average agent of the law thinks 'Thou shalt not kill' means *Thou shalt not take affirmative steps to murder*, then these unfortunates are nagged by the disquieting possibility that the commandment might actually mean, *Thou shalt cause the other to live* (cf. Levinas 1999, 127). They suspect that the faithful performance of their legal and moral duties never completely washes the blood off their hands, no matter how much praise they receive for it from the chorus of legal sheep surrounding them. In truth, such individuals feel more like Lady Macbeth after Duncan's murder: for them the smell of blood lingers still (*Macb.* A.5 S.1).

This book is written for discomfited souls such as these: people who have experienced (or are open to experiencing) a certain degree of ethical rupture between the rule of law as officially advertised in liberal societies and life as it is actually lived by our fellow human beings around the globe – not only within liberal societies but also within the impoverished illiberal societies upon which the West so heavily depends for cheap labour, products and raw material. To be sure, the malcontents to whom I refer have learned the most basic lesson of history: namely, eggs must always be broken to make the omelette of any plausible human society. But they also know that broken eggs can and do 'speak up', as Hannah Arendt (1994, 270) puts it, in voices they cannot refuse to hear. To individuals such as these I will be offering a perspective that is meant to be insurrectionary without being utopian. As for what, precisely, this troubled and troubling perspective sees, and whether it can or should demonstrate its 'usefulness', for the time being I can only throw myself on the reader's mercy by pleading my favourite two lines from *The Love Song of J. Alfred Prufrock*: 'Oh, do not ask, "What is it?"/Let us go and make our visit' (Eliot 1934, 11).

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Louis Wolcher (2006), 'The Tragic Foundations of Human Rights', *Wisconsin International Law Journal* 24, 523–56. Copyright by The Board of Regents of the University of Wisconsin System; reprinted by permission of the *Wisconsin International Law Journal*.

Louis Wolcher (2006), 'Universal Suffering and the Ultimate Task of Law', *Windsor Yearbook of Access to Justice* 24, 361–99.

Louis Wolcher (1999), 'Time's Language', published as '*Die Sprache der Zeit*', tr. Chris Hirte, *Lettre International* 47, 18–26.

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Chapter 1

A Summary of Themes

> A writer is like a rat who builds the maze from which he sets out to escape.
>
> Raymond Queneau (Polizotti 2007, 48)

If this book were called 'The Task of Plumbing', it would probably contain helpful advice on how to make objects such as sinks and toilets perform properly. And indeed, there are many important volumes on law and justice that treat legal institutions as objects or entities in this sense: their premise is that law's task is to make something called 'the law' or 'the practice of law' work better. Reprising the ancient antithesis between Plato and Aristotle, the idealist insists on the primacy of the idea of law over its implementation, while the realist insists on the primacy of the social practice of law over its idea. But at the end of the day, both approaches essentially conceive of legal institutions as useful appliances, like sinks and toilets. The present work does not conceive of law and justice in this way. Nor does it seek a definitive solution to the problem set forth in its title ('Law's Task') that could be rightly characterised as pragmatic or useful to some predetermined end. No theory (or recipe) for how to do law or achieve justice will be found in these pages.

In a world that tends to judge a project by its immediately verifiable practical utility, a philosophical journey such as this one always faces a peculiar difficulty: it is incapable of letting its readers know 'right away', so to speak, both the end to which it leads *and* the path of thinking that leads there. Hegel's denunciation of prefaces (1977, 1–3) famously illustrates this difficulty, as does Wittgenstein's warning to the audience at the outset of his 1929 'Lecture on Ethics' (1993, 37):

> [T]he hearer is incapable of seeing both the road he is led and the goal which it leads to. That is to say: he either thinks: 'I understand all he says, but what on earth is he driving at' or else he thinks 'I see what he's driving at, but how on earth is he going to get there'. All I can do is again ask you to be patient and hope that in the end you may see both the way and where it leads to.

If it is true that books which aspire to be genuine works of thinking can unfold their insights only if one is patient with them, then authors of such books would be wise to give their readers at least some perspicuous indication of the whole before asking them to be patient. I will therefore briefly summarise the basic structure of the book in this chapter, while asking the reader to keep in mind that the ideas mentioned below can be properly understood (and justified) only by their subsequent, unabbreviated development.

Broadly speaking, the present work attempts to think five distinct yet dialectically interconnected points, or themes: (1) the problem of philosophical method, or how best to think about law's task (Chapter 2); (2) the relationship between legalised

human suffering and the responsibilities of those who perform law's task (Chapter 3); (3) legal violence and legal meaning (Chapter 4) in relation to the outer limits of reason in legal interpretation (Chapter 5); (4) the connections between the ubiquitous practice of attempting to ground human behaviour in the 'contents' of legal and moral norms and certain widely accepted beliefs about the nature of time and temporality (Chapter 6); and (5) the irremissibly tragic nature of law and justice (Chapter 7). The foregoing list of general themes can be further shortened to five words: *thinking*, *suffering*, *meaning*, *time* and *tragedy*. Inasmuch as the book's meditations on law and justice attempt to think these five themes both individually and as a whole, the remainder of this chapter will provide a preliminary map of the territory (or maze) through which we will be travelling.

Thinking

Chapter 2 seeks to determine the most appropriate philosophical method for thinking about the book's guiding question – 'What is the ultimate task of law?' – and to elucidate the special meaning the question will have in the context of these investigations. Traditional legal theory tends to focus exclusively (if not obsessively) on two questions: 'What is law?' and 'Why is law?' Chapter 2 exposes the metaphysical limitations which surround these questions, as well as the related question, 'What should law be?' There is an important sense in which questions of the form 'What is X?', 'Why is X?' and 'What should X be?' are pre-philosophical, or at least pre-critical, whereas the distinctly phenomenological question 'How is X?' is the most fundamental philosophical inquiry of them all. 'How' comes first because we always have to be experiencing the world somehow or other before it ever occurs to us to ask about something's what, why, or should. Properly understood, what, why and should are how's children, not its siblings. Thus, I will claim that to acquire a genuinely critical understanding of human law-doing one must first ask not what or why law is, but *how* law's task is performed.

The question 'How?' brackets or transcends the formal distinction between a state of normalcy and a state of exception in the law. Agamben (2005, 4), following Carl Schmitt (1985, 5), defines a state of exception as a special kind of law that suspends the legal order itself in response to a so-called 'national emergency'. Hitler's 1932 'Decree for the Protection of the People and the State', which suspended the articles of the Weimar Constitution concerning personal liberties, was one such state of exception, as was the 'military order' issued by President George W. Bush on 13 November 2001, which authorised indefinite detention and trial by military commission of certain non-citizens suspected of involvement in terrorist activities (see Agamben 2005, 2–3). These examples illustrate a legal phenomenon that has become increasingly common in today's world, even (or especially) in so-called democratic societies: the attempt to create a law that would negate the very rule of law itself – to use the law to define the law's own threshold

or limit. Like the ancient Paradox of the Liar,[1] the words which express the state of exception attempt to say, paradoxically: 'I am the law, and I say there is no law.'

This book's investigations into law's task are not confined to the sphere of decisions which claim that they are *based* on pre-established law, for there is something ineluctably law-like about any human attempt to inscribe limits to the law, whether the one who draws the line stands within the legal order or outside of it. This is most obvious, of course, when a judge rejects a legal claim on the ground that the person against whom it is asserted enjoys a legally guaranteed 'liberty' interest. Here it is none other than the judge's decision on the legal norm *qua* 'law' (e.g. the Bill of Rights) which establishes that private power is allowed to exert itself in ways that are unmediated by public power. From the point of view of the judiciary, there can never be what Hans Kelsen (1992, 84) calls a 'genuine gap' in the law, since judges must always legally dispose of the cases before them *somehow*, no matter how frivolous or difficult the underlying claims may be.[2] In all judicial cases where a legal norm is held 'not to apply' to a particular situation, it is the judge's decision on the law itself which gives rise to the 'negative norm' (Kelsen 1992, 85) that the defendant is free to do or forbear from doing.

What is true in the case of the ordinary juridical decision between right and no-right on the basis of the law is also true in the case of the extraordinary sovereign decision to suspend the law on the basis of necessity. The sentiment expressed in the venerable saying *necissitas non habet legem* ('necessity has no law') may distally trigger a sovereign decision on the exception, but the decision itself is quintessentially legal: it establishes the law that there is no law. 'What opposes unites', says Heraclitus (1985, 15), and in this case he is right: although the decision that necessity requires a suspension of the law may have no law in its origin, it gives law in its result (cf. Agamben 2005, 27). Law-preserving power, law-making power and law-suspending power all pertain to law's task because those who wield these three forms of power all crave and seek the kind of popular legitimacy that only the words 'the law of the land' can bring, and because there is an essential nexus between human suffering and *any* sort of attempt to legally legitimate it. In short, the labour of announcing and applying a law against laws is no less a manifestation of law's task, as the concept is used here, than the labour of announcing a new law, or applying an existing one. A decision 'based on' the law uses law's authority the way an advancing warrior wears a shield on his back – to guard against the risk of friendly fire. A decision 'to make' or 'to suspend' the law uses law's authority the way an advancing warrior pushes his shield ahead of him – to overcome enemies. Either way, a shield is a shield.

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1 This famous paradox, attributed to the Greek philosopher Eubulides of Miletus (4th century BCE), can be expressed in many ways. Perhaps its most orthodox formulation is: 'Somebody says "I am lying"; is what he says true or false?'

2 Cf. Agamben (2005, 31): 'At least as early as Article 4 of the Napoleonic Code ("The judge who refuses to judge, on the pretence of silence, obscurity or insufficiency of the law, can be prosecuted on the charge of denial of justice"), in the majority of modern legal systems the judge is obligated to pronounce judgement even in the presence of a lacuna in the law.'

Thus, the judge who announces a decision is performing law's task, but so too is the dictator (or the president) who suspends the law by a decree intended to have the force of law. Pascal (1941, 103) gives an ironic clue as to why this is so: although it is right to obey what is just, he says, it is also necessary to obey what is strongest; but since human beings cannot seem to make what is just strong, they usually settle for making what is strong just. Unfortunately, history teaches us that all too often merely *calling* what is strongest 'just' is what counts as making it so. There seems to be a widespread human tendency to kneel and genuflect to existing legal arrangements, boundaries and limitations, whatever they may be and however much suffering they produce, so long as they provide the masses with a minimally acceptable level of stability, or 'law and order'. Given that most people tend to behave like sheep when it comes to confronting legalised power, no genuine critique of the law's relationship to universal human suffering can afford to ignore any of the many ways in which that relationship is manifested.

It follows that the thinking attempted in this book cannot dwell overmuch on 'what' law's limit is. Pursuing that problematic is no different in principle than what people do when they christen what is strong – or what they would like to become strong – with the word 'just'. Although it may be very useful politically, such a procedure leads to the construction of a theory of division – law versus non-law, justice versus injustice, or sovereign power versus non-sovereign power – that overlooks the tragedy of divid*ing* human suffering as such. In contrast to the foregoing problematic, this book attempts to bring to language what is going on (i.e. what shows itself in appearing) whenever real human beings (I call them law-doers) purport to act in law's name or with its support – whether they think they are following the law *or* creatively interpreting it, applying it *or* making exceptions to it, affirming it *or* suspending it.

Chapter 2 also introduces the familiar idea that all legal performances ultimately consist in a kind of inter-human violence that is legitimated by little more than the vagaries of history. Only history's winners get to make law, and whether it is good law or bad law is completely irrelevant to its painful origins in concrete historical struggles. As I indicated in the preface, the book also interprets legal performances as singular deeds concentrated in the time of the present – that is, they are actions that always take place, if at all, *right now*. This implies that law-doing is the inescapably present use of force (including the explicit or implicit threat of force) by certain individuals who invoke the authority of law against other individuals. Moreover, any reasons that law-doers may offer to justify their activities – whether they say they are seeking to enforce their legitimate rights, secure justice, practice domination for its own sake, or achieve any other goal – do not diminish, by even one iota, the painful nature of their methods.

Suffering

Chapter 3 brings out a simple but disquieting feature of all known institutions of law and justice: namely, the fact that they are intimately connected to the phenomenon of human suffering. On the one hand, law and justice, taken at their most fundamental

level, *divide* primordial human suffering, and moreover, they create still more suffering as the intended or unintended consequence of their very act of dividing it. On the other hand, it is also true that without the persistent suffering of human dissatisfaction with the given, there would be nothing for law and justice to divide. It follows that these institutions exist (and continue to exist) only because people long for a world that differs from the one in which they presently find themselves. For example: the typical plutocrat craves less taxes and more security for his wealth; while the typical torture victim craves less physical pain and more liberty for his body. To paraphrase the British historian Sir Lewis Namier, in both cases the suffering of people's craving desire for what they take to be a better world is the music to which legal and political ideas are a mere libretto.[3]

Since human suffering is both an origin and a consequence of the coercion that law perpetrates in the name of justice, it is imperative to think through the relationships that subsist between legal institutions and what I call 'universal human suffering'. The latter concept is quite literally *universal*: it includes each and every instance of human dissatisfaction with the given. Here one can find all of the misery that humans are heir to, in whatever form it takes and whoever experiences it. The thought of universal human suffering can be scandalous, because it appears to draw no distinction between the sufferings of the oppressed and the sufferings of their oppressors. To borrow one of Wittgenstein's metaphors (1993, 40), if there really were a 'Big Book' that recorded all of mankind's countless sufferings, then murders and other horrible outrages would stand on exactly the same level as any other event mentioned in the pages of this massive tome. Even though law and politics might later attempt to establish an essential difference between those who oppress and those who are oppressed, the class of universal suffering to which they both belong logically precedes its division into conventionally reassuring subcategories such as right and wrong, lawful and unlawful, and just and unjust.

To think otherwise is not to *think* at all, but rather to accept conventional legal and moral categories without being willing to trace them to their roots. While it may seem unpardonable to mention the sufferings of plutocrats and the sufferings of torture victims in the same sentence, merely noticing that both are instances of universal human suffering is not the same as arguing that they are morally equivalent. Please understand that this book does not advance an agenda that is meant to be 'anti-law', 'anti-justice' or 'anti-human rights'. It does not seek to prove that the various modes of suffering which are created and sustained by law and justice are somehow 'bad' or 'wrong', or that the rule of law produces no other effects that might be counted as 'good' from the standpoint of this or that credible value orientation. The point is not that the burdens inflicted by law are (or are not) outweighed by the benefits it creates. Strictly speaking, the questioning attempted in this book is prior to any pragmatic calculus of costs and benefits. I simply want to investigate – and bear witness to – the much-neglected fact that, whatever else may be said about law and justice, they just *are* intimately connected to the ceaseless historical production and reproduction of human suffering.

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3 Namier actually said that human emotions are the music to which political ideas are a mere libretto. See 'Tales from Arabia', *The Economist*, 24 June 2006, 11.

And why, pray tell, might one bear (or want to bear) witness to this connection? After all, reason in most of its traditional Western forms not only condemns 'immoral' acts that hurt other people – it also frowns upon any manifestation of 'excessive' concern and compassion for the suffering of others. Conventional reason acts on the basis of what Gary Younge (2007a, 12) has called the 'corrosive notion of the worthy victim'. This means that reason loves only the right amount of love for the right people – a tendency that is hardly conducive to approving of this book's apparently promiscuous ethical framework.

In *A Matter of Principle*, for example, the liberal legal philosopher Ronald Dworkin (1985, 83–7) draws a sharp distinction between 'bare harm' and 'moral harm', and suggests that only the latter need concern us as ethical beings. Bare harm, he says, is merely 'subjective', and occurs whenever a given deprivation causes a person pain or frustrates plans he deems important in life; but moral harm is 'an objective matter', whether or not bare harm occurs, since its status is vouchsafed by the existence of objectively valid moral norms and principles. To anyone who thinks about human suffering in this way, this book's concern for *all* of mankind's many woes must seem quixotic, at best, if not downright incomprehensible.

Nevertheless, there is an eerie (and troubling) resemblance between Dworkin's notion of 'bare harm' and Agamben's previously mentioned concept of 'bare life'. As I noted in the preface, those who fall under the latter concept are logical products of a state of exception: the law, which refuses to treat such beings as juridical persons, at most is willing to tolerate their merely biological existence. Thus, one might say that 'bare harm' is the most that could ever happen to someone who is possessed only of bare life. Like the ancient Roman figure of *homo sacer* on which its concept is based, bare life lies beyond the pale of what the powers-that-be are prepared to call the 'objective' law. In the form of the concentration camp inmate or terrorist detainee, for instance, the possessor of merely bare life experiences suffering that the legal order interprets as wholly 'subjective' and beyond its reach.

Moreover, even if conventional morality were to condemn the law for permitting or tolerating such a state of affairs, this would only happen if the suffering in question were seen to offend the objective moral order. The kind of reason that cares only for what is universally right or wrong regards *truly* bare, naked suffering – suffering that eludes the grasp of all 'objective' legal and moral norms – as being unworthy of notice. For a magisterial rationality such as this, the real victim of an objectively wrong action is always the 'injured universal' (the law itself) rather than this or that embodied human being (see Hegel 1967, 141). Among other things, this way of thinking is consistent with the thesis that an objectively right action produces no victims – and no 'moral harm' – that a reasonable person should care about.[4]

As if in direct response to the foregoing distinction between bare harm and moral harm, the phenomenologist Vladimir Jankélévitch (2005, 11) once remarked that values themselves are not 'capable of being wronged' – only human beings who suffer can be hurt. He is right: no one has ever seen a law book or a bible weep on account of

4 Cf. Chief Justice Taney's infamous remark, in *Dred Scott v. Sandford*, 60 U.S. 393, 407 (1856), that members of the 'negro African race … had no rights which the white man was bound to respect'.

the countless violations of its precepts that occur every moment of every day. Thus, in anticipation of traditional reason's putative disapproval of this book's concern for the phenomenon of universal human suffering, Chapter 3 will give a phenomenological description of a point of view, or attitude, that I call 'ethical distress'.

Ethical distress is akin to the Freudian psychological category of hysteria (see Žižek 1999, 248). It is first and foremost an ontological fact (an 'is') rather than some allegedly desirable state (an 'ought'): that is, either you experience it or you don't. On the one hand, ethical distress is similar to pity and compassion, inasmuch as all three ways of being are other-oriented, or 'altruistic'. But on the other hand, it is also different from pity and compassion in two important respects: first, ethical distress shows itself as a never-ending sorrow or burden (a constant comportment) rather than as the mere consequence of a particular ethical encounter; and second, it is closely linked to a profoundly tragic sensibility with respect to law and justice. Describing the phenomenon of ethical distress will thus orient the reader to a basic theme – 'the tragic circle of law, justice and human suffering', as the subtitle puts it – that in one way or another colours every word in this book.

Meaning

Chapter 4 attempts to clear away the cobwebs of misunderstanding which surround the important relationship between the linguistic signs that express the norms of law and justice and the juridical problem of determining 'legal meaning'. Here the so-called internal point of view of legal decision makers (e.g. judges) is taken very seriously, and the traditional view that there are or can be valid 'reasons' for legally correct actions, independently of their 'causes', is placed into its proper phenomenological context. This investigation of legal language and meaning will eventually have the effect of de-rationalising the process of enforcing the law – tearing it loose from its grounds – and placing the ethical burden of the resulting production of pain squarely where it belongs: namely, on the shoulders of those particular individuals who keep on choosing to 'do law', day after day and moment after moment.

Further to this end, the next chapter (5) identifies and describes a phenomenon I call 'reception'. This pre-rational phenomenon belongs to the spheres of norm-following and legal interpretation, and I will claim that it ultimately characterises each and every concrete experience of 'following the law'. The existence of reception exposes the internal point of view to the corrosive effects of history and contingency, even (or rather especially) in the context of the so-called 'easy case'. In a difficult legal case the decider's ethical responsibility is patent and therefore impossible to evade – a choice must be made, and only the decider can make it. Easy cases are far more dangerous, ethically speaking, since they do not appear to involve any choice on the part of decision makers, who need only follow their herd instincts to reach a result that everyone else will immediately recognise as 'legally correct'.

One might say that the difference between a difficult case and an easy case is analogous to the difference between an individual act of violence and mob violence. The former can hurt or kill people, to be sure, but the latter has the capacity to hurt and kill on a larger, more terrifying scale. An even more disturbing analogy touches

upon the human capacity for evil. The relation between a difficult case and an easy case is like the relation between Aristotle's belief (1137ª20–25) that only people with evil characters are capable of committing truly evil acts and Hannah Arendt's notion (1965) that even the most decent and ordinary people are capable of participating in 'the banality of evil'. For in undergoing the phenomenon of reception we are never really ourselves – we are *them*, and we do what *they* want.

Strictly speaking, the phenomenon of reception indicates that the idea of law (or of *a* law) as such is constantly vacillating between a state of presence and a state of absence or, as Agamben (2005) would put it, between a state of normalcy and a state of exception. This follows from Chapter 5's critical analysis of what Wittgenstein calls the 'magical view of language': the theory that legal norms have 'meanings' that are capable of grounding legally correct actions.

The logical form of the magical view of language is 'S' R ❒: that is, linguistic sign 'S' stands, and must stand, in logical relation R (e.g. 'containing' or 'referring') to some other entity ❒ that is called its 'meaning'. In one way or another, this view informs even the most sophisticated versions of traditional legal theory. I will attempt to show how adherence to the magical view leads to philosophical confusion and, more importantly, to ethical evasion. Elucidating the magical view of language will involve us in a discussion of the logical differences between propositions and norms, and between *seeing* ideas (*à la* Plato) and *inferring* grounds (*à la* H.L.A. Hart and Ronald Dworkin). This, in turn, will lead directly to an analysis of the limits of reason in legal interpretation, and hence to a confrontation with the nettlesome problem of human freedom and ethical responsibility in the moment of the decision as such.

Time

Chapter 6 brings the ideas of meaning, freedom, responsibility and suffering face to face with the all-important category (and problem) of time and temporality. I describe two competing ideal-typical conceptions of time in legal theory – 'linear time' and 'existential time' – and draw a strong analogy between the time(s) of law and the time(s) of religion. Whether in law or in religion, our abstract theories of time are products of our pitiable yearning for a stable 'time-place' within which to situate authoritative grounds for action – grounds that would relieve us of the burden of existential freedom in (and responsibility for) the social world that we keep on creating and recreating by our deeds.

On the one hand, Chapter 6 will describe the frustrating logical aporias to which the idea of linear time leads, primarily by means of a close reading of Kant's theories of pure and practical reason in relation to the faculty of imagination. But on the other hand, this chapter will also try to uncover the motivational poverty of the more radical and allegedly 'liberating' idea of existential time. Whatever else it may be, time *is* neither a line nor a horizon, and for far too long we have let these duelling metaphors of linear and existential time control the way we understand law and justice. In short, I wish to criticise the value of *both* conceptions of time for the project of thinking critically about the relations among law, justice and human suffering.

Tragedy

The foregoing investigations into temporality will lead directly to Chapter 7's use of Kafka's great parable of time, *Er* ('He'). The goal here is to dislodge the traditional view that time is an abstract horizon or milieu – a sort of container or series of containers within which events transpire. With the assistance of Hannah Arendt's reading of the parable, I will interpret time metaphorically not as a dimension or Kantian form of intuition, like space, but rather as a chaotic maelstrom of forces that are always presently contending with one another in a vortex formed by the human mind and body. To switch metaphors, those who perform law's task are like blindfolded butchers carving up a carcass, and the words 'law' and 'justice' are but labels slapped on the hunks of raw meat they keep on hewing from the social body.

Although Chapter 7 is entitled 'The Tragedy of Law and Justice', the theme of tragedy appears in many different guises throughout the book. Over and over again we will see that justice is congenitally dependent on law for its enactment and preservation. As Pascal (1941, 103) suggests, the idea of justice would amount to little more than an absurd pipe dream without the prospect of legal violence to support it:

> Justice without might is helpless; might without justice is tyrannical … Justice is subject to dispute; might is easily recognised and not disputed. So we cannot give might to justice, because might has gainsaid justice, and has declared that it is she herself who is just. And thus being unable to make what is just strong, we have made what is strong just.

Pascal's ironic *pensée* has aged quite well as a description of everyday opinion concerning the relationship between law and justice in most of today's fully developed liberal democracies. People may say they want justice, but they are usually willing to accept existing legal arrangements as the very embodiment of justice, at least up to a (very distant) point. Human beings are generally inclined to naturalise both the existing legal distribution of entitlements in society and the current way those entitlements are enforced.

This general human tendency to acquiesce in the self-evident rightness or inevitability of the powers that be, like sheep following a Judas goat, shows why those who challenge particular laws or legal regimes in the name of justice hardly ever attack the authority of law itself: even the most radical reformers and revolutionaries eventually want to appropriate a share of that very authority for their own ends. The age-old debate between the theories of natural law and legal positivism about whether morality is or should be a part of law presupposes that the coercive mechanisms of positive law are *worth* being part of. It follows that the institutions of law and justice are deeply (and worryingly) implicated in the suffering of anyone against whom law's coercive methods are brought to bear in the service of their lofty claims. What is more, whenever justice attempts to establish itself through the violence of law, it becomes co-responsible for producing the sorry situation of any innocent bystanders who may suffer as a consequence of law's operations.

In *Critique of Violence*, Walter Benjamin (1978, 298) criticises as 'ignominious' the doctrine of the sanctity of life, and offers the example of the just and revolutionary killing of the oppressor as proof. His vehement negation of the proposition that

mere bodily existence stands at a higher level than the possibility of a just existence for humankind allows us to glimpse a feature of the relationship between violence and suffering that is ordinarily overlooked. Benjamin's image of self-righteous slaughter is a reminder that even the just and necessary deserts of bad people – including especially people who are merely thought to be 'bad' – are engines of suffering for *someone*.

Take human rights. Some (even many) intellectuals have criticised standard Western conceptions of human rights – or at least the most stridently liberal of these conceptions – on account of the latter's instance that human rights are both globally universal and universally the possessions of individual subjects (see Bröstl and Pavčnik 2001). These criticisms provide an excellent frame of reference for thinking about the intimate relationship between law-doing and a truly universalised conception of human suffering. In particular, certain uncomfortable questions have arisen:

- Consider the insipidly named 'collateral damage' that always seems to accompany humanitarian military inventions such as those in Somalia and Kosovo: do justice and human rights in such cases always warrant and excuse the foreseeable death of innocents from errant bombs and bullets?
- Does the military, economic and juridical enforcement of human rights norms by powerful states purporting to wear the mantle of universal humanity betray a certain particularity of interest on account of that enforcement's obvious partiality and selectivity (e.g. Iraq, Afghanistan and Iran are attacked as bastions of repression, but Pakistan and Saudi Arabia are treated as valuable allies)? – In short, could it be that some forms of human rights enforcement are at bottom simply new labels on the old bottle of Western political, economic and cultural imperialism?
- Do universal rights norms reflecting the Enlightenment ethic of individualism sometimes inflict 'collective trauma' (Lambert 2008, 39) on real human beings by papering over fundamental conflicts between a hypostatised individual right of self-determination and longstanding local conditions that privilege social values over the will of the individual?
- Should the negative conception of rights contained in many human rights declarations (freedom *from* certain forms of state coercion) give way to a more positive conception of rights (freedom *to enjoy* certain economic, social, or cultural entitlements), given that implementing the latter rights might cause a decline in the social and material position of the relatively well off?
- Should the unprecedented threat of terrorism to the many in the post-9/11 era permit a certain relaxation of vigilance when it comes to protecting the human rights of the alleged terrorist few?
- Given that political and economic resources are limited, even in developed countries, why does the problem of protecting individual human rights devour so much of our intellectual energy, while so little of it goes to remedy the many other pressing problems of humanity, such as poverty, hunger, and disease?

The forgoing questions should not be interpreted as arguments against human rights, as if I secretly wanted to make the case for more torture and oppression in the world. Instead, merely to formulate these questions at all is to raise the suspicion that not every person of good will would automatically agree that the gains of universal human rights enforcement are always *completely* free from any offset on account of individual, social and cultural losses. Consider, for example, the tragic plight of children who are refused asylum and refugee status in the West (notwithstanding a well-founded fear of political or ethnic persecution in their own countries) because they were forced at an even younger age to become child soldiers in the service of oppressive regimes (see Happold 2002). Does justice for these unfortunate former killers demand that they be given asylum, or does justice for their victims demand that they be deported to their home countries to face prosecution and/or persecution?

At the more mundane level of law's intra-national operations, what about the anguish and privation of those innocents who love or otherwise care about a person who is punished by law-doers, however deserving the latter's punishment may be according to the conventional criteria of law and justice? Where is the justice in the tears (and worse) of the parents, spouse, children and friends of those who are justly repressed or destroyed? The Kantian idea that punishment ought to be deserved (1996, 170–71) does not explain the justice of the collateral (but clearly foreseeable) punishment of blameless ones such as these. On the one hand, if law-doers invoke the social contract to justify this kind of suffering, then one begins to wonder whether the social contract is not capable of justifying just about *any* sacrifice that the state may demand in the service of the 'common good'. On the other hand, if law-doers attempt to naturalise innocent suffering of this type by analogising it to an unlucky stroke of lightning, then such a move would indeed make the Goddess of Justice sightless behind her blindfold, though not in the way that is usually thought. By naturalising what *she* in fact brings into being, the goddess perversely blinds herself to the unnatural consequences of her own actions.

Then there is the intractable problem of those unfortunates, caught in a web of circumstantial evidence, delay, defensive inadequacy, or prosecutorial excess, who fall unfairly under the wheels of a judicial system that is inevitably less than perfect. 'Mistakes will be made' and 'No legal system is perfect': thus do law-doers blinker their vision so as not to see law's costs. Convention seems to count the suffering of those who are unjustly (but irremediably) imprisoned or executed, together with the previously-noted suffering of innocents who care about those who are justly condemned, as mere instances (yet again) of unavoidable collateral damage in the war that justice wages on injustice.

Figure 1.1 is meant to distil the foregoing points and examples into a set of perspicuous conceptual relationships. The sum total of all human suffering presently being experienced in the world is depicted as a universal set in this diagram. Its five numbered subsets represent virtually every relation between law-doing and suffering that will be discussed in this book. Please keep in mind that the diagram is supposed to demonstrate conceptual relations only: that is, the relative physical sizes of the subsets shown in the drawing are not intended to reflect the relative 'magnitudes' (if that is the right word) of their empirical contents.

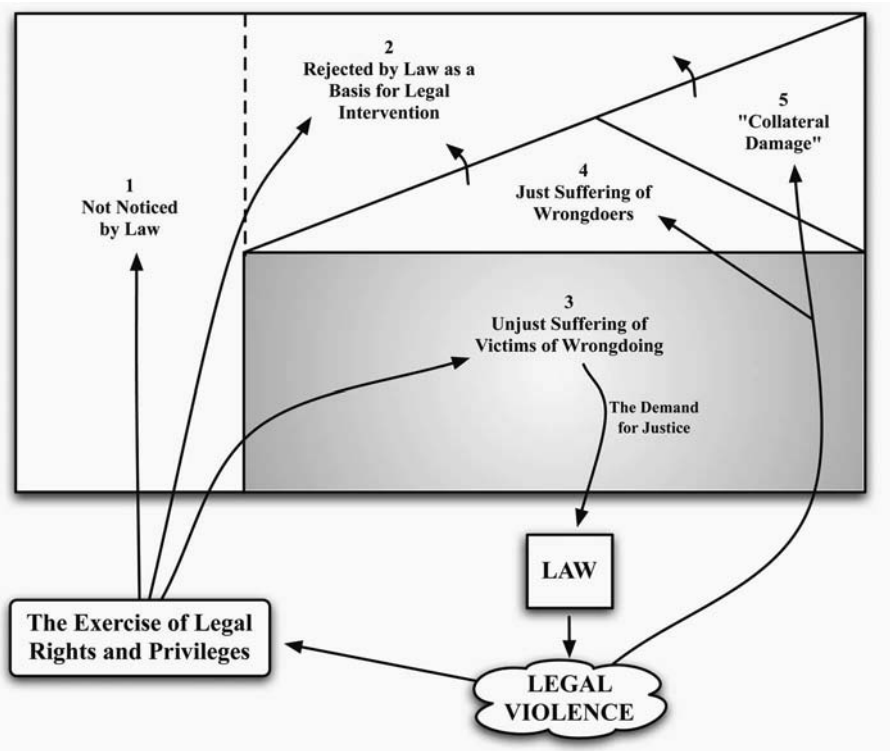

Figure 1.1 Law's division of universal human suffering

In reading Figure 1.1, it is easiest to begin at the bottom with 'legal violence' (i.e. legal coercion and the threat of coercion) as it comes to the aid of those who have convinced the agents of law and justice that they are victims of wrongdoing (category 3). Category 3 is shaded to indicate that it is conventionally taken to be the primary reason for law's existence (as in 'law exists to protect people's rights'), although in fact it is but one moment in a cyclical movement that connects legal violence to all five modes of universal suffering. The sufferings of victims of wrongdoing are continuously replenished by the everyday exercise of legal rights and privileges, represented by the arrow flowing into category 3 from the small box in the lower left portion of the diagram. This is because one cannot successfully complain about *legal* wrongdoing unless one is found to be a proper rights-holder to whom others owe legal duties. Thus, a juridical right sets up expectations the non-fulfilment of which is interpreted as a juridical wrong. The victims of this sort of wrong tend to experience their sufferings as 'unjust', and this leads them to make demands on the law for corrective (and coercive) justice.

In applying force (represented by the upward-pointing bifurcated arrow on the right side of the drawing) to prevent or remedy unjust suffering caused by legal wrongdoing, the law most obviously inflicts pain on the wrongdoers themselves (category 4). But in punishing these transgressors, legal actors also create, rather less

obviously, what military officers are wont to call 'collateral damage' (category 5). This category includes the sufferings of otherwise innocent people who are adversely affected by the just application of legal force to wrongdoers: bystanders injured by a police officer's 'lawful shoot', the grieving parents, spouse and children of a death row inmate, the disappointed old friends of someone whom prison has turned into a cranky depressive or a moral monster, and so forth. And precisely because legal violence stands ready to enforce the rights of the victims of wrongdoing in this way, it creates the conditions (i.e. the 'entitlements') that are necessary for the everyday exercise of legal rights and privileges (signified by the left-pointing arrow). Here, for example, can be found the so-called 'free market' as it has been pre-structured by this or that set of legal rights, privileges and duties and their various modes of enforcement.

In the course of exercising legal rights and privileges (signified by the leftmost two upward pointing arrows), private and public law-doers can and do create two additional forms of suffering: the kind that the formal agents of law do not even notice (category 1), and the kind that legal agents notice but nonetheless reject as a basis for intervening (category 2). The line separating the latter two categories is broken to indicate that there exists a certain degree of porosity between them: assuming they can find a lawyer who is willing to represent them, people who feel injured by the 'legitimate' exercise of legal rights and privileges by others can always *ask* the law to help them. In that event legal agents *must* perforce take notice of their plight, even if only to reject their claims as 'frivolous'. Finally, the two short arrows flowing from categories 4 and 5 into categories 2 and 1 indicate the obvious point that neither lawfully punished wrongdoers nor those who are 'collaterally damaged' by valid legal operations can make any viable claim on the law: either law-doers will overlook their suffering altogether, or else they will reject it as a basis for legal remediation.

It is possible (and instructive) to call all of those human beings who keep on suffering without remedy or attention outside of category 3 *victims of legal right-doing*. These 'victims' include not just convicted prisoners, losing defendants in lawsuits, and their families, but also many of the individuals mentioned in the preface: the Third World's poor who sell their body parts in the medical tourism trade, the wannabe prison inmates Timothy Bowers and Victor Lopez, the burnt-out former homeowners in Los Angeles who could not afford to purchase the services of a private fire company, and so on. In sum, there is an important sense in which the temple of justice is like a saloon: there really is no such thing as a free lunch for those who seek to quench their thirst for justice at the bar of the law.

Law-doers not only divide the category of universal suffering into parts, they also attempt to publicly legitimate the resulting distribution of pain and gain. Moreover, while they are performing this task, law-doers have an understandable (but regrettable) tendency to ignore the phenomenon of universal human suffering, and to revel (or at least acquiesce) in the legal and moral rightness of the abstract linguistic norms on which they fancy their actions are based. In other words, most of them come to believe in their own rhetoric – a result that both natural law theory and legal positivism encourage. These two hegemons of mainstream (analytic) philosophy of law seem to care more about 'laws' – in the sense of the linguistic

signs which express abstract legal norms – than they do about real, concrete human actions and reactions. Thus, the theory of natural law dwells obsessively on the question whether purported legal norm X is just or unjust under moral criterion Y, while legal positivism primarily wants to know whether X has the right origin or pedigree under historical criterion Z. Although they are competitors in most other respects, both theories nonetheless share the minimum ethical premise that if legal norm X passes muster under *both* Y *and* Z, then legal agents can and should perform X-type actions without any further sense of personal responsibility.

I will claim that this way of thinking about law and justice is bad faith, in the Sartrean sense of a lie that one tells oneself in a vain attempt to escape the psychological and emotional burden of feeling responsible for *all* the consequences of one's present actions. For good and just suffering, no less than bad and unjust suffering, is never the work of the ink-stained pages on which legal and moral norms or criteria are inscribed (e.g. 'X', 'Y' and 'Z'). Words are but image wands: they belong to the night, where they can readily conjure up phantasms and ghosts, dreams and nightmares. But legalised suffering of any kind is no image; and it is always inflicted (or tolerated) by particular human beings as they perform the labour of law under the hot glare of the noonday sun.

Since the ultimate task of real, flesh-and-blood law-doers is to divide universal human suffering into parts, I wonder what would happen if they all approached the performance of their task with a heart (and a face) full of anxiety and sorrow? Like the ancient Greek mask of tragedy, such a demeanour would signify to law-doers and to others that they are acting in a tragedy. Precisely because it is necessary for justice to be done, it is also tragic when it *is* done, for one person's justice almost always leads to someone else's subjugation and pain. The word 'tragedy' is related to the Greek verb *trōgein*, meaning to gnaw. Perhaps the glorious work of doing justice should begin to gnaw at our consciences a bit more, much as the eagle Ethon continuously gnaws at Prometheus's liver as his punishment for having defied the gods and brought the gift of fire to humanity. For even assuming Plato is right that the sense of justice is God's gift to human beings who otherwise would have torn one another apart (see *Protagoras* 322*c*1–4), it is also true that this gift has a distressing price that must always be paid by someone, and that should always be acknowledged, in respectful sorrow, by anyone who stands to benefit from it.

There is a sense in which the official mantras 'He received his just deserts' and 'Her suffering was regrettable but necessary' debase our language, our hearts and our humanity. To paraphrase George Orwell's great essay, *Politics and the English Language* (1954, 172), ready-made phrases such as these tend to construct our sentences for us, think our thoughts for us, and permit us to conceal the meaning of our words, even from ourselves. Indeed, this kind of concealment may be one of law's most important, if darkest, tasks. It seems to me that what we owe to the human beings who continue to swell history's seemingly endless list of losers and also-rans is not so much to retrieve our lost memories of their sufferings. We owe them much more: namely, to affirmatively transgress those eminently 'reasonable' official doctrines which forbid us from forming such memories in the first place. In any case, this conclusion, despite the bluntness of its expression, should suffice to indicate the general direction in which the present investigations are headed.

Chapter 2

The Guiding Question

> For questioning is the piety of thought.
>
> Martin Heidegger, *The Question Concerning Technology* (1977, 35)

What is the ultimate task of law? This will be our guiding question. Although the language used to express the question seems straightforward enough, what it is trying to ask is far from self-evident. Thus, it behoves me to clarify at the outset both the particular journey of thought the question initiates and the special meaning it will receive in these pages. Only in this way can the present work obtain an initial orientation that is appropriate to its intended scope.

The verb 'is' in our question does not symbolise the kind of identity that one can find in a formal definition ($a = b$), such as John Austin's 'law is [i.e. equals] the command of the sovereign' (cf. 1998, 192). Nor is it a mere copula for binding a subject to a predicate (*S* is *P*), as in Hans Kelsen's 'law is [i.e. has the quality of being] coercive in nature' (cf. 1992, 26). In the present context, 'is' plays the role of an ontological signifier – it refers to the sheer *existence* of law's task – and the fact that it expresses the guiding question in the present tense is meant to carry a great deal of weight. These investigations conceive of law's task as a concrete and singular historical phenomenon that people are always performing right now, so to speak, each and every time they take steps to establish legality, enforce legal rights and duties, or exercise legal privileges.

Right now is when push comes to shove in the law. By this I mean that law always happens, if at all, in the incomparable uniqueness of some moment or other. But of course a moment is far too concentrated a portion of time to sustain any enduring distinction between a legal norm and its application, or, more generally, between an act which conserves something old and an act which founds something new. It is curious, but true: the general can encounter the particular, and the concept can encounter the object, only in the concrete now-ness of this or that *particular* moment. No other kind of temporal venue for this uncanny blending of incommensurables (idea and thing) is even conceivable. On the one hand, the time when law authorises or condemns is also the time when it arrives in and as a human deed; but on the other hand, no mere announcement of law's arrival could ever come soon enough to prevent its immediate departure into the past. By definition, that which is no longer here in any way (e.g. a law book, long since incinerated, that no one can remember even existed) is incapable of 'laying down the law' to someone who *is* here. In such an environment, it is not law's past which controls the present, but rather the way in which human beings presently remember and construct law's past. Thought from the standpoint of the moment – the inescapable ground of all human living and dying as such – it would seem that the law is what it does.

Hence, either law's task is performed within the compass of some human being's particular 'right now' or else it is not performed at all. For example: a judge who sentences a dope-sick crack addict to prison is performing law's task *right now*; lawyers who mud-wrestle for their greedy clients in a commercial lawsuit or a high-stakes corporate negotiation are performing law's task *right now*; a government bureaucrat who ponders whether to grant or deny welfare benefits to a homeless person is performing law's task *right now*; and a border agent who arrests a destitute foreign job-seeker trying to enter the country without a visa is performing law's task *right now*. Looked at close-up – that is, from a relentlessly 'now'-ish point of view – the human beings touched by law's operations seem to be little more than bubbling cauldrons of desire. And the place where law's task is performed seems less like a cool and pillared temple of justice than it does a small and frail barque (to borrow Schopenhauer's image)[1] continuously being tossed hither and thither on a vast ocean of discontent.

The Nature of Guiding Questions in General: 'What?', 'Why?' and 'How?'

A guiding question inquires into the manner of existence of a particular being or phenomenon – in this case the phenomenon called 'law'.[2] In most situations, the point of asking a question is to get an answer that will be useful for accomplishing some previously posited end. But if a question is philosophically motivated, as this one is, it should never be received as a mere technical challenge to be settled once and for all – that is, in such a way that one no longer has to experience what the question asks as a problem. Our guiding question is posed not to reason in the narrow Enlightenment sense of the capacity to engage in strictly logical and calculative thinking (*Verstand*), but to reason in the larger Kantian and Hegelian sense of the faculty of critical and reflective thought (*Vernunft*).[3] Thus, the question of law's ultimate task attempts to catch sight of something that remains (and should remain) perennially worthy of thought, in and of itself.

The word 'law' in our guiding question does not refer to some sort of pragmatic instrument for the difficult work of wise governance, or for the equally difficult work of securing and protecting universal respect for fundamental rights. The answer to the question of law's task is definitely *not* that it serves to pacify the *bellum omne*

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1 Cf. Schopenhauer (1969, i. 352–3): 'Just as the boatman sits in his small boat, trusting his frail craft in a stormy sea that is boundless in every direction, rising and falling with the howling, mountainous waves, so in the midst of a world full of suffering and misery the individual man calmly sits, supported by and trusting the *principium individuationis*, or the way in which the individual knows things as phenomenon.'

2 The term 'guiding question' (*Leitfrage*) is Heidegger's. He distinguishes (1991a, i. 4) between a 'guiding question', which asks about the what-being and that-being of particular beings (or beings as a whole), and a 'basic question' (*Grundfrage*), which inquires into the truth of being itself. Since I have already spilled enough ink trying to understand and criticise Heidegger's famous 'ontological difference', I will say no more about it here (see Wolcher 2005, 65–120).

3 The distinction between the German philosophical terms *Verstand* and *Vernunft* is ultimately Kantian. The word *Verstand* is conventionally (and somewhat misleadingly) translated as 'understanding', and the word *Vernunft* as 'reason'.

contra omnes that would exist without it; or that it determines and enforces valuable rights and duties; or that it establishes public values by doing the will of the people's elected representatives; or that it creates and enforces the entitlements that enable markets to function and human potentialities to flourish. All of these answers respond to a different kind of question: the kind that wants to know what happens *after* or *before* law's task is performed. At best they list certain possible effects of, or *ex ante* justifications for, the labour of law's task; they do not inquire into the nature of that task considered as a phenomenon in its own right.

A phenomenon as such is not the same as its causes and effects. Nor is it equivalent to its purposes. Law's task *qua* phenomenon just is what *it* is, and not something else. Thus, any sufficient answer to this book's guiding question must refer to legal performances themselves – to what legal actors actually do, primordially and immediately, when they engage in law-work. And what law-doers do, if we do not take too distant a view of it, is connected intimately to the phenomenon of human suffering, and to the forces, both legal and non-legal, which modulate it.

Our customary ways of talking about the law make it very difficult to investigate this dimension of law's task. It has become almost a truism in philosophy that the way a question is formulated already begins to answer it.[4] The reason is logical: any meaningful question presupposes at least *some* preliminary understanding of its object. The question, 'What is the ultimate task of gzrynx?', is unanswerable, to be sure, but not because an entity called 'gzrynx' is extremely hard to know about. The question is unanswerable because no one has any idea – any *pre*-understanding – of what 'gzrynx' (a silly word I just made up) is meant to signify. Whenever we encounter a question that makes sense to us im-mediately (i.e. in a way that is literally 'not-mediated' by doubt), our pre-understandings may be, and usually are, non-theoretical and vague – indeed, they probably do not even rise to the level of conscious understandings at all. But at least they orient us to the kind of object that the question is interrogating and the region of being where an answer might be found.

This is hardly fresh news to philosophers. Plato, for one, explained the phenomenon of knowledge as the soul's recollection of what it already knows before ever taking a look at the world (see *Meno* 81*d*), whereas Kant (1998, 210–18) imputed our ability to know things to certain 'pure concepts of the understanding' that are pre-wired into the minds of all rational beings. These and other theories of transcendental epistemological universalism continue to appeal to certain kinds of legal thinkers – neo-Thomists, for example, who imagine that an eternal natural law is accessible to universal right reason (see *Summa Theologica*, II q. 93 a. 3). Nevertheless, most sophisticated legal theorists these days think of themselves as neo-historicists. That is, they have internalised, in one way or another, the Hegelian-Marxist idea that our pre-understandings of law and justice are products of social and historical circumstances rather than eternally valid features of human reason. Ever since Hegel (1977) inscribed the truth of historical change within the dialectic, most philosophers have realised, or at least suspected, that what ordinary understanding takes to be an immediately knowable *particular* being (e.g. our guiding question) is always already concretely mediated in us by its idea (i.e. the *general*) as that idea appears at a given stage of its historical development.

4 Cf. Marx (1964, 5): 'To formulate a question is to resolve it.'

Heidegger (Heidegger and Fink 1993, 17), for instance, famously characterised our relationship to these pre-understandings (*Vorgriffen*) as our being 'permanently set in motion and caught in the hermeneutical circle' – that is, in a dynamic and historically contingent circuit of intelligibility pre-connecting subject and object, question and answer, and knower and known. Wittgenstein (1953, 11e), in turn, spoke of this relationship in terms of 'language games' (*Sprachspiele*) embedded in a 'form of life' (*Lebensform*) that precedes and enables all particular uses of language. Yet another interpretation of the relationship between pre-understandings and language was provided by the radically polymorphic thinker Walter Benjamin, who distinguished between the mere object 'intended' by a word and the culturally specific 'mode of intention' that makes the word's employment come to life,[5] and who referred to the 'uncommunicable' that is silently symbolised (but not described) in every act of communication (1986, 331).

However, whether one's theory of knowledge is rooted in historicism or in transcendental universalism, and regardless of what metaphor one employs to characterise the relationship between language and our pre-understandings of it, this much is clear: only if we already grasp (somehow) what a question is *trying* to ask us, before any attempt to answer it, do we say that the question makes sense to us. This is good news, all things considered, because without the pre-assurance of a possible answer we could not even begin to question our world: we would not know where or how to start. But there is also some bad news to go along with the good. Since the very sense of a question is predetermined by the kind of answer we already imagine will satisfy it, this means that any given line of questioning is always at risk of becoming dangerously pedantic, narrow and one-sided. Thus, the awesome gift of understanding can easily become a kind of Trojan horse, tempting us to accept without question what is already officially certified as well known, and causing us to believe that there is nothing more to learn about it.

The law, in particular, is a notoriously reluctant witness: it confines its testimony to the questions that are asked of it, and volunteers no information beyond that. For a long time conventional legal theory has been preoccupied with two questions, which it keeps on asking over and over again: *What is law?* and *Why is law?* As it is usually understood in philosophy, the first question pertains to the criterion for identifying a given phenomenon *as* law; it seeks to establish law's essence, or quiddity, defined as that which all possible instances of law have in common – what law is 'in general' (see Heidegger 2002b, 1). The second question generally presupposes that the first one has already been answered and that we now know *what* law is. The question 'Why?' holds on tightly to a particular understanding of law's 'what' in order to uncover *something else*, something which stands logically beneath or temporally behind what law is in itself: either law's rational ground or its historical and social causes.

5 In his essay *The Task of the Translator*, Benjamin (1968, 74) gives a particularly enlightening example of the distinction between an intended object and its mode of intention: 'The words *Brot* and *pain* "intend" the same object [i.e. bread], but the modes of this intention are not the same. It is owing to these modes that the word *Brot* means something different to a German than the word *pain* to a Frenchman, that these words are not interchangeable for them, that, in fact, they strive to exclude each other.'

A thing's ground is to its causes as a gardener's goal of cultivating a pretty flower bed is to sunshine, water, fertiliser and seeds. Technically, the concept of law's *causes*, at least as it is ordinarily understood, corresponds to what Aristotle (see $194^{b}15–195^{a}5$) would have called its material and efficient causes: roughly speaking, the physical, historical, social and psychological events and conditions that have 'produced' or 'led to' law's contents and practices being what they are at any given point in time. On the other hand, the concept of law's *grounds* corresponds more or less to Aristotle's categories of formal cause and final cause: that which makes a legal performance what it is (its *eidos*, or form) and that for the sake of which it exists – its proper reason or purpose (*telos*). Although much more needs to be (and will be) said in later chapters about the various senses in which 'What?' and 'Why?' are asked and answered in traditional legal theory, for now it will suffice to formulate a third question that is rarely ever put into contact with the other two. Distilled to its essence, this question is: How is law?

The questions 'Why?' and 'How?' inquire into different spheres of knowledge. *Why* a phenomenon exists pertains to its antecedents or its grounds, but *how* it exists always co-determines our understanding of *what* it is. Those who concern themselves with uncovering the general laws of human behaviour and the useful explanations they afford investigate the causal why of a phenomenon; while the job of investigating a phenomenon's normative why traditionally falls to those who want to inquire into its legitimacy. Whenever these two 'whys' coalesce (which they often do), they lead to what the philosophy of science calls a 'functional' explanation. Intuitively operating on the basis of what Kant (2000, xvii) calls the 'purposiveness [*Zweckmässigkeit*] of nature', the functionalist endeavours to project the present effects of a phenomenon back into the past so that he can constitute those effects as the phenomenon's latently rational 'purpose'.

To give a simple illustration, consider the hypothetical (and extremely dubious) argument that giraffes are *meant to* and *should* have long necks just because they *do* in fact use them to reach leaves in tall trees. Indeed, even the philosophical concept of purposiveness itself can become part of a functionalistic account. Kant (xvii) himself accomplishes this sort of thing when he draws the conclusion that a principle of purposiveness *must* underlie and explain the general phenomenon of human judgement simply because people just *do* frequently interpret phenomena 'as if' they were intended to be what they are. This way of conceiving of the phenomenon of purposiveness lets Kant transform the mundane description of a common mode of behaviour into an antecedent 'principle' that explains why that behaviour exists.

In legal functionalism, cause and effect, is and ought, collapse into one another, creating a sort of Kiplingesque 'Just So' story in which the observed present effects of legal operations become law's intended and/or proper goals. One can detect this sort of thing in the commonly expressed opinion that 'the' purpose (whose purpose?) of law is to keep order, just because a given society is relatively stable and at the same time possesses a working legal system that produces well-ordered effects. A somewhat more sophisticated example is Lon Fuller's influential claim (1969, 122) that, since human beings do in fact use legal rules to guide and coordinate their behaviour, therefore law is (and should be) 'the enterprise of subjecting human conduct to the governance of rules'. Finally, consider Antonio Gramsci's theory of

'hegemony' (1971, 161), according to which the pacifying and stabilising effects of bourgeois institutions, including the rule of law, explain why those institutions are 'meant' to serve the long-term interests of the ruling economic class, even though they occasionally require the elite to make certain material sacrifices so the system can claim to be classless, impartial and even-handed.

Responding to teleological claims such as these, Nietzsche (1968, 268) once said, with unimpeachable logic, that 'a belief can be a condition of life and nonetheless be false'. Functionalists of all political stripes are inclined to disagree with him; their hunger for the psychological comfort of explanations leads them to confuse what is with what had to be and must continue to be. In the ways exhibited by the theories of Gramsci and Fuller, as well as in countless other ways, people who ask 'Why?' all too often transform is into ought, and their descriptions of a social practice into eternally valid prescriptions for (or indictments of) that practice.[6]

In contrast to the usual causal and normative ways of thinking, the delicate mission of ascertaining the unified how-and-what of a social practice requires painstaking ontological investigation, and culminates in a pure description rather than an explanation or a justification. I hasten to add that the words 'pure description' do not imply that the investigator claims to be an immaculate perceiver or an omniscient being (i.e. a totally value-free individual in some metaphysical or epistemological sense). Rather, they simply mean that the investigator has chosen to suspend, or place in 'brackets', any conscious value judgements about what he is investigating. Max Weber (1949, 1) defines a value judgement as a practical evaluation of the satisfactory or unsatisfactory character of a phenomenon that is subject to our influence. But of course, to suspend value judgements in this sense is not the same as being personally free of values, as Weber (7) himself points out in his classic discussion of the anarchistic law professor:

> One of our foremost jurists once explained, in discussing his opposition to the exclusion of socialists from university posts, that he too would not be willing to accept an 'anarchist' as a teacher of law since anarchists deny the validity of law in general – and he regarded his argument as conclusive. My own opinion is exactly the opposite. An anarchist can surely be a good legal scholar. And if he is such, then indeed the Archimedean point of his convictions, which is outside the conventions and presuppositions which are so self-evident to us, can equip him to perceive problems in the fundamental postulates of legal theory which escape those who take them for granted. Fundamental doubt is the father of knowledge.

A doubt that is fundamental in Weber's sense feels compelled to doubt what everyone else assumes is settled and well known. This is not (or not only) scepticism; rather, it manifests the 'wonder' (*thaumadzein*) that Socrates (*Theaetetus* 155*d*) said lies at the origin of all philosophy. Thus, the investigation and description of a phenomenon's 'how' is not the bringing to explicit expression of some pre-existing objective being –

6 Cf. Haskell (1987, 834): 'Because the Gramscian alchemy acknowledges the existence of pluralism and consensus, even as it transmutes them into proof of domination, it serves – paraphrasing what Erasmus Darwin said about the relation of Unitarianism to Christianity – as a feather pillow, perfect for catching falling Marxists.'

a stable 'what' – that everybody already recognises and understands. On the contrary, this enterprise is a matter of attempting to bring a new and hitherto unobserved truth into being – a matter of speaking this truth out loud so that a phenomenon's 'how' can dislodge, enlarge, complicate and enrich our comprehension of its 'what' (cf. Merleau-Ponty 1962, xx). That these different ways of making sense of the world sometimes find themselves in tension, or even at cross-purposes, is indicated by a trenchant remark of Wittgenstein's (1984, 40e): 'People who are constantly asking "why" are like tourists who stand in front of a building reading Baedeker and are so busy reading the history of its construction, etc., that they are prevented from *seeing* the building.'

The word 'how' comes from the Indo-European pronominal base **kwo-*, which is also the root of the Latin word *qualitas* (literally 'how-ness'). Cicero (1960, 24) actually invented '*qualitas*' to translate Plato's concept of *poion* (from *poiesis*, 'to create'), which Aristotle, in turn, had used to name that which changes and admits of degrees ('quality'), as opposed to that which is unchanging and absolute ('quantity' or 'substance') ($1^{b}25$–$11^{b}14$). The sense of 'How?' in the context of these investigations is roughly consistent with this etymology: it inquires into law's 'that-being' – what Spinoza (1955, 135) calls its *conatus essendi*, or tendency to persevere in time – rather than its 'what-being', or atemporal essence. To illustrate: it is one thing to describe the essence of fire (i.e. what makes a given phenomenon 'fire'), but something else to describe the phenomenon of fire as an ever-changing durational being which somehow manages to persist, as a quasi-unity, from the time it is kindled to the time it goes out.[7] To borrow a distinction from the medieval Scholastics, the what-being (*essentia*) of something is its determination as a present entity possessing such-and-such attributes, whereas its how-being (*existentia*) consists in its having a certain mode of existence – a manner or style of enduring, yet also changing, through time.

This book temporarily suspends the ubiquitous human inclination to interrogate law's whats, whys and wherefores. Its basic orientation to the problems it considers is therefore phenomenological. Formally speaking, it attempts what Edmund Husserl (1962, 99) calls the *epoché* (from the Greek *epokhê*, meaning 'stopping point'): it abstains from adopting a 'natural standpoint' on its themes. In the allegory of the cave, Plato (*Republic* 514*a*–517*e*) famously claimed that a thing's what-being (its *eidos* or *idéa*) and its temporal existence are fundamentally separate: only the former was he prepared to call *to on*, or that which is (i.e. an enduringly present being); the latter he dismissed as *me on*, or non-being. Plato thus raised 'what' to the mountaintop of the knowledge-worthy and threw 'how' down into the pit of irrelevancy. Despite countless modifications (and refutations) of this basic Platonic position – starting with Aristotle and continuing through Hegel, Nietzsche, Heidegger and beyond – traditional legal theory today remains utterly captivated by the question of law's quiddity: what law is and what it should be. In this book, however, we will attempt to (re)break Plato's ancient spell and interpret law's what and its how as opposite sides of the same coin, or different aspects of one and the same phenomenon: namely, the actual doing of law-work at the very moment of its doing.

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7 Cf. Heraclitus (1987, 25): '*Kosmos* [the (ordered?) world], the same for all, no god or man made, but it always was, is, and will be, an everliving fire, being kindled in measures and being put out in measures.'

The Special Meaning of 'Law' in the Guiding Question

We can now turn our attention from the general philosophical context of our guiding question to its particular meaning. Let us begin with the word 'law'. As it appears in the question, 'What is the ultimate task of law?', the word 'law' does not name some kind of authoritative *entity*, material or conceptual, such as Austin's command of the sovereign (1998, 102) or Hart's rule of recognition (1961, 92–3). Theories such as these conceive of legal language as an instrument of control (including self-control), rather than as a dynamic element in the always-singular temporal event of *controlling* as such. For them the rule of law is the law of rules. Theories which depict the law as a meaning-full entity are content to reflect the separation maintained in everyday language between command and obedience, or norm and application. More importantly, they portray the law as a puissant 'other' *vis-à-vis* the behaviours of the human beings who perform law's task: that is, as a formally and substantively distinct ground of those behaviours.

It is easiest to see this separation in what Ronald Dworkin (1986, 6–11) calls 'plain-fact' theories of law, which naïvely claim that the law consists exclusively in what legal institutions have 'actually' decided in the past. On this view, the application of law is a ministerial, if not mechanical, task: law-doers need only (*a*) ascertain the empirical facts about what has already been decided or commanded by those authorised to make law, and (*b*) follow what these facts 'say' the law is. This form of crude legal positivism interprets a disagreement about what the law requires as a disagreement about the facts, as if what law truly *is* (right now) is exactly what it always has been, and as if what law is and what it ought to be have absolutely nothing to do with one another (cf. Fuller 1958).

The main reason why the plain-fact thesis is theoretically naïve is not because (or just because) it presupposes erroneous metaphysical views about the nature of temporality and human normativity. As Dworkin (1986, 10) correctly observes, the plain-fact thesis fails primarily because it gives a descriptively inadequate account of *how*, phenomenally speaking, real law-doers actually go about performing law's task:

> The plain-fact view … is rejected in the accounts thoughtful working lawyers and judges give of their work. They may endorse the plain-fact picture as a piece of formal jurisprudence when asked in properly grave tones what law is. But in less guarded moments they tell a different and more romantic story. They say that law is instinct rather than explicit in doctrine, that it can be identified only by special techniques best described impressionistically, even mysteriously. They say that judging is an art not a science, that the good judge blends analogy, craft, political wisdom, and a sense of his role into an intuitive decision, that he 'sees' law better than he can explain it, so his written opinion, however carefully reasoned, never captures his full insight.

Let it be noticed that this passage reinforces, in its own limited way, the basic methodological point that it has been the purpose of this chapter to establish: law's 'what' and its 'how' cannot be properly understood in isolation from one another.

Curiously enough, though, the hard separation between a legal norm and its application is just as rigidly maintained even in more sophisticated accounts of law, such as those of Hart (1961) and Dworkin (1986). The former's theory is overtly

semantic: it holds that shared historical (factual) criteria about the use of the word 'law' supply law-doers with all they need to know about the law and its contents. The latter's theory is interpretive, and therefore covertly semantic: it adopts what it calls the 'internal point of view' of judges to describe law-doers as active participants in a process of creative interpretation. But in both cases the law that pertains to any given case – once it is *finally* ascertained or interpreted – is supposed to consist in what the law's verbal expression 'means'.

Although Hart's and Dworkin's arguments do come closer than the plain-fact thesis does to describing the phenomenological facts of the case, as a general matter overtly semantic and interpretative theories such as theirs are identical to the latter in one crucial respect. At the end of the day, after all is said that can be said about the law's meaning, all three theories interpret the expression of that 'meaning' itself (e.g. the linguistic sign 'X means Y') as an authoritative other *vis-à-vis* the law-doer regardless of how it was produced or who produced it. There are many different ways for people to kiss the lash and receive absolution from a reified image of law, including swearing obedience to texts written by others (e.g. Austin), swearing obedience to texts produced by a communal project of creative interpretation that includes one's own voice (e.g. Dworkin) and swearing obedience to texts that one has legislated for oneself (e.g. Kant). The concept of fidelity to law is ultimately the same in all three theories: after all relevant legal words are spoken, and just before the moment of legal coercion begins, law-doers must let themselves become the objects of their own objects.

This way of thinking models the relation between the law and law-doers as analogous to the relationship between ground and grounded (e.g. a premise and a conclusion) or cause and effect (e.g. an itch and a scratch). Of course, there is nothing inherently wrong with the law-as-entity model, which corresponds to the commonly held normative opinion that people (and especially judges) generally ought to 'follow' the law. Indeed, the potent image of a sharp dichotomy between norm and application, or law and law-doer – A versus B, with A 'leading to' B's actions – can be quite useful as a political stratagem. This is especially true if one's goal is to devise an ideology of social control through law which (*a*) reduces the idea of human freedom to the individual's theoretical opportunity to accept or reject a text that he believes, in good faith, expresses what the legal control mechanism ('the law') requires, and (*b*) reduces the idea of ethics to the individual's decision whether or not to obey what the mechanism seems to 'say'.

However, a different approach is needed if we are to understand what this book's guiding question is trying to ask. Once again: our question inquires into the phenomenological 'how' of the relationship between law-doing and human suffering. It follows that the word 'law' as used in the guiding question cannot refer to some*thing* that a law-doer finds in a law book or constructs by means of an interpretation, creative or otherwise. Common opinion obscures how the linguistic signs which express legal norms can appear to say (or mean) things to those who apply them. To believe and assert, in utmost good faith, that the meaning of legal norm X is Y is one thing; but to investigate how the phenomenon of meaning-recognition shows itself in experience is something else. Law-doing is simply not the same as the phenomenology (or the philosophy) of law-doing.

From a phenomenological perspective, no discrete law-thing – no crystallised 'other' of pure authoritative meaning standing apart from this or that material sign or mental image of it – can be found in experience at the very moment of legal judgement. David Hume was one of the first philosophers to give clear voice to this fundamental phenomenological fact. Referring to the analogous question of whether we have phenomenal grounds to believe that a well-defined 'self' exists, Hume (2007, 149) wrote: 'When I enter most intimately into what I call *myself*, I always stumble on some particular perception or other. – I can never catch *myself* at any time with a perception, and never can observe *anything but the perception.*' To be sure, ordinary language knows of such a thing as 'legal interpretation', and even a 'correct legal interpretation', and it is very important to clarify the grammar of these expressions by looking closely at what happens when they are applied. But as I will attempt to demonstrate in subsequent chapters (with Wittgenstein's assistance), the so-called 'meaning' of a legal norm always shows itself concretely in experience as just another symbol or image floating before the eyes or flitting through the mind of the law-doer.

Thus, for example, suppose it is true that everyone thinks legal norm X means Y. How does this truth show itself in the course of the concrete experience of performing a legal task? Although much more will have to be said about this question in later chapters, it is still possible to give the preliminary sketch of an answer here. What actually shows itself in experience is never more than a *symbol* or *image*: perhaps the symbol 'X means Y', or a mental image of this or that particular example of X-ness or Y-ness. The most that ever appears to the law-doer at the very moment of decision itself is what the early Wittgenstein (1974, 8) called a 'picture' (*Bild*). This picture cannot apply itself – it merely hangs on the wall of the mind, so to speak; nor does it come equipped with yet another picture standing behind it (e.g. its mysteriously autogenic 'meaning'). In one way or another, the law-doer simply 'receives' the inner perception of a symbol or image of the law in a manner that is immune, as a matter of phenomenological fact, to any further description and analysis.

There is a useful analogy here to the modern legal theory of the state of exception. As Agamben (2005, 26) notes, this theory attempts to include the sovereign decision on the exception within the juridical order by creating a paradoxical 'zone of indistinction' in which the fact justifying the suspension of the normal legal order (e.g. public necessity) somehow becomes a 'law' that eclipses the law.[8] In a similar

8 Most modern theories seek to include the state of exception within the juridical order itself by specifying by statute or in the constitution the circumstances under which legal rights may be suspended in cases of national emergency. For example, Article I, sec. 9, cl. 2 of the United States Constitution provides: 'The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.' Other theories (e.g. Carl Schmitt's) conceive of the state of exception as inherently political and extrajudicial, and thus as 'outside' the legal order. Agamben (2005, 23) asks a series of rhetorical questions which underscore the paradoxical nature of both theories:

> The simple topographical opposition (inside/outside) implicit in these theories seems insufficient to account for the phenomenon that it should explain. If the state of exception's characteristic property is a (total or partial) suspension of the juridical order, how can such a suspension still be contained within it? How can anomie be inscribed within the juridical

way, one could say that even the most garden variety instance of legal interpretation displays a phenomenal zone of indistinction between law and fact. This is because the law's verbal expression must *in fact* be received by the decision maker in some way or other in order for it to have any effect whatsoever. Once this concrete and historically contingent event of reception (a fact) establishes itself, it quickly metamorphoses into the law of the law, in the form of a new statement of what the law means or requires in this particular case. During this strange process of transubstantiation – this judicial Eucharist – the particular becomes the general, and a fact somehow becomes the law.

For present purposes, therefore, we should resist the temptation to think of the law as a discrete thing standing categorically apart from the activity of doing law. For us, 'law' will refer to the undivided unity of a concrete historical activity that is always being performed right now by particular law-doers in particular situations. This point of view is grounded in a phenomenological conception of time, and is more or less a reflection of Heidegger's notion of 'historicality' (*Geshichtlichkeit*). In Heideggerian terms, the word 'historical' (*historisch*) pertains to the mere study of past events, while 'historicality' refers to the existential condition of *Dasein* (literally 'being-there'), his word for the manner of being of a human being. According to Heidegger (1962, 372–3), *Dasein* is a 'futural' (*zukünftig*) being: it lives out its life *in the now* by continually projecting itself into the future on the basis of its past (426–34).

To similar effect, our guiding question is rooted in the fundamental discovery that primordial time – time as we actually experience it – consists in living our entire lives in a constantly renewed and ever-refreshed 'right now'. On this view, the conventional interpretation of time as a sort of string of beads – a succession of homogenous (or even heterogeneous) present moments that occupied the past, occupy the present, and will occupy the future – is exactly that: a mere interpretive image that is itself grounded in the experience of primordial time. Formally speaking, therefore, the word 'law' in the guiding question means a doing-in-the-now performed by flesh-and-blood human beings who presently invoke (or credibly threaten to invoke) state-sanctioned force of a type that conventional thinking would recognise, however vaguely and unthematically, to be a manifestation of the legal order.

It follows from the foregoing observations that this book will not be recommending or proposing a binding theory about which abstract entities are or are not entitled to bear the moniker 'law'. The rather loose definition of law as the immediate use of state-sanctioned force should not be read as advocating a position in the debate within legal positivism about the proper criterion of law-hood, or as taking a stand in the age-old controversy between positivism and natural law theory. This move is not an evasion, but rather an absolute necessity. Conventional theories of law take it for granted that once a given instance of human suffering is objectively justified by something called 'the law' there is no longer any need to be concerned with it.

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order? And if the state of exception is instead only a de facto situation, and is as such unrelated or contrary to law, how is it possible for the order to contain a lacuna precisely where the decisive situation is concerned? And what is the meaning of this lacuna?

On this view, traditional legal theory supposes that the transition between what law-doers take to be 'the law' and a particular legal performance is merely a question of getting it right, or perhaps of interpreting the law-thing, including its thing-like institutional history, in the 'best' possible light (see Dworkin 1986, 87). In short, most legal thinkers do not put into question the very problem that I am most eager to expose to critical inspection here: namely, what I have elsewhere (see Wolcher 2005, 121) called *the problem of the passage* – the phenomenon of universal human suffering at the very moment of its division by human law-doers.

Violence and Non-Violence

To think in a 'how'-ish manner about the problem of the passage requires a sustained investigation into the relationship between authoritative legal language (e.g. statutes and precedents) and what legal actors actually *do*, right now, to other human beings in the names of law and justice. As Agamben (2005, 37) has shown, the concept of the legal norm as such, viewed as a self-sufficient and independent entity, is a mere abstraction. It is possible to form such a concept only if the concrete praxis of the law, in its immediate reference to the real, is 'suspended' by someone who wishes to isolate the norm from the way in which law-doing always shows itself phenomenally: namely, as this or that unique and singular moment of the norm's application.

One of Agamben's principal interlocutors, the German legal philosopher Carl Schmitt (1985, 12), indirectly acknowledges this point in his book *Political Theology*. There Schmitt asserts what has to be the *sine qua non* of any plausible theory of the rule of law: in the normal juridical situation, he writes, 'the autonomous moment of the decision recedes to a minimum'. For present purposes, it will be sufficient to read Schmitt's statement in a Wittgensteinean manner as referring to the linguistic rather than the ontological sphere. That is, ordinary usage in the legal language game holds that judges are supposed to 'apply' authoritative legal norms rather than 'suspend' or 'annul' them.[9] But what recedes 'to a minimum' in the moment of a concrete decision on a norm (i.e. the autonomy of the judge's decision) is still in existence – it is still *alloyed* with the norm as a matter of fact. This means that the norm *qua* independent entity (e.g. 'idea') can be isolated and removed from the precise way in which it is embedded in legal praxis only if we overlook its real mode of appearance and engage in a subsequent (or prior) act of abstraction.

In short, authoritative legal language cannot be torn loose from the concrete context of its use without begging or obscuring the important question of *how* it is used. The radical implications of this simple phenomenological insight will not become fully apparent until Chapter 5, which consummates the book's investigation into the problem of legal meaning in relation to the limits of reason in legal interpretation. For now, though, it is important to understand another aspect of the

9 This interpretation becomes all the more compelling when it is recalled that Schmitt's remark on the 'normal situation' of a judicial decision is meant to frame a logical opposition to the decision on the exception, pursuant to which the legal norm is 'destroyed' (*vernichtet*) by the one who successfully takes it upon himself to suspend the law during an emergency (1985, 12).

analytical distinction between a legal norm and its application, one that Robert Cover's justly famous essay, *Violence and the Word*, manages to express with unusual clarity and vividness. Not only does '[l]egal interpretation take place on a field of pain and death', writes Cover (1986, 1601), but also '[n]either legal interpretation nor the violence it occasions may be properly understood apart from one another'. The negative index of the propriety to which Cover refers is the phenomenon of ethical self-deception. Those who insist on thinking of legal norms as idealised 'things' set apart from their relation to the real have a strong tendency to conceal from themselves the intimate relationship between legal language, on the one hand, and violence and human suffering, on the other.

As Jacques Derrida (2002, 233) reminds us, the very English word we use to describe what law-doers do to other people in the moment of performing their official duties alludes to the intimate connection between law and inter-human violence: judges and other legal agents, we say, 'en-*force*' the law. This way of speaking unwittingly makes a decisive etymological connection between what law-doers do and the Latin word *vīs* (meaning 'force'), from which the English word 'violence' is derived. Just as the best apple in the barrel is every bit as apple-ish as the worst, so too the best legal sanction in the world is still a kind of violence. Ask an executioner or a prisoner on death row, and they will tell you that the threat and application of legal force is a coercive phenomenon no matter how legitimate, right and just it may seem when considered from a more detached point of view.

The violence of capital punishment is obvious. Less obvious, but still asking to be noticed, are the many lesser forms of violence that are committed every day in the name of law and order. From the overt violence of an arrest to the covert violence of a 'No Trespassing' sign, the close connection between law and suffering is obscured whenever legal practices are described in politer terms. Perhaps this explains why Benjamin (1986, 285–6) took pains to show how the seemingly 'narrow' popular debate on the moral legitimacy of capital punishment actually puts *all* forms of legal violence into question:

> The opponents of these critics [of capital punishment] felt, perhaps without knowing why and probably involuntarily, that an attack on capital punishment assails, not legal measure, not laws, but law itself in its origin. For if violence, violence crowned by fate, is the origin of law, then it may be readily supposed that where the highest violence, that over life and death, occurs in the legal system, the origins of law jut manifestly and fearsomely into existence.

It may be conceded that a crackling electric chair and a police shootout look and feel more 'violent', in the everyday sense of that English word, than a judge's decree, a border fence, or a plutocrat's tough negotiating stance. But so what? We have known since the days of the Greeks that common opinion (*doxa*) is usually content to take what 'they' say about a thing for granted, and that anyone who insists on negotiating the hard path to knowledge and understanding (*epistēmē*) eventually comes to realise, with Heraclitus (1987, 71), that 'a thing's real constitution has a tendency to conceal itself'. In philosophy, as in ethical life, it is dangerous to let the everyday usage of a word set limits to what we can think.

Consider the case of H.L.A. Hart. In the course of criticising John Austin's 'sovereign command' theory of law, Hart (1958, 603) points out that the commands of Austin's sovereign, backed up only with the threat of force, seem little different in principle than the command given by the quintessential outlaw, 'Give me your money or your life'. Hart then asserts, quite plausibly, 'Law is surely not the gunman situation writ large, and legal order is surely not to be thus simply identified with compulsion'. And indeed, there is a limited but important sense in which he is correct. For the most part, people come to *acquiesce* in the legal order – to naturalise the everyday actions of its officials – whereas no one ever genuinely acquiesces in the gunman's command to pay up or die. In short, undoubtedly most people would *notice* and *categorise* the gunman's command, but not the law's, as an instance of violence. But most people are not every person. If Hart's socially conditioned 'rules of recognition' (1961, 92) allow individuals to identify the primary rules of legal obligation in their society, then this is analogous to the way that herd animals are able to recognise members of their own species. The gathering of the herd according to its own particular 'rule of recognition' may indeed allow some (or even most) of its members to survive and to breed, but at what cost, and to whom?

Despite the obvious socio-psychological distinction that Hart draws between the gunman's command and the ordinary, day-to-day operations of the legal order, there can be no categorical difference between the two cases unless the sole criterion for the concept of violence is held to be its visibility *as* 'violence' to the average person. Since such a criterion lets common opinion restrict thought's possibilities in advance, it surrenders all claim to being genuinely critical, and hence will not be adopted here. If we let convention define the meaning of violence for us, we will wind up unthinkingly apologising for the suffering that law and justice inflict and tolerate, rather than holding law, justice and convention to account for what they seem so eager to overlook: the phenomenon of *universal* human suffering. Thus, the main reason for characterising legal sanctions and the threat of them as instances of violence is to establish (or reinforce) the important psychological and ethical connection between the normal operation of the objective legal order and the subjective sensibilities of law-doers. To put the matter bluntly, I want law-doers to start herding together less and worrying (*as* individuals *about* individuals) more.

And why should they herd together less and worry more? Once again, Benjamin (1986, 288) furnishes us with the basis for a possible answer: 'When the consciousness of the latent presence of violence in a legal institution disappears, the institution falls into decay.' If we interpret 'decay' as ethical decay, or insensitivity to human suffering, then history proves Benjamin right. Once law-doers forget that their methods are ultimately based on force and what force has wrought (i.e. socially conditioned mass obedience), all too often they have been able to talk themselves and others into believing that their official decrees benefit everyone and harm no one. Ethically speaking, there is great danger in the use of concepts such as 'the people', 'society', and 'the nation', for they are mere abstractions and what they purport to name is incapable of feeling pain or shedding tears. Only individual human beings can bleed and weep. Rousseau's dangerous notion (1993, 194) of obedience to the 'general will' (*volonté générale*), according to which even recalcitrant individuals will ultimately benefit from being 'forced to be free', makes the legal order appear

wholly benign and costless in the long run. But individual sufferers are caught like flies on the flypaper of the moment, and they never actually *experience* 'the long run' – no one ever does. To paraphrase John Maynard Keynes, in the long run we are all dead. Ethically speaking, officials who follow Rousseau's line forfeit the right to claim that their decrees are worthy of the violence used to effectuate them and the human suffering to which they inevitably lead.

If we say, with Benjamin, that law is violent in both its origins and its methods, then what form of social ordering would we be prepared to call non-violent? This question is important, though not for the reason that might first suggest itself. A decision to recognise law's violent nature is not the same as a decision *against* legal violence (or even against the suffering it causes); someone who calls the law violent is not necessarily saying that it is evil and should be replaced everywhere by non-violent means of social ordering. The question of the antithesis between the use of violent and non-violent means in the sphere of social relations is significant not because violence is inherently bad, but because the word 'violence' loses all significance unless it is paired with *some* conception of non-violence. The hypothetical definition 'Non-violence is violence' is just as meaningless – and just as Orwellian – as the Newspeak slogan 'War is Peace' (Orwell 1950, 7).

To claim that everything human beings do is an instance of violence would leave one vulnerable to the counterclaim that the word 'violence' signifies nothing at all, since it admits of no exceptions. If every man is a king, as Louisiana's assassinated governor Huey Long once asserted, then no one is a king. In that event the linguistic sign 'king' would become a mere form of address, like 'Mr' or 'Hey you!' Thus, if the word 'violence' is to avoid suffering a similar fate, we need to give the concept of legal violence a clear logical antithesis. Not only that, the antithesis must be capable of transcending the traditional natural law argument that legal positivism tolerates norms and practices that are unjust by this or that formal criterion of justice (see Fuller 1958). This is because we are seeking not a criterion for identifying violence that is unjust, *à la* natural law, but rather a conception of non-violence that will allow us to interpret even the enforcement of *just* laws as a form of violence.

Whenever and wherever the law threatens or strikes, the duties it imposes, and the rights and privileges it recognises, stand starkly opposed to the sort of un-coerced, peaceable and completely anarchic cooperation that constitutes the only imaginable pure antithesis to inter-human violence in the resolution of disputes. For someone like Benjamin (1986, 289), the subjective preconditions of this form of cooperation include '[c]ourtesy, sympathy, peaceableness [and] trust'. For someone like Habermas (2003, 37), the ideal form of such cooperation is a speech situation in which 'all relevant voices, topics, and contributions' are respectfully considered. Then there is John Rawls (1971, 12), who imagines the existence of an 'original position of equality' behind 'a veil of ignorance' – a hypothetical forum, as it were, where people can fairly and non-violently agree to the terms of their subsequent social relationships. The views of many other political theorists might be mentioned here as well.

That the conditions of the possibility of achieving a truly non-violent mode of social ordering can be endlessly debated goes without saying. But it is important to remember that the 'how' of a phenomenon, considered in its own right, is not the same as the 'what' of its causes and conditions. Speaking from the standpoint of the

'how', there can be only one possible criterion for identifying the genuinely non-violent form of social cooperation we seek: it must remain completely unalloyed, *at all times*, with any public or private act of force or the threat of force. What this means is that each member of the group must be absolutely free, *de jure* and *de facto*, to walk away from the communal project at any time, without fear of penalty, whether now or in the future – indeed, without even the fear of suffering legally permissible social ostracism. Anything less stringent than this would reintroduce the possibility (and more importantly, the threat) that individuals could be coerced at *some* point in time, for experience shows that people often change their minds about what they want to do with their lives in the finite amount of time that remains to them.[10]

To borrow from the terminology of rational choice theory, in any hypothetical social situation modelled as being *completely* non-violent the 'transactions costs' of faithlessness would have to be zero.[11] No one would behave strategically or hold any grudges towards others in this society, for otherwise the threat of defection would evoke the counter-threat of future non-cooperation ('tit-for-tat'), and this would re-introduce the prospect of coercion into the situation. Defection and any harm it may cause to others would have to be immediately forgiven by all in a forgiveness that knows no table of exchange, and that lacks any sense of 'because', as Vladimir Jankélévitch (2005, 130) puts it. In such a world, unqualified mercy and forgiveness would follow each and every transgression in the way that Jesus said God sends down the rain: on the just and on the unjust alike (Matt. 5:45). To be sure, any organised attempt to enact this kind of cooperation as a political programme would be widely regarded as fancifully utopian and 'unrealistic' when compared to law and social custom, both of which rely on various forms of coercion to induce compliance with legal and social norms. But that observation is really beside the point. The purpose of constructing an ideal-type of *purely* non-violent social cooperation here is not to posit some sort of desirable or achievable political goal, but to provide the concept of legal violence with a clear logical antithesis.

The minimum implication of Proudhon's well-known statement (1994, 13), 'Property is theft', is that any legal assurance of 'mine' and 'yours', however beneficial it may be to certain individuals or even to society as a whole, already introduces the element of coercion into human relationships in the form of the state's readiness to use force to protect property rights. Indeed, the spectre of legal violence even haunts the formal embodiment of cooperation as a jurisprudential category, the so-called 'legal contract'. For one thing, the right to withhold one's property unless one's terms are agreed to is backed up by the threat of legal sanctions against anyone who would prefer to take what they need or want on other terms (or no terms). What is more, a *legal* contract, by definition, stealthily inserts a third party, the state, into the relationship

10 Among other things, this definition of non-violence shows why most social contract theories of law and justice (e.g. those of Hobbes, Locke, Rousseau and Rawls) are ultimately aimed at legitimating the use of legal violence against individuals whom they regard as 'irrational', rather than at criticising violence as such.

11 Cf. Benjamin (1986, 289), where the primitive conference, considered as an ancient technique of civil agreement, is portrayed as non-violent because there was originally 'no sanction for lying'.

between the contractors, each of whom reserves the ultimate right to resort to a coercive legal remedy should the other not perform. In sum, the threat of legal coercion is a shadow that falls on *every* human relationship that the law is capable of touching, however remote may be the chance of its consummation in any given situation.

Aside from the obvious violence of legal sanctions imposed against losing defendants in lawsuits, the previous considerations also suggest that it is possible to find an element of violence even in the law's decision to *withhold* sanctions. Seen from the standpoint of a universalised conception of human suffering, a policeman's decision to let company goons 'illegally' beat up strikers differs only in degree, not in kind, from a judge's 'legal' decision against enjoining an employer's attempt to break a union by locking out his workers. The one forthrightly allows private violence to hold sway; the other quietly maintains the threat of legal violence to protect the employer's property rights should his employees attempt to disrupt operations or resume work without his consent. If space were no constraint, countless other examples could be offered to show that there is a troubling kinship between the visible infliction of public violence by the state, in the form of a legal sanction, and the less visible but still potent permission for private coercion that the state gives whenever it chooses to withhold sanctions from those who claim the right to its protection. But of course, the theoretical roots of this kinship run deep in Western thought: from Hobbes's argument (1914, 66) that the threat of legal force is necessary for there to be property rights and a just commonwealth, to Marx's analysis (1986) of how the state's creation of liberal property rights and market relations enables, and even presupposes, human exploitation and suffering within a publicly created and maintained 'private' sphere.

From what has already been said about the theoretical opposition between violence and non-violence, it is possible to draw two important conclusions: (*a*) the difference between the law's readiness to enforce legal relations and the gunman's demand 'Give me your money or your life' is one of degree rather than of kind; and (*b*) the only sort of human cooperation that is entitled to be called *completely* non-violent is that which never once ceases to be voluntary and incoercible in principle, for everyone involved, from its inception to its conclusion. Contrary to John Rawls (1999, 26 n. 22), who on this point follows Hobbes (1914, 87), it is simply not true that the only imaginable theoretical alternative to legal violence is 'private violence for those with the wills and the means to exercise it'. This way of thinking naturalises inter-human violence, making it seem no different than a person's '"right" to move his body in the direction of a desired goal' (Benjamin 1986, 277). To say that the only alternative to state violence is private violence is to arbitrarily define the lesser of two evils as beyond criticism, if not 'good' and 'just'. It is to decide not to make suffering *as such* into a problem that is worthy of thought.

Admittedly, the definition of non-violence that has just been given is extremely narrow and demanding, and it would be both arbitrary and unwarranted if it were being recommended as a realistic goal for political action. But this book does not plead an anarchist's manifesto (cf. Sorel 1999), even if it is willing to appropriate an anarchistic conception of non-violence. The latter conception performs a completely different function here. Perhaps no one has expressed this function any better than Emmanuel Levinas (1996, 23):

> For me, the negative element, the element of violence in the State, in the hierarchy, appears even when the hierarchy functions perfectly, when everyone submits to universal ideas. There are cruelties which are terrible because they proceed from the necessity of a reasonable Order. There are, if you like, the tears that a civil servant cannot see: the tears of the Other.

This remarkable passage never ceases to amaze with the sheer profligacy of its ethical concern. It demonstrates that the ceaselessly non-violent form of social ordering imagined above does not *just* constitute a logical limit to the concept of violence. By emphasising the absolute freedom of the putative victim of violence to avoid its infliction at any time, the logical structure of the form of non-violence we are imagining also demonstrates that the adjectives 'violent' and 'non-violent' are not, strictly speaking, objective properties of the physical and psychological methods that some people use to gain the cooperation (willing or unwilling) of other people. Were it otherwise, Levinas's concession of the 'necessity of a reasonable Order' would negate his phenomenological conclusion (and proof) that it is still possible to experience certain hierarchies as cruel and terrible despite (or even precisely because of) their objective necessity.

Objectivist conceptions of the distinction between violence and non-violence dogmatically overlook the attitude of the particular human beings against whom a given means is used, and fail to recognise that the decision to regard a situation as violent or non-violent always requires a subjective judgement. More importantly, the ideal-typical conception of non-violence that we have constructed here will provide the concept of 'ethical distress', which is described in Chapter 3, with a firm logical foundation. It will help to show what it means to say that it is possible to feel ethically troubled at the prospect of using or threatening *any* form of coercion to overcome other people's resistance to one's desires, even if this is done in the name of just laws and just causes.

The Difference Between a Critique of Suffering and a Critique of Violence

Inter-human violence is epiphenomenal. It concerns us only because it is a cause of something else that concerns us as ethical beings: human suffering.[12] Violence as a means sometimes produces suffering as its end (e.g. the punishment of criminals), but it almost always produces suffering as one of its intended or unintended consequences. In other words, bad things can and do happen when official swords are drawn, even in regimes governed by the so-called 'rule of law'. The past can appear seamless and predictable in the chronicles of history: it is always possible to prove that hindsight is better than foresight by ignoring the terror of the unforeseen. However, the moving *faux* present of a historical figure whose past actions are recounted sequentially in the form of a historian's narrative should never be confused with the real present confronting us *right now*.

12 Cf. Benjamin (1986, 277): 'A cause, however effective, becomes violent, in the precise sense of the word, only when it bears on moral issues. The sphere of these issues is defined by the concepts of law and justice.'

The real present – the site of life as it *is being* lived – brims with what Alain Badiou (2003, 56) calls 'the surprise of the unexpected'. Anyone who acts in the *right now* (i.e. everyone who is alive insofar as they *are* alive) knows, or should know, that even the use of just and legitimate force can unleash consequences that are extraordinarily complex and hardly ever wholly benign. Mainstream legal theory seeks to ward off individual responsibility for these consequences in one of two ways: either by valorising the ends as 'just' (natural law theory) or by valorising the means as 'lawful' (legal positivism). As a result, the phenomenon of universal suffering – suffering as such, irrespective of its causes and conditions – remains largely invisible to the ones who valorise its infliction.

We will continue to correct for legal theory's congenital myopia towards universal suffering by noticing the purely formal (i.e. logical) validity of an argument that Walter Benjamin makes at the outset of his 1921 essay, *Critique of Violence* (1986, 277–300). In a nutshell, Benjamin claims that neither a system of just ends (natural law) nor a system of justified means (positive law) could ever provide a basis for criticising legal performances *as such*. As we have seen, for Benjamin the essence of law is *Gewalt*, a German term that denotes power, authority, dominion, might, force and violence, and that is often used to refer to official or authorised means of domination. Although most of these subtleties get lost when the word 'violence' is used to translate *Gewalt*, there is no single word in English that captures Benjamin's meaning any better. So I will restore at least some of the subtlety here by authorial fiat: henceforth 'violence' means the exercise, in the now-time, of domination by one person over another through coercion or the threat of coercion. Domination by means of illegal violence is what people sometimes call a 'crime' or a 'tort'; domination by means of legal violence is what they sometimes call 'justice' or 'the way things are'. Moreover, as was noted above, the word can even be stretched to include the implicit, subtle, and usually unintentional threats that always pre-frame human relationships whenever people confidently exercise rights and privileges that the legal system is prepared to back up with force in the event of resistance.

Benjamin's demonstration (1986, 277–9) of the critical inadequacy of the theories of positive law and natural law begins with the observation that these approaches to the problem of violence merely provide principles for distinguishing amongst cases in which violence is used: they oppose lawful (or just) violence to unlawful (or unjust) violence. But whenever a theory is concerned exclusively with dividing its field of inquiry into parts, it leaves itself without any resources to evaluate or criticise the whole. The attitude of Aquinas is typical: 'an unjust law … has the nature, not of law, but of violence', he writes (*Summa Theologica*, II q. 93 a. 3). This way of thinking suggests that the prudent enforcement of *just* laws is free of violence – as if a police truncheon were a bouquet of flowers and the official execution of a legal judgement were a tea party. Aquinas implies that it is not necessary to notice (or care to notice) any ethical problem with the use of legal force to pursue just ends. Since both positive law and natural law unquestioningly accept the legitimacy of at least some kinds of violence, it follows that they are constitutionally incapable of addressing the question (in Benjamin's words) of 'whether violence, as a principle, could be a moral means even to just ends' (1986, 277).

Natural law does not criticise the use of (measured) violence to achieve just ends, and positive law turns a blind eye to the use of (measured) violence aimed at enforcing commands or rules that satisfy one or more of its criteria for 'law', such as legitimate historical origin (Austin) or widespread social recognition (Hart). The word 'measured' is enclosed in parentheses to indicate the obvious point that both positive law and natural law have the means to criticise 'excessive' violence used to pursue valid legal or moral ends. There is such a field as the law of remedies, after all. And lest we unfairly conclude that legal positivism must be a moral monstrosity, it should be acknowledged that one of the main features of its thesis that law and morality belong to separate spheres (see Coleman and Leiter 1996, 241) is the claim that individual law-doers have a *personal* moral obligation to refuse obedience to unjust laws (see Raz 1984), or at least to the laws of unjust regimes (see Finnis 1984).

As important as these two clarifications are, however, they do not deflect the main thrust of Benjamin's argument. In sum, he rightly concludes that the theories of natural law and positive law are constitutionally incapable of thinking a truly *universalised* conception of violence. The ultimate proof of this is the fact that neither theory makes a problem out of the application of necessary and appropriate force aimed at attaining ends it considers both legally *and* morally valid. Either these theories do not see such legal operations *as* violence (*à la* Aquinas), or else they do not think that justly applied legal force is any more troubling, ethically speaking, than what we do to a mosquito when we swat it.

The notion that one might question the phenomenon of universal inter-human violence, and not just violence that this or that accepted social norm condemns as being unjust or illegal, is both stunning in its audacity and radical in its implications. Unfortunately, by the end of *Critique of Violence* the extraordinary breadth of Benjamin's initial vision narrows considerably. He eventually succumbs to the understandable temptation to avert his gaze from the sad spectacle of *universal* violence and *universal* human suffering.

Having exposed the terrible truth of universal historical violence by denying it any kind of rational (i.e. casuistical) justification, Benjamin cannot resist nurturing a desire for the appearance of a Messianic principle of division that would be beyond reproach – one that would usher in the golden age of a glorious justice-to-come. On the final page of his essay, Benjamin (1986, 300) finds himself celebrating the possibility of what he takes to be a 'pure' (*reiner*) kind of violence – 'divine violence' (*göttliche Gewalt*) – that would be capable of validly and definitively discriminating between the just and the unjust. Although it is ontologically pure, however, Benjamin recognises that the provenance of this violence will generally remain unknown and unknowable to human beings:

> If the rule of myth is broken occasionally in the present age, the coming age is not so unimaginably remote that an attack on law is altogether futile. But if the existence of violence outside the law, as pure immediate [divine] violence, is assured, this furnishes the proof that revolutionary violence, the highest manifestation of unalloyed violence by man, is possible, and by what means. Less probable and also less urgent for humankind, however, is to decide when unalloyed violence has been realized in particular cases. For only mythical violence, not divine, will be recognizable as such with certainty, unless it be in incomparable effects, because the expiatory power of violence is not visible to men.

The major premise of Benjamin's argument is quite simple to state: certainly an omniscient God (assuming that such a super-being exists) must know for sure whether our actions are right and just, even if we humans do not. This conditional supposition provides the slender reed on which Benjamin floats the weighty idea that human beings have an invisible warrant for the use of just (and in Benjamin's case this means revolutionary) violence.

Wittgenstein (1984, 34e) once said that nothing is as difficult as not deceiving oneself. As if illustrating this very point, Derrida has already demonstrated the considerable danger of self-deception (and worse) implied by the Benjaminian theory of divine violence. Near the end of his essay, Benjamin (1986, 294–7) distinguishes divine violence from 'mythical' (i.e. legal) violence by contrasting the biblical story of God's judgement on the company of Korah[13] with the Greek myth of Leto's punishment of Niobe.[14] The surprising (and frightening) mytheme of this contrast is the relation between these two forms of violence and the shedding of blood. Mythical violence is bloody, writes Benjamin, whereas divine violence is 'lethal without spilling blood' (297):

> Just as in all spheres God opposes myth, mythical violence is confronted by the divine. And the latter constitutes its antithesis in all respects. If mythical violence is lawmaking, divine violence is law-destroying; if the former sets boundaries, the latter boundlessly destroys them; if mythical violence brings at once guilt and retribution, divine power only expiates; if the former threatens, the latter strikes; if the former is bloody, the latter is lethal without spilling blood.

Derrida's reaction (2002, 298) to Benjamin's imagery in light of the Holocaust offers a devastating critique of the thesis of divine violence, even if Benjamin himself (who died in 1940) could not have anticipated it: 'When one thinks of the gas chambers and the cremation ovens, this allusion to an extermination that would be expiatory because bloodless must cause one to shudder. One is terrified at the idea of an interpretation that would make of the holocaust an expiation and an indecipherable signature of the just and violent anger of God.' In sum: if it is possible to argue that

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13 According to the Book of Numbers, God destroyed Korah, Dathan and Abriham, and their families, for having challenged Moses' leadership over the people of Israel; he did this by causing the earth to split open and swallow them whole. Then he consumed with fire the 250 other men who had followed Korah (Num. 16:31–5). Benjamin (1986, 297) has this to say about the 'divine' nature of God's violence in this story: 'It strikes privileged Levites, strikes them without warning, without threat, and does not stop short of annihilation. But in annihilating it also expiates, and a deep connection between the lack of bloodshed and the expiatory character of this violence is unmistakable.'

14 The goddess Leto punished Niobe for the arrogance of disparaging her and her two children, Apollo and Artemis. Leto sent the latter to slay Niobe's children with arrows, which they did (see Graves 1955, i. 258–9). Unlike God's punishment of the company of Korah, however, Leto left the offender (Niobe) herself physically untouched and thus able to experience a full measure of grief and remorse; this is what makes the tale an example of 'mythical' violence rather than 'divine' violence. Remarks Benjamin (1986, 294): 'True, it might appear that the action of Apollo and Artemis is only a punishment. But their violence establishes a law far more than it punishes for the infringement of one already existing.'

Auschwitz was just, as Benjamin's criteria seem to imply, then it is difficult to see how anything could ever be classified as categorically unjust.

It is tempting to think that the reason Benjamin went astray in *Critique of Violence* is because he injected 'irrational' theological concepts into the 'rational' spheres of law and justice. But it would be a grievous error to assume that secularists and atheists are immune to Benjamin's form of self-deception just because they eschew the prospect of religious revelation in favour of the sober calculations of reason. It was not his belief in the idea of *God*'s judgement that got Benjamin into trouble, but rather his belief in the general idea that there is (or must be) a secure *principle of division* – rational *or* irrational – that would somehow redeem or absolve human actors of individual responsibility for the historical suffering that they keep on perpetrating in the names of law and justice. As I will attempt to show more fully in Chapter 6, the general notion of an ethically significant principle of division that precedes action is the common thread linking faith and reason, both of which nurture what might be called 'high hopes'.

What faith and reason both hope for is not so much the arrival of a better future in and of itself, but rather the arrival of a better future the imagined existence of which will have redeemed the countless sufferings and deaths that must be inflicted to achieve it. The future anterior tense of the verb form 'will have redeemed' is critical here: it testifies to the anxiousness of a present being that knows it must painfully overcome others to reach its (or the law's) goals, and that looks for a sign that its upcoming actions in inflicting this pain will ultimately be ratified by *some* powerful authority (God or reason) as having been necessary and proper. Strictly speaking, effacing or negating this worry by means of 'hope' is not a condition of action as such. It is not even a condition of just action. At best it is the condition of feeling entitled to act with a clear conscience – that is, without having to feel personally responsible for the resulting 'just' suffering of others. Properly understood, the sentiment of hope is the enemy of nihilism not (or not only) because the latter openly despairs of a better future, and thus seems dangerously 'pessimistic', but because nihilism denies hope the right to wear an ethical carapace of right or righteousness as it blunders into the future over the bodies of history's losers.

In this one critical respect, reason and faith are identical. Beyond hoping and yearning for a 'better world', either here or in the hereafter, their common intellectual and emotional *problem* is to feel justified in doing what they believe they 'must' do in order to get there in the service of their master, be it reason or God. One might say that reason and faith both identify with the figure of Abraham as he is about to slay Isaac at God's (or the law's) command, rather than with the figure of Isaac as he is about to be slain (Gen. 22:9–10). This 'perpetrator perspective', so to speak – this obsession with being righteous or right – shows why a critique of violence as such can never become a genuine critique of suffering as such. The angel that eventually stays Abraham's homicidally upraised hand approvingly utters the Hebrew word *yare*, meaning fear or dread, to describe the latter's attitude towards God (Gen. 22:12). Like Abraham, those who merely pursue a critique of violence fear the consequences of being wrong – or, if you will, they 'absurdly believe' in the impossible rightness of their actions (see Kierkegaard 1995b, 33–4) – more than they grieve on account

of what they will have to do to others in order to be proven right. In this one respect at least, the desire for justice is a profoundly selfish emotion.

Thinking Beyond the Categories 'Hopeful' and 'Hopeless'

Nevertheless, since hope for a well-grounded justice-to-come is a very common human emotion, if not an anthropological need, I should forthrightly acknowledge it now so as to clearly distinguish Benjamin's kind of journey from the much stonier path that we are taking in this book. Our path can be far more difficult to travel, emotionally speaking. In contrast to Benjamin's argument for the existence of divine violence, the present work does not seek or offer the comfort of hope for some criterion that would distinguish the infliction of just suffering from the infliction of unjust suffering. This is not because its author believes that the yearning for justice (or, more generally, a 'meaningful existence') is unworthy or naïve. Kierkegaard (1995b, 21) thinks that life would be empty and comfortless without such a yearning, and I daresay most people probably would agree with him. But while the prospect of living in *utter* despair is certainly horrible to contemplate, it seems to me that the ethical consequences of not experiencing any despair at all are far worse.

If we are to count the possibility of achieving (or at least striving towards) justice on earth as a minimally fit object of human hope and yearning, then any credible idea of it presupposes a fundamental willingness to mistrust the methods that seem necessary or appropriate to enact it. Any other attitude lets reason fall prey to one of history's most pernicious illusions: namely, the ignoble conviction that the end always justifies the means – and the nobler the end, the greater the justification. To paraphrase Hannah Arendt's essay *The Eggs Speak Up* (1994, 270–84), this way of thinking and being conceives of its task as breaking eggs in order to make omelettes.[15] Yet there is always something dark (and vaguely suspicious) about the project of justifying egg-breaking, no matter how scrumptious the resulting omelette promises to be.

The general principle of mistrusting the proposed means for achieving an idealised social end should not be confused with conservatism, for the former principle is also deeply suspicious of the conservative project of striving to maintain the *status quo*. A healthy degree of mistrust requires unblinking critical inquiry into the rational project of enacting *any* form of justice-to-come, whether that project seeks to construct a Brave New World *or* maintain existing power relations. Particular human beings always live and die right here and right now – there appears to be nowhere and no-when else they could live and die.

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15 Bartlett (1980, 928) attributes the eggs/omelettes idea to an old French proverb: '*On ne saurait faire une omelette sans casser des oeufs* [You can't make an omelette without breaking eggs].' Gary Younge (2007, 10) notes the following early, and particularly revealing, political use of the expression during the age of empire and 'the white man's burden': '"You cannot have omelettes without breaking eggs", said former colonial secretary Joseph Chamberlain at a Royal Colonial Institute dinner in March 1897. "You cannot destroy the practices of barbarism, of slavery, of superstition, which for centuries have desolated the interior of Africa, without the use of force … Great is the task, great is the responsibility, but great is the honour."'

Thus, the concept of striving towards a justice-to-come does not, strictly speaking, concern what common opinion would call 'change', for there is a sense in which the present moment never changes – it just *is*. Instead, that concept can be defined as acting *right now* in the service of a goal or plan the perceived rightness of which veils the phenomenon of universal human suffering from the actor's view. If progressive utopianism blindly inflicts present suffering in order to make a better future, then reactionary conservatism blindly authorises present suffering in order to preserve the legacies of the past. One way or another, they are both oblivious to the full extent of human pain and anguish in the now. It follows that the principle of which I speak here – mistrusting the means – is neither progressive nor conservative. Rather, it despairs (but not utterly). It is a living mirror that reflects not the universe, as Leibniz (1934, 13) would have it, but the tragic aspects of our place in the universe.

A good example of this sort of tragic sensibility can be found in Levinas's remark (1998, 99) that 'the justification of the neighbour's pain is certainly the source of all immorality'. But one need not despair of justifications as much as Levinas did in order to recognise the disturbing truth contained in Hannah Arendt's historical observation (2006, 79) that '[p]ity, taken as the spring of virtue, has proved to possess a greater capacity for cruelty than cruelty itself'. A line that she cites from a petition written by the Paris Commune to the National Convention in the Spring of 1871 would be amusing if its context were not so tragic: '*Par pitié, par amour pur l'humanité, soyez inhumains!* [For pity's sake, and the love of humanity, you must be inhuman!]'.

By the same token, Georges Sorel's diagnosis of the moral sensibilities of Robespierre and his colleagues aptly illustrates how belief in the absolute justice of one's cause can lead, almost naturally, to the commission of terrible atrocities. The Committee on Public Safety was eager to let the high justice of the Revolution's ends ('*Liberté, égalité, fraternité, ou la Mort!*') justify the means. But step by step the resulting Reign of Terror replaced the dream with an ethical nightmare. Not only that, during the Terror, Sorel notes, 'the men who spilt the most blood were precisely those who had the strongest desire to let their equals enjoy the golden age of which they dreamt and who had the greatest sympathy for human misery' (Sorel 1999, 10).

Desire discriminates in dreams. Deeds then inscribe the mind's discriminations in flesh and blood. Hence, the category of *discrimination as such* is logically prior to the categories of ends and means: the mind must divide this from that before the body can give its distinctions any real consequences. By the same token, legal judgement (a congenitally verbose affair) is plainly not the *same* as the moment of remedial violence, even if the latter usually does follow the former like an explosion follows the act of lighting the fuse on a stick of dynamite. And while metaphors can be useful, both decency and reason require that we not conflate the merely metaphorical violence of purely mental discrimination with the very real violence that occurs when law-doers physically or psychologically coerce others. That said, however, it is equally imperative to notice that law-doers normally attempt to draw abstract distinctions before they draw the sword. It is therefore necessary to put the phenomenon of discrimination as such (and not *merely* violence) into question in its own right before we can even understand, let alone realistically hope for, any sort of justice that would be worthy of the name.

A phenomenology of mental discrimination in the context of legal judgement is not the same as a critique of practical reason in the Kantian sense. Unlike Kant's *Second Critique* (1996, 139), the present work does not seek to 'prove' the reality of pure practical reason and the transcendental freedom on which it is based. Nor does it try to establish the formal conditions which allow practical reason to determine the will, including the 'good will' that is the be-all and end-all of the Kantian conception of morality (Kant 1993, 154–5). Instead, this book's critique of mental discrimination will attempt to think in slow motion, decoupling words from deeds, and deciding from doing; it will also deconstruct the familiar distinction between a legal performance's rational grounds and its pre-rational causes. My goal is not to prove how legal and moral reasoning can (or should) lead to outcomes that allow one to unleash legal force and inflict human suffering with a good conscience. Rather, I want to (*a*) understand how the yearning for the comfort of a good conscience that is well-grounded in 'principles' of law and justice actually shows itself in experience, and (*b*) investigate how the feeling of being textually well-grounded can lead to the kind of everyday horrors that only those who act in 'good conscience' are capable of committing.

Arendt (2005, 102) has observed that in the act of judgement 'only the individual case is judged, not the standard [of judgement] itself or whether it is an appropriate measure of what it is used to measure'. For example, although carpenters often use tape measures in their work, they hardly ever feel the need to measure their tape measures with other tape measures. Read in context, Arendt's remark implies that people should judge less automatically, and should begin to think more critically about the standards of judgement that they use. But while this is undoubtedly good advice (though perhaps not in the field of carpentry), it does not inscribe the outer limits of ethical thought. With respect to the path of thinking that we are attempting to follow here, the concept of ethical sensibility is simply not exhausted by verifying the standards we use to judge other people. Ethical sensibility also includes the *problem* of the passage from judgement to violence, and from violence to suffering: it includes an awareness of the brute and tragic fact that other people can and do suffer at our hands, regardless of how necessarily or deservedly.

Since the agents of law and justice invariably cut what is immediately given to them into mutually antagonistic parts – right and wrong, just and unjust – the opportunity to contemplate the phenomenon of cutting itself is even more remote to them than is the opportunity to criticise the standard with which they do the cutting. Heidegger (2004b, 9) points out the reason for this: 'The peculiarity of factical life experience consists in the fact that "how I stand with regard to things", the manner of experiencing is *not* co-experienced … [Indeed], factical life experience manifests an *indifference* with regard to the manner of experiencing.' In short, when law-doers decide, they just decide – they usually do not also experience the event of deciding itself in the form of a problem that is worthy of thought.[16] In this book we are attempting to rectify this omission by making the moment of deciding as such into an explicit phenomenological theme.

16 There are, of course, certain rare but notable exceptions (see Hutcheson 1929; Kennedy 1986).

Looking at law from this point of view makes it possible to notice that what shows itself most immediately in the moment of doing law and justice is a kind of secular version of Jesus' parable of the shepherd dividing the sheep from the goats (Matt. 25:31–46). Just like the shepherd, law-doers separate the human beings who fall within their jurisdiction into two populations: the lawful and the unlawful, or the just and the unjust. The difference is that Jesus' metaphorical 'sheep' go to heaven and his 'goats' go to hell, whereas those who are condemned by the human agents of law and justice must sweat out their misery here on earth, along with everyone else.

Who is a Law-Doer?

Hobbes's famous statement, 'Soveraigne Power [is] not so hurtfull as the want of it' (1914, xxx), indirectly confirms the paradoxical nature of politics and law when seen from the standpoint of universal suffering. Apart from expressing his strong preference for organised government over anarchy, Hobbes's dictum concedes that both sovereign power *and* its absence belong to the order of what is hurtful – the order of that which causes human suffering. As we have seen, the paradox of the political is that it is enacted by and through the force of law as its principal method, and therefore that it both remedies and causes human suffering. As Austin Sarat (2001, 49) says, law is only a 'partially realised promise to overcome disorder and aggression, tame and domesticate force, and subject action and instinct to reason and will', for its method is to 'respond in kind, and … traffic in its own brand of force and coercion'.

The legal order not only uses force to hold at bay 'illegal' disorder and aggression, it also legalises any suffering caused by the coercive nature of the very act of ordering itself. The occupation authority, targeted assassinations, the steely gaze of the armed security guard, the pink slip and the dispossession it implies, the prison cell, the lawsuit with its warrants and judgements, and even the barbed wire fence designed to wound would-be trespassers: these and countless other politico-legal practices show that the law delivers a mixed blessing – that at any given moment it creates security for some at the cost of insecurity for others, and that it constitutes political freedom only by repressing natural freedom.

On the other hand, it would be naïve and pre-critical to imagine that the instruments which cause legalised suffering can only be employed by a 'sovereign' and the official minions who do his (or its) bidding. Legal power is also capable of producing its effects more amorphously and clandestinely, even if it is true that there are some people who always seem to have greater means of coercion at their immediate disposal than others. To borrow Foucault's felicitous way of putting it (1980, 98), there is a sense in which power functions in the form of a chain or network rather than as the exclusive possession of a few. Thus, he says, 'it is already one of the prime effects of power that certain bodies, certain gestures, certain discourses, certain desires, come to be identified and constituted as individuals'.

Foucault's interpretation of power radicalises, socialises and de-ethicises Aristotle's great insight ($1105^{a}18$–$1105^{b}17$) that excellence and virtue are won not by

theory but by training and habituation – or, as Will Durant (1933, 87) famously puts it, 'we are what we repeatedly do'. For Foucault, we are what power repeatedly does with and through our minds and bodies. Seen from this point of view, the police and the courts are but the tip of the legal iceberg: we keep ourselves and others in line every day by routinely respecting the boundaries of what is 'normal' and subjecting those who transgress the boundaries to criticism or worse. This state of affairs is at least co-established by the background rules of property, torts, contract law and criminal law that have already pre-structured our sense of what is normal and proper in human relations.

There is an important sense in which the acting subject is always already a *legal* subject, inasmuch as it habitually expects certain privileges and protections, and performs certain duties, that would not exist were it not for the particular legal order in which it finds itself. By way of illustration, consider those volunteer American soldiers in Iraq who happen to be opposed to the present war, but who nonetheless 'do law' to themselves, so to speak, when they say things like 'you signed that paper' or 'they got that contract' in order to explain why they continue to participate in the fighting (Parenti 2006, 18). It is not necessary to subscribe to Freud's thesis that the human mind is split against itself – that it is comprised of three discrete categories (id, ego and superego) dynamically interacting with one another – to notice something quite extraordinary about this example. Here is a concrete instance of legal power in which certain internalised juridical categories and hazily understood socio-legal expectations have caused people to repress their own moral objections to what they are being asked to do in the name of the nation and its laws. These volunteer soldiers have legally coerced themselves, so to speak. As this example suggests, when legal power is interpreted from a Foucaultian point of view, it is not at all surprising that a very large number of actors have occasion to exercise it.

Consider a few examples: property owners seeking to exclude others from their land; citizens exercising various legal privileges (such as the privilege of self defence); teachers and parents implementing their legal right to discipline unruly children; reporters lodging embarrassing demands for information under the Freedom of Information Act; mutually hostile litigants fighting out their aggressions in lawsuits; lawyers subpoenaing witnesses and executing judgements; judges deciding cases in national and international tribunals; bureaucrats granting or denying government benefits; police officers cruising the neighbourhood in patrol cars; international peacekeeping forces protecting refugees; international corporations cooperating with repressive regimes by informing on the activities of dissidents and labour leaders; negotiators driving hard bargains in commercial transactions by relying on the legal right to withhold their property and labour unless the other side agrees to their terms; and self-styled 'minutemen' policing America's border with Mexico to keep out certain (brown-skinned) illegal aliens. In principle, these examples suggest that the list of law-doers can be made just as long as the extension of the concept 'juridical person'.

Although the previous remarks imply that there is a sense in which just about everyone 'does law' in one way or another, it should always be kept in mind that the meaning of the concept of *doing law* is no more self-evident than the meaning of the concept of law itself. Indeed, we risk effacing or losing the critical salience of our guiding question if we insist on construing it too dogmatically. Thus, I will

not further define the concept of doing law, for trying to gain too much precision on this point would be irrelevant and even inimical to the book's project. It will be recalled that this volume does not seek to advance a formal criterion of law-hood, *à la* legal positivism or the theory of natural law. Instead, it is concerned with the phenomenon of doing law *however* broadly or narrowly the analytical concept of 'law-as-entity' might be defined. In other words, what it aspires to uncover about this phenomenon should be valid whether one thinks that the only law-doers who count are state officials enforcing sovereign commands, or whether one constructs the set of law-doers to include a larger or different group of actors. The previous Foucaultian expansion of the concept of 'law-doer' should therefore be interpreted as a not-so-subtle hint, so to speak, concerning the outermost *possible* reach and implications of these investigations.

The Doing of Law: Subservience in the Task and the Proximity of the Ultimate

With this clarification in mind, the time has come to elucidate the concept of doing law by paying close attention to the origin and meaning of two of the words that appear in our guiding question: 'ultimate' and 'task'. Take the latter word: the noun *task* comes from the Medieval Latin word *tasca*, which originally meant a tax or service imposed by a feudal superior on his vassal. The question 'What is the ultimate task of law?' appropriates this etymological origin of 'task'. It interprets law-doers as more or less willing vassals of the law: human beings who receive legal texts and institutions as imposing a quasi-feudal service that cannot or should not be shirked. Law-doers within the meaning of our question are similar to the 'man from the country' in Kafka's parable *Before the Law* (1937, 267–9). The legal theorist Peter Fitzpatrick (2005, 12) has aptly called this well-known text, which appears in Kafka's novel *The Trial*, the 'ur-parable of access to law'. Like Kafka's naïf, law-doers think that the law should be 'accessible to every man and at all times'. But they also conceive of it, as he does, as a kind of super-human power that at once dominates human beings *and* promises justice to them.

Law-doers imagine their relationship to the law as one of subservience to a power that protects by force, threatens with force, supervises through force, and strongly recommends (quite literally) a life programme that distinguishes the proper from the improper and the right from the wrong. Although only human beings can create legal texts (after all, chipmunks and sunbeams have never once enacted a piece of legislation), law takes revenge for its non-autogenic nature by inducing people to accept its separate existence. To use Marx's still-useful terminology, law-doers *alienate* and *reify* their work in the shape of a law-thing that they receive and accept as an alien power to which they owe obedience. They may even come to love and worship it, as in the paeans to the rule of law that one can witness on 1 May of every year, in American Bar Association speeches and pamphlets produced for the pagan-like celebration of 'Law Day'.[17]

17 See http://www.abanet.org/publiced/lawday/home, the American Bar Association's homepage for 'Law Day'. The first page of the site urges lawyers to 'celebrate Law Day every

Although it is both feared and loved, this alienated law-thing owes its entire existence to none other than law-doers' own activities in respect of it. As a legal norm or principle actually shows itself in the moment (which is to say, as it *always* shows itself) it does not presently 'have' a past in which its message (or 'original intent') is authoritatively communicated, or even communicated at all. Strictly speaking, the past of a legal text cannot cast its light on the present, for the present moment does not 'contain' any of the light that shone on the past when *it* was the present. The present contains only traces and echoes from the past. Law-doers can only bring to life what they *call* the text's 'past' in the form of a socially acceptable interpretive image that is either constructed or received (as always) in the present.

Benjamin (1999, 462) evocatively calls the present image of what we think the past recommends or requires of us 'dialectics at a standstill'. In any case, without a sort of massive social conspiracy to keep on acknowledging its existence and mastery, the law, like so many other 'social facts', would amount to nothing.[18] But since this conspiracy is not overt, it is hardly ever seen for what it is; instead, the conspiracy stealthily brings about a state of affairs in which it becomes natural and normal to think of the law as a law-thing, precisely because everyone else treats it that way. Thus it comes to pass that human beings let themselves become the objects of their objects (*the law*; *justice*; *human rights*), in the precise Marxian sense that they forget their own ongoing authorship of, and responsibility for, these institutions and practices.

I hasten to add that noticing the ubiquitous phenomenon of alienation is not necessarily the same as impugning it (as Marx did) as a condition that can and should be overcome. One does not need to subscribe to Marx's rationalistic thesis (1964, 44) that it is possible and desirable for man to 'revolve about himself as his own true sun' in order to notice that, as things stand now, for most of their lives human beings tend to revolve around objectified social products rather than around themselves. They do things like 'pledge allegiance to the flag and to the republic for which it stands', invest in 'human capital', buy and sell 'commodities', manage 'human resources', laud and protect the 'institution of marriage', go to work for 'the company', obey 'the law', and so forth. The average person does not aspire to become what Sartre (1956, 631) calls a 'For-itself' (*pour-soi*) that knows it is 'condemned to be free'. And one need not denounce law-doers for their Sartrean bad faith in order to notice that they simply *do* habitually surrender their existential freedom to social norms and expectations, including hypostatized conceptions of what the law requires.

If law's task involves a kind of law-bound subservience on the part of those who perform it, we have also said that this task is *ultimate*. What is the meaning of this 'ultimate'? On the one hand, 'ultimate' can be traced to the Late Latin word *ultimatus*, meaning 'at an end'. But on the other hand, the Latin cognate *ultima* also comes from the adverb *uls*, meaning 'beyond', as opposed to *cis*, which means 'on this side of' or 'near' (see Agamben 2005, 46). This etymological difference

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year with programs focusing on our heritage of liberty under law and how the rule of law makes our democracy possible'.

18 The reference in text is to Emile Durkheim's classic injunction to 'treat social facts as things' (1985, 9).

corresponds to the two principal ways in which the English word 'ultimate' is used in everyday speech: it can mean (*a*) that which has come to end and is incapable of further analysis, or (*b*) that which is farthest away.

The word ultimate in our guiding question is employed in the first sense. It means that which is incapable of further analysis, division or separation, rather than that which is farthest and most remote. Indeed, it is very important to recognise that in the present context the first meaning of the word 'ultimate' actually negates the second. This is because the ultimate in the sense of this book's guiding question is also that which lies closest to hand in the day-to-day doing of law. Of course, that which lies closest to hand is not necessarily the most visible or easiest to understand, for as Heidegger says, sometimes 'the simpler things become, the more puzzling they remain' (Ludz 2004, 9). Be that as it may, however, whatever else the ultimate turns out to be, it is also the most proximate. It consists in the intimate, possibly beneficial, often painful, and sometimes deadly event of dividing the legal from the illegal and the just from the unjust, and it occurs (to paraphrase Robert Cover again), on a field of pain and death.

The ultimate task of law has been concealed under the sediments of two millennia of philosophical speculation about the 'true' nature or essence of law and justice. Theories of what law *is* abound; investigations of what law-doers *do* are few and far between. Although I claim that law-doers both ameliorate and produce human suffering, this thesis is not causal in the usual sense of the word. I do not impute suffering to law, or law to suffering, as if these two phenomena stood in separate temporal boxes (t_1 and then t_2) on a time line. Rather, suffering and law are conjoined in a 'right now' that never ceases, like the famous illustration showing Sherlock Holmes and his arch-nemesis Moriarty locked forever in their death-grip atop the Reichenbach falls (see Figure 2.1).[19]

On the other hand, it is also the case that this book claims that suffering *precedes* law, in the non-causal sense of constituting law's ultimate ground, and that law, though epiphenomenal, continually co-produces suffering in the dialectical sense that it acts back on its ground to fan the latter's flames, so to speak. From a phenomenological point of view, it is incomplete and misleading to state that '[a]bsent the threat, prospect, or possibility of disorder and aggression in the worlds that all of us inhabit, law, as we know it, would be unnecessary' (Sarat 2001, 49), for this formula leaves out the all-important question of how we interpret and react to our perceptions of disorder and aggression. Even a peaceful and well-ordered world under conditions of total anarchy can wind up disappointing and disaffecting some people. Milton's Satan is right: one person's well-ordered and peaceful heaven can

19 The reference is to the final scene in Arthur Conan Doyle's short story 'The Final Problem' (1930, 479–80). The original appeared on the frontispiece of the December 1893 issue of *The Strand Magazine*, where the story was first published. Drawn in pen and ink and wash by Sidney Paget, the picture, entitled *The Death of Sherlock Holmes*, shows the fight between Sherlock Holmes and his arch-nemesis Professor Moriarty just before they plunged to their 'deaths' in one another's arms. Of course, Doyle was later forced by massive popular demand (as well as his own pecuniary circumstances) to bring the great detective back to life.

Figure 2.1 ***The Death of Sherlock Holmes***

Source: Sidney Paget (1893), pen, ink and wash. Reproduced by permission of the British Library (shelfmark 012634.m.16).

be another person's disordered and aggressive hell.[20] It is suffering, not violence as such, that lies at the root of law. Since the argument is that suffering is the ultimate ground of law *and* that law reinforces or co-produces suffering, it might be best for now to describe their relationship the way Hegel (1977, 11) would, and simply say, 'The true is the whole'.

20 'The mind is its own place, and in itself/Can make a Heaven of Hell, a Hell of Heaven' (Milton 1949, 240).

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Chapter 3

Suffering and Ethical Distress

> Everyone hustles his life along, and is troubled by a longing for the future and weariness of the present.
>
> Seneca, *On the Shortness of Life* (2005, 11)

The Lake

Imagine a placid mountain lake in late spring, buzzing with insects, ringed by grasses and trees, the boulders along its shore thick with moss, its calm surface mirroring the blue sky and the encircling woods. Perfect as it is, the lake has no aspirations. The seasons conjoin soil, water and air in a languid minuet of change. So gradual are these seasonal variations that the lake always appears to be an eternally unique being even though in fact it is always changing, in the way that the hour hand on a clock always appears to hold steady even as it moves, imperceptibly, around the dial. Tossed by a windstorm, the lake is the lake; iced over and flecked with snow, the lake is the lake; placid and warm, in the way we are imagining it, the lake is the lake. Like the rose of the medieval poet Angelus Silesius, which 'blooms because it blooms/pays no attention to itself, asks not whether it is seen', one might say that the lake is 'without why': it persists just because it persists.[1] Unburdened by the disquiet of desire, the stimulation of pleasure, or even the satisfaction of contentment, the lake always just *is* whatever it is *becoming* (see Figure 3.1).

We humans are not like the lake. Restless and dissatisfied beings that we are, we are inclined to interpret our present life as a false dawn preceding a better, truer future that must lie just over the horizon, like tomorrow's sunrise – a future that can and will be ours if only we are deserving enough, patient enough, or lucky enough. Our attitude towards the years we have left on earth tends to be 'futural' (*zukünftig*) in what Heidegger (1962, 373) calls an inauthentic (*uneigentlich*) sense: most of the time we 'have in view a "now" which has *not yet* become "actual" and which sometime *will be* for the first time'. To live in the future in this way means that our experiences of the present moment are always more or less tinged (or tainted) by a craving desire for what can never be ours: the future as such. Anointed sovereigns of the now, we neglect the only domain we will ever have in order to daydream about the kinds of turreted castles and rich kingdoms that can only be found in fairy tales.

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1 Angelus Silesius is the *nom de plume* of Johann Scheffler, a medical doctor who lived in Silesia from 1624 to 1677, and who wrote an impressive volume of spiritual poetry entitled *The Cherubic Wanderer* (Heidegger 1991b, 35). In translation, the book's verse number 289, called 'Without Why', reads as follows: 'The rose is without why. It blooms because it blooms,/It pays no attention to itself, asks not whether it is seen.'

Figure 3.1 A mountain lake in spring

Brimming with discontentedness over what is, we yearn for what is not. Even when joyful we long for what we do not have in our immediate possession: 'for all joy wants eternity', as Nietzsche (1978, 227) remarks, and yet is never able to realise it. Sadly, the momentary enjoyment of present happiness is always marred by the bitterness of its inevitable disappearance, as the wish fulfilled at once makes way for a new wish (cf. Schopenhauer 1969, i. 196).

Attuned to this central reality of human experience, Hegel (1977, 50–51) famously describes the essence of the human being in terms of desire and 'determinate negation' (*bestimmte Negation*): we act as if there were a painful wound in being itself that we must pick at incessantly, like a scab. In what Jean-Luc Nancy (2002, 50) calls 'the restlessness of the negative', we always seem to be in the process of transforming what is given to us into something else, reconfiguring it in accordance with our desire for an absent essence or perfection. Thus, for example, we try to impose ideas on the mountain lake to make it into something that it presently is not: a prime piece of vacation property, for instance, or perhaps an inspiring bit of McNature within which to situate a hi-tech corporate 'campus'.

As these examples suggest, one of our most important ideas is *law*, for it takes law-doers to turn the environing world, which is *de facto* the indivisible common ground of all who are born into it, into a set of 'entitlements' that are *de jure* the exclusive possessions of a few. The seemingly paradoxical thesis that property is a kind of theft (Proudhon 1994, 13) is misunderstood if it is interpreted merely as an anarchistic slogan. In addition to being that, Proudhon's aphorism also underscores the fact that the illegal violence of theft is actually implied by, and is a correlative of, the legal dispossession that makes property rights possible in the first place. 'There

can be no Propriety, no Dominion, no *Mine* and *Thine* distinct', says Hobbes (1914, 66), unless a power exists that is sufficient to overawe people with the threat of violence in the event they attempt to lay their hands on what the agents of that power are prepared to recognise as another's belongings. Properly understood, this point is grammatical rather than empirical: it is possible for a person to 'trespass' or 'steal' (at least in the way we use those terms today) only if some form of publicly displayed power – whether we call it 'the state', private 'protective associations' (see Nozick 1974, 12–15), or anything else – helps some people take money or labour from other people for the privilege of standing on the ground, clothing their nakedness, slaking their thirst, or satisfying their hunger.

But it would be a grievous mistake to think that the raw material we transform with the idea we call 'law' is just the lake, considered as a material object, or even that it consists primarily of the abstract juridical binaries (right/duty, immunity/disability, etc.) that formally organise our legal relationships with other people (see Hohfeld 2001). A more important raw material than either of these is our own seemingly bottomless *desire* to transform our relationships to the lake and others – a desire that ebbs and flows in synchrony with our changing moods and fortunes. Seen from inside, most human beings are 'Aeolian harp[s], stirred by all manner of breezes and elements', as Johann Gottfried Herder (2006, 362) puts it. Our desire for the absence of present pain and the presence of absent gain traces the graph of an unhappiness that is irregularly but progressively amortised throughout our lives (cf. Jankélévitch 2005, 25).

To put a name on it, the never-ending desire for more goods, more status, more satisfaction, more justice, and more human rights – in short, more X of any kind – is a form of suffering. This is meant not as a reproach, but as a simple observation. The legacy of this kind of suffering suffuses the day-to-day grind of individual experience, with all of its plentiful frustrations and disappointments. These can be a well-nigh inexhaustible source of annoyance (and worse), as some of the West's keenest philosophical minds have observed. Thus, for example, it is said that we are beset by: (*a*) the wearying pressures of our bodily needs and wants, which can be forces 'more compelling than violence' (Arendt 2006, 53); (*b*) our nagging worries about being liked and respected by others, or, to put it more generally, 'having validity in the communal world' (Heidegger 2004b, 196); (*c*) 'the hellish, compulsive character of the whole from which we all suffer' (Adorno 2000, 84) – namely, that frightful totality in which power, in the form of official knowledge, presents itself as the only possible reality (Foucault 2006, 190); and (*d*) even 'that bitterest of all sufferings, dissatisfaction with ourselves' (Schopenhauer 1969, i. 307).

There is a limited but important sense in which privileged intellectuals are able to feel sufferings of these sorts more frequently and more keenly than other, better adjusted individuals. Although Benjamin (1978, 286) claims that the violence of the death penalty reveals 'something rotten in law', he implies that the executed criminal himself may not be the best witness to this epiphany; the death penalty reveals law's rottenness, he says, 'above all to a finer sensibility, because the latter knows itself to be infinitely remote from conditions in which fate might imperiously have shown itself in such a sentence'. In other words, the privileged intellectual who bears witness to the pain and death of an unprivileged criminal risks being burdened

by the sort of guilt and despair that can be experienced only by those who know the depressing existential *meaning* of what they have witnessed.

The intellectual – or at least a certain kind of intellectual – knows that the guilty person 'infinitely exceeds the sin in which our rancour wants to imprison him' (Jankélévitch 2005, 17), just as the real mountain lake shown in Figure 3.1 infinitely exceeds any possible description or depiction of it. This sort of intellectual suspects that the idea of the criminal's unitary, diachronic self is 'a great falsification', as Nietzsche (1968, 401–402) puts it, invented by the resentful for the sake of punishment itself. She knows that it is impossible, strictly speaking, to punish som*one* for his act of injustice, because time continually changes everyone and everything. Physically and psychologically speaking, it is quite literally the case that *this* defendant – the one in the dock now – is never exactly the 'same' person as *that* transgressor was then. Time's relentless dissolution and reinvention of individual identity implies that the event of juridical punishment as such always arrives too late to punish the right person. Thus, there is a sense in which legal punishment is always undeserved by the particular embodied being that undergoes it.

The pages of Western political and legal theory also bear witness to the ubiquitous presence of intellectual suffering (including the suffering of intellectuals), in the form of a desire for more or better 'justice'. Considered solely from the standpoint of the phenomenological category *craving desire for a better world*, there is little to distinguish, say, Ronald Dworkin's yearning (1991, 359) for a theory and practice of decision making that will yield legal answers that 'really are' true and sound from Georgio Agamben's yearning (2000, 8) for a radically emancipated kind of political life that is 'directed towards the idea of happiness … starting from … the irrevocable exodus from any sovereignty'. Whether mainstream or radical, all political and legal theorising – indeed all philosophy itself – is beset by demons which it hopes its arguments will exorcise. Philosophy is therefore a symptom of, and not just a response to, human suffering, just as '[t]he philosopher's treatment of a question is like the treatment of an illness' – the philosopher's *own* illness (Wittgenstein 1954, 91e).

As an ontological category, the kind of desire to which I refer is what Nancy (2003, 263) has called 'unhappiness without end'. That is, it is a way of living in which happiness is experienced as an essentially *negative* phenomenon – 'a soothing, calming and quieting of pain', as Marcuse (2007, 206) puts it – rather than as a reasonably achievable permanent state of affairs. Our intermittent bouts of feeling happy merely temporarily override the 'default position' of desire in which we normally find ourselves. This shows why Horkheimer and Adorno (2002, 116) define amusement as the temporary forgetting of suffering, even when it is most vividly on display. For example, the phenomenon of forgetting suffering amidst its display occurs in the spectacle of a comedic performance that shows the humorous side of pain only because it somehow renders us blind to the torments and agonies that would have belonged to the participants if their situation were real. A related sort of forgetting happens when we do not 'see' the homeless person lying in the doorway as we quickly walk past on our way to a party, or when we switch the TV channel to an entertainment programme rather than watch yet another depressing news report about yet another famine or genocide in the Third World.

Of course, everyday experience generally cannot bear to hear human life slandered in the foregoing ways. Common opinion tends to classify suffering as a 'psychological content', as Levinas (1998, 91) puts it, 'similar to the lived experience of colour, sound, contact, or any other sensation'. On this view, the only thing that seems to stand between suffering and permanent happiness is 'present circumstances' or 'the way things are now' – that is, a congregation of merely accidental stumbling blocks on a yellow brick road that leads to the Emerald City of permanent happiness. Conventional wisdom holds that most of these stumbling blocks are surmountable, and that any we fail to surmount should be reinterpreted as 'cold realities' to be integrated into our psyches by means of therapy or religion. And if all else fails, there is always the possibility of finding refuge in sheer stupidity, which, as Jankélévitch (2005, 75) says, is the only way that many people have of retaining their innocence.

Even the most skilful artistic depiction of suffering hides suffering's brutal singularity from us under the aspect of the general, which is the hallmark of representation as such. Whatever mimesis mimes, it is not the real as such. Just as the tick of a clock always marks the past, not the present, given that it takes time for its sound to reach the ear, so too the created image always arrives too late to be the image of exactly what it aspires to depict. To paraphrase the poet John Ashbery (1990), the recurring waves of arrival that reach our retinas from the past depict only what we choose to see.

For example, nowhere in the visage of the central figure in Polydorus's monumental statue depicting the punishment of Laocoön (Figure 3.2) do we find the suffering and terror of someone who is aware that he and his sons are being strangled (right now) by enormous serpents.[2] Instead, we find what Lessing once called 'the sigh of Laocoön' (see Herder 2006, 6–7): a kind of dignified mask signifying that its wearer has both recognised and submitted to his fate. The artist's gesture naturally serves to redeem (and more importantly, to obscure) the spectacle of pain and blood that must have both preceded and followed the brief moment in which the unfortunate priest's sublimely chiselled countenance shone forth. It would seem that the whole tendency, if not purpose, of this noble group of sufferers frozen in marble is to deny a simple but ugly truth: the real sufferings and screams of people like Laocoön and his sons *will always have happened*, beyond all representation, no matter what the future brings or what we (or the gods) may subsequently say or think about them. Wrought by the loving hands of the sculptor, Laocoön's image does not depict suffering, for true suffering is unlovable by definition. Rather, the image is didactical: it shows us only what the noble endurance of suffering *should* look like. It teaches us how best to suffer, but it does not want or try to exhibit Laocoön's suffering as such.

2 Laocoön was a Trojan priest of Apollo who angered the god by marrying and begetting children, despite a vow of celibacy, and by lying with his wife in the presence of Apollo's image. After unsuccessfully warning Priam to refuse the Greeks' gift of a wooden horse, he was chosen by lot to make a propitiatory offering to Poseidon on behalf of the city. Whereupon Apollo sent two huge sea serpents to kill the priest and his sons as a warning of Troy's approaching doom (see Graves 1955, ii. 333).

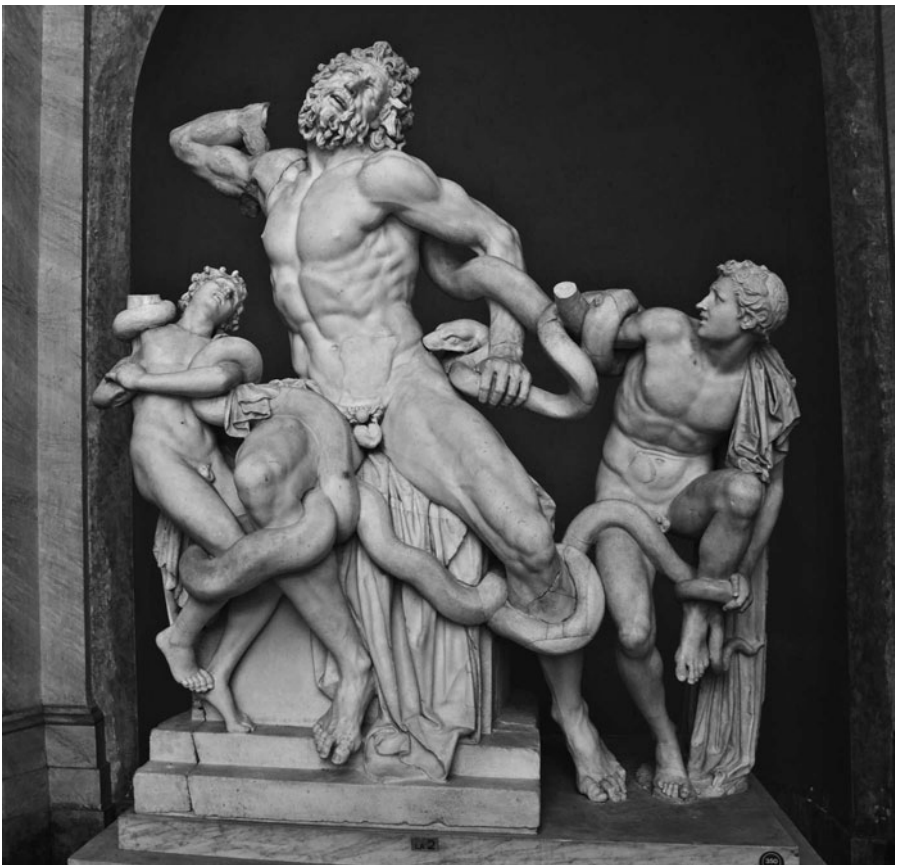

Figure 3.2 The punishment of Laocoön

Source: Rhodians Agesander, Athenodorus and Polydorus (3rd century BCE), sculpture group in the Vatican Museum. Photograph by Jean-Christophe Benoist. Reproduced by permission of Wikimedia Commons.

In direct contrast to the moral teaching embodied in Polydorus's sculpture, the word 'suffering' for present purposes casts a much wider net than either art or common opinion normally allows. Beyond a merely occasional bout of pain or woe that rears up to interrupt an otherwise pleasurable hedonic flow, 'suffering' in the context of these investigations serves as an ontological signifier: it determines, or rather co-determines, the being of the human being in the way that the Buddha's famous 'First Noble Truth' (Bukkyō Dendō Kyōkai 2002, 38) does, albeit without its author's religious motivation:

> The world is full of suffering. Birth is suffering, old age is suffering, sickness and death are sufferings. To meet a man whom one hates is suffering, to be separated from a beloved one is suffering, to be vainly struggling to satisfy one's needs is suffering. In fact, life that is not free from desire and passion is always involved with distress. This is called the Truth of Suffering.

Less a malignity that can and ought to be excised from an otherwise healthy mind and body (cf. Levinas 1998, 95), the ontological category of suffering is even large enough to include the desire to abolish suffering, as if the desire not to desire were a kind of revenge that suffering takes on anyone who dares to oppose it. We will therefore adopt Schopenhauer's thesis that 'all willing springs from lack, from deficiency, and thus from suffering' (1969, i. 196), but not because we wish to parrot his sort of gloomy pessimism about the world. We adopt the thesis that all willing springs from suffering because only this point of view allows us to catch sight of the *ethically questionable* side of most of the uplifting advice we get about how to live – including especially the kind of advice that seems to equate perpetual discontentedness and the striving to overcome the will of others with the very essence of morality and reason.[3] The kind of dogmatic moralism that reduces ethics to a set of particular goals or obligations created by the imagination, vetted by reason, and established by the will is incapable of perceiving the tragic. It does not know that conflicts about justice bring to light not an opposition between right and no-right, but rather an opposition between what Jean Hyppolite (1996, 33) calls 'two rights and two passions', only one (or none) of which is fated to prevail in any given situation.

Although the human being's essential *incompleteness* accounts for the concept of determinate negation in Hegel's thought, Hegel himself did not grapple with the category of universal human suffering in its own right. Suffering is merely a cost of progress for Hegel – a deficit that is always outweighed or offset by something else. The task of thinking universal suffering as such fell to his arch-nemesis, Arthur Schopenhauer, the West's philosopher of suffering *par excellence*. In discussing the purposes of tragic art, for example, Schopenhauer (1969, i. 253) famously raised universal human suffering into philosophical prominence by uttering words of cheer such as these:

> The unspeakable pain, the wretchedness and misery of mankind, the triumph of wickedness, the scornful mastery of chance, and the irretrievable fall of the just and innocent are all here presented to us; and here is to be found a significant hint as to the nature of the world and existence. It is the antagonism of the will with itself which is here most completely unfolded at the highest grade of its objectivity, and which comes into fearful prominence. It becomes visible in the suffering of mankind which is produced partly by chance and error; and these stand forth as the rulers of the world, personified as fate through their insidiousness which appears almost like purpose and intention.

It is important to understand that these words are not symptoms of a mind that sees everything *sub specie mali*, as William James puts it, 'as though evil and enemies were everywhere' (see Richardson 2006, 348). For Schopenhauer (see 1969, i. 254), the tragic nature of life shows itself not in the struggle between good and evil, or even in the fact that evil frequently triumphs over good, but rather in the universal sufferings that belong both to the evil person *and* the good person by virtue of the 'original sin' of their having existed as human beings in the first place.

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3 Cf. Marcuse (2007, 236): 'Man must never cease to be an artist, to criticise and negate his present self and society and to project by means of his creative imagination alternative "images" of existence.'

Schopenhauer sees the world *sub specie patientia* as an ontological matter, rather than *sub specie mali* (or *bonum*) as an ethical one: for him, the world lies under the aspect of suffering rather than under the aspect of evil or good. More recently, Levinas (2003a, 59–60) has updated and accounted for suffering as an ontological category by imputing its content to the superabundance of the immediate: the unbearable pressure of the amorphous 'there is' (*il y a*) that presses upon our senses and makes us yearn for escape from the ever-present background drone of existence. This background droning, which can become deafening in the torture and misery of boredom, mocks the perpetual non-appearance of enduring satisfaction. It also signifies a certain conceptual ambiguity concerning the relation between language and life that illustrates a lesson experience is constantly drumming into us: in one way or another, everything eventually disappoints.

On the one hand, life is constantly falling short of its idea, or the idea of its proposed transformation, and thus it disappoints us in the way that a criminal disappoints us by failing to comply with a legal norm. This is what Hegel meant when he said that tragedy is the representation of the absolute position (see Hyppolite 1996, 58), for the absolute position is unattainable except through the endless repetition of successive failures aimed at attaining it. But on the other hand, the idea is also constantly falling short of life by failing to capture the particularity of a situation or experience that impossibly yearns to express itself in the form of what Lyotard (1996, 426) calls a 'little narrative' (*petit récrits*): a tale that resists closure and totality, yet somehow manages to give definitive voice to what is most singular and unique about its narrator. *This* sense of the shortfall between language and life is what Derrida (2001, 65) calls yet another 'illimitable source of suffering': namely, the impotence of a singular experience that hopelessly yearns to fix in language and thought, once and for all, what language and thought can only generalise and distort.

A pure language of names – a language that reveals or uncovers the real without representing it or otherwise drawing attention to itself – is no longer possible for human beings, assuming that it was ever possible in the first place (see Benjamin 1978, 314–32). In the first decade of the twenty-first century, it would seem that the only kind of language still available to us originates in what Agamben (2000, 84) calls 'the society of the spectacle'. The spectacle frames what we buy, vote for and watch in our living rooms; it is found everywhere in what passes for 'democracy' and 'liberty' in the West: in the cachets of heavily advertised luxury goods, in the carefully crafted sound bytes and talking points of politicians, in reality TV shows, and in a constant stream of polling data that tell us 'what the people think'. For us, language has constituted itself as a semi-autonomous sphere in politics, entertainment, advertising and the media. Most of the time it does not seem to reveal much of anything at all, other than itself. Language shows *itself* in the form of glittering images – castles in the air – that ever more successfully claim our attention spans, our votes and our credit cards.

Thus: (*a*) at least half of the time life disappoints us when compared to the language of images, in which case our suffering results from what Schopenhauer (1969, i. 88) calls 'the want of proportion between what we demand and what comes to us'; and yet (*b*) the rest of the time language disappoints us when compared to life, in which case our suffering results from the fact that 'words dilute and brutalise;

words depersonalise; words make the uncommon common' (Nietzsche 1968, 428). In the first case, life is hell and language becomes a kind of utopia; in the second case, language is hell and the concrete (life itself) becomes the utopia that language falsifies (cf. Adorno 2000, 49). Those who fall silent, on this account, inhabit the purgatory of knowing that genuine communication between people is no longer possible, owing to a certain contradiction contained within modern language itself: on the one hand, the real can only be explained by recourse to the true, and thus as soon as we talk we merely express the universal or imagistic and not the particular that we would like to express (cf. Habermas 2003, 143); but on the other hand, if we do not speak at all, no one will ever understand us (cf. Kierkegaard 1995b, 52–3).

No matter how one construes suffering and its causes, though, there is no denying that people yearn to be released from it. The human desire for escape from suffering leads people to imagine that they can make (or try to make) *past* suffering cease in a *present* liberation on the basis of an idea that will secure them a happy *future*. This picture of liberation from suffering portrays time as a sort of spatial medium, like agar in a Petri dish, in which the conditions requiring liberation grow like noxious bacteria. Liberation itself, then, is imagined as a kind of glorious transcendence from an unhealthy past to a future that has been freed of all happiness-killing organisms by the antibiotic of an idea that can only be delivered by the syringe of an action deliberately aimed at realising it.

Unfortunately, human beings quickly learn that there is always an unbridgeable gap between their bright ideas for combating suffering and how their ideas are actually implemented. 'Everything disappoints', wrote Kierkegaard (1993, 62) in his diary: 'Hope, the hoped for does not come, or the hoped for comes – and disappoints.' Isn't this *exactly* how it is, most of the time? People hardly ever get exactly what they want, and even when they do it never seems to be enough. They think up ideas and images of new and different things to want, while all the while they feel the absence of the wanted as if it were a physical hunger, gnawing at their innards. As Henri Bergson (1997, 10) says, '[t]he idea of the future, pregnant with an infinity of possibilities, is … more fruitful than the future itself, and this is why we find more charm in hope than in possession, in dreams than in reality'. The Eastern image of the 'hungry ghost' (*preta*, in Sanskrit) is a perfect symbol of the Hegelian human being whose life consists in ceaseless, desire-driven negation in accordance with its ideas of a future that will never arrive. Cursed with a huge stomach and a tiny, inadequate mouth, this mythological creature is always trying to eat, but can never manage to consume enough to satisfy its hunger (see Pine 2001, 450).

William James once remarked, albeit without adjudicating the question, 'That life is not worth living a whole army of suicides declare' (see Richardson 2006, 355). Be that as it may, it is obvious that the homeless, the hungry, and the oppressed suffer from being conscious of the awful things that happen to them in comparison with what they need and want, yet do not have. But suffering is not limited to those who have little or against whom the worst outrages are committed. Justice has chiliastic tendencies: it yearns for an end of days that will both complete and redeem *all* of our sufferings. But history shows that the circle of universal human suffering is never closed. Since what is not yet completed cannot yet be redeemed, it follows that genuine redemption, like the future itself, is always infinitely postponed.

Although the philosophical concept of universal human suffering is probably a child of the French Revolution, which made it 'integral to the concept of man that *all* of humanity could be debased or exalted in every individual' (Arendt 1994, 181), it has been known since antiquity that every human being suffers, regardless of his social status or material condition. 'Even the greatest blessings create anxiety', wrote Seneca (2005, 28). The relatively well-off (including the high and mighty) also suffer, even if they do manage to avoid becoming hungry ghosts that are always greedy for more things and more power. That is because people who already own much invariably worry about losing what they have. Experience teaches (or should teach) the essential truth of Augustine's dictum (1961, 232) about the ugly worm in the apple of any prosperity: 'When I am in trouble I long for good fortune, but when I have good fortune I fear to lose it' (*Prospera in adversis disedero, adversa in prosperis timeo*). The poor and oppressed suffer in squalor, the middle class suffers in moderate comfort, and the rich and powerful suffer in style. But the simple fact that they all *suffer* is what makes them into vessels for (as well as potential recipients of) our ethical concern.

The Difference Between Suffering and the Causes of Suffering

The word 'suffering' comes from the Latin terms *sub* ('from below') and *ferre* ('to bear'), an etymology that sheds light on two of suffering's most important features. First, suffering is a singular personal experience: each individual sufferer has to 'bear' it for as long as it lasts. Second, suffering is an unwanted burden: it presses down upon the sufferer, who yearns to be relieved of it. The pressures of real or imagined necessity – what Tocqueville (1990, ii. 87–8) calls the 'close and enormous chain which girds and binds the human race' – are among the most obvious causes of suffering, as are the all-too-common phenomena of inter-human violence and psychic violation. But here, as elsewhere in philosophy, it is important to distinguish an effect from its causes. Just as the existence of sunshine is causally related, but not identical, to a garden in bloom, so too the causes and conditions of suffering are related, but not identical, to the experience of suffering on account of those causes and conditions.

The existence of sadomasochism proves that the manifestations of what most people would call suffering are not necessarily experienced as unwanted burdens by everyone. Likewise, the public spectacle presented by emaciated fashion models, whose careers and starvation diets put one in mind of Kafka's short story, *A Hunger Artist* (1983, 268–77), can only serve to confound the distinction between wanted and unwanted pain. Strictly speaking, these examples show that the phenomenon of suffering as such is always one step removed from its origins, and that its concrete content at any given moment is logically separable from its genesis. This also follows from the more general logical (and phenomenological) stipulation that a thing as such is never *identical* to its causes – just as the world now *is* never exactly the same as what it *was* then. A secondary meaning of the verb 'to suffer' gives an important clue about the nature of the difference between suffering and its causes. To suffer something in this secondary sense means to let it happen – to tolerate its

presence – as in Jesus' statement, 'Suffer the little children to come unto me, and forbid them not' (Mark 10:14). This usage of 'suffer' suggests the disturbing thesis that the ultimate criterion of suffering (in the primary sense of the word) consists in the sufferer's *response* to it.

Certainly this was one of ancient stoicism's most important doctrines, which Epictetus (1961, 86) managed to distil into a single sentence: 'Men are disturbed not by the things which happen, but by their opinions about the things.' The Stoics held that suffering is not an objective property of spatial and temporal relations among bodies and objects, but rather a psychic consequence of the interpretation that people bring to their experiences of events. This insight explains why sufferers sometimes forget to suffer immediately after awakening from a good night's sleep: those for whom 'sleep knits up the ravell'd sleave of care', as Shakespeare (*Macb.* A.II S.2) puts it, need to remind themselves of their unhappiness before they can resume the task of suffering again. In short, the strong possibility that people suffer some of their experiences to be 'suffering' suggests that suffering in the primary sense of the word is an accomplishment (or at least a co-accomplishment) of the sufferer himself.

That there is a logical and factual distinction between suffering and its causes is undeniable. Whether this distinction can be made to support any credible political or normative conclusions is another matter. The Stoics defined happiness as the absence of pain and freedom from strong emotion (*apatheia*) rather than the presence of satisfaction, for they knew that human desire, being insatiable, can never be fully satisfied. From this they drew the conclusion that people ought to accept things as they are so as to achieve tranquillity of mind (*euthymia*) as their highest good. 'Seek not that the things which happen should happen as you wish; but wish the things which happen to be as they are, and you will have a tranquil flow of life', advises Epictetus (1961, 87). 'Nothing is so bitter that a calm mind cannot find comfort in it', declares Seneca (1961, 70). 'Let opinion be taken away, and no man will think himself wronged', writes Marcus Aurelius (1900, 35).

In advising people to complain as little as possible about the world – to calmly accept their own worldly status and condition no matter how lowly or degraded – stoicism places the individual quest for spiritual peace before the collective struggle for political peace between individuals. It also comes close to blaming the victims of injustice for their own suffering, effectively repudiating an argument that is indispensable for any social movement which aspires to succeed: namely, the thesis that there exists an essential practical (if not moral) connection between the call to abandon illusions and the call to abandon the social conditions which require illusions (see Marx 1964, 44). The ethical teachings and political implications of stoicism must therefore appear dubious, at best, to anyone who condemns the needlessness and injustice of so much abject suffering in the world.

The Dialectical Loop Linking Suffering, Law and Justice

Notwithstanding its marked tendency towards political conservatism, stoicism does contain at least one mighty truth that is pertinent to the present investigations. To put it in a nutshell: if human beings never felt aggrieved or disappointed by anything

they would not need law and justice, for in that case everything would feel fine to them just the way it is, *whatever* it is. Then they would be like the mountain lake shown in Figure 3.1, or like Angelus Silesius's rose: 'without why'. The converse is also true, of course, for as we have seen, the institutions of law and justice can be (and are) powerful causes of human suffering in their own right. Even Excalibur, the magical sword that both cuts and heals, did not heal *everyone* it wounded. The more aggrieved people feel, the more intrusive (and aggravating) the coercive remedies for their aggravation can become.

'The ceaseless efforts to banish suffering achieve nothing more than a change in its form', says Schopenhauer (1969, i. 315), and history proves him right. Human beings seem to be habitually discontented with the way things are, regardless of how they are. Jean Hyppolite (1996, 44), channelling Hegel, has even attempted to make a virtue out of this apparent necessity by saying that 'the world is what it ought not to be so that we can make it what it ought to be' – as if the whole point (if not joy) of existence is to keep on trying to fix a broken world that refuses to stay fixed: a world that perversely flies apart every time we glue its pieces together. Although convention holds that freedom is the uniquely human capacity to change the world, at the end of the day it is not freedom that most individuals crave, but happiness. Freedom is the means, on this view, and true and abiding happiness is the end. To paraphrase Pindar (1938, 312), however, the ultimate end that most people crave – permanent happiness – is but a dream that a shadow dreams.

In their endless quest for the will-o'-the-wisp of a happiness that abides forever, sufferers frequently appeal to the existing legal order for comfort and assistance, and some of them even get a measure of temporary relief from it. This is law's chief virtue: operating on Plautus's premise (1874, 226) that man is wolf to man ('*Homo homini lupus est*'), law's arrangements socialise individual wolfishness and offers sufferers the opportunity to channel their predations and counter-predations into legally (if not socially) acceptable forms. This is why Foucault (2003b, 15) insisted on inverting Clausewitz's notorious aphorism[4] to say that politics and law are actually the continuation of war by other means. Nothing lasts forever, though, and people can also come to suffer not just from the 'private' war of impersonal market forces channelled through background legal arrangements, but also from the 'public' violence exhibited by existing law enforcement itself. Indeed, the deceptively peaceful Foucaultian 'war' that we call the rule of law is *always* in the process of breaking out into the patently warring 'peace' of political agitation aimed at law's transformation or overthrow.

Experiencing the law as an oppressive burden, at any given point in time some (or many) people are inclined to call it unjust, whereupon they invariably turn to some reality-transcending ideal of justice for comfort. Since the popular virtue associated with suffering is endurance, this is usually all that happens: the oppressed merely cultivate their martyrdom and get on with their unhappy lives, perhaps nurturing a vague hope for redemption at the end of days. Kafka's famous parable (1937, 267–9) of the man from the country who waits an entire lifetime for justice before

4 'War is not merely a political act, but also a political instrument, a continuation of political relations, a carrying out of the same by other means' (Bartlett 1980, 448).

the door of the Law – while never once gaining (or forcing) admittance – allegorises human nature in a way that effectively reverses Plautus's metaphor: when it comes to submitting to 'lawful' authority, most of the time people are sheep, not wolves.

Every now and then, though, reality-transcending ideals of justice find their way into popular movements (reformist or revolutionary) to throw off existing law. Indeed, some of these movements actually succeed, at least until the inevitable countermovement sets in. Thus, for example: either absolutism yields to the demand for constitutional government (e.g. the Magna Charta binds the king to the law) or constitutional government gives way to absolutism (e.g. Robespierre and the Terror supplant the Oath of the Tennis Court); either *laissez-faire* government yields to the demand for social regulation (e.g. Franklin Roosevelt's New Deal) or government regulation recedes because of the demand to get government 'off the backs of the people' (the Reagan Revolution); either repressive law succumbs to the demand for rights by marginalised groups (e.g. *Brown v. Board of Education* and the Civil Rights Act of 1964) or newly established rights succumb to a resentful majority's demand for a return to the *status quo ante* (e.g. 'white flight', *de facto* segregation and the abolition of affirmative action).

As the foregoing examples suggest, time's passage never halts at the bright, shining moment when justice prevails over unjust law. Nor, it seems, do deep-seated social problems ever magically resolve themselves. A justice that rises triumphant over unjust law no longer can claim to be reality-transcending, for it has succeeded, against all odds, in remaking reality itself. Now the trajectory of its glorious apotheosis must be ingloriously reversed: justice finds itself in the awkward position of having to descend from a perfumed heaven of aspiration to a malodorous earth awash in perspiration – an earth in which the newly victorious human champions of justice now feel compelled to redeem its promises. Justice triumphant over law finds out very quickly that it must replace revolutionary chaos with a new *nomos*, and anomic freedom with the security of authoritative standards of behaviour. In a cruel parody of the usual order of things, the brightly coloured butterfly of justice metamorphoses into a drab legal caterpillar: a new legal regime emerges in browns and greys from the chrysalis of radical or revolutionary change.

The inherent insatiability of human desire being what it is, however, it is never very long before this new regime begins to evoke the same kinds of resentful feelings and reactions as the old. A good example of this is Karl Polanyi's 'thesis of the double movement' (1957, 144), which reflects the fact that for the past two hundred years economic liberals intent on spreading the 'justice' provided by the market system have inevitably been met by a protective social countermovement for a 'justice' which uses state power to protect those who are disadvantaged by the market's operations – and *vice versa*. The result has been two centuries of historical oscillation between competing ideals of justice. Although this oscillation marks a genuine dialectic and not a mere decidable antithesis, ordinary political discourse tends to falsify it by portraying it as a 'choice' between capitalism and socialism.

In truth, however, all political victories within this opposition at any given moment in history are temporary. The momentary victor in this dialectic actually begins to lose its influence at the very point it achieves its greatest political success, for past that point its singular responsibility for addressing (and failing to cure) universal

human suffering becomes more visible, and the counterclaims of its weakened (but not vanquished) opponent start to become more persuasive. In sum, the glittering trophy of power begins to tarnish the minute it is won, for its possessor cannot but fail to deliver to *everyone* the 'more' that they all so desperately crave. To put it more generally: sometimes people accept the progressive or revolutionary gift of new law and appeal to it for comfort and assistance, and other times they feel oppressed by it and resent it; whereupon the process of a butterfly striving to become a caterpillar starts all over again.

The net historical result is what a Hegelian would call the bad infinity of an endless dialectical loop without sublation: (*a*) suffering in anarchy leads to a demand for justice within the law; (*b*) justice defined only by law leads to suffering; (*c*) suffering *from* the law leads to the demand for a justice beyond law; (*d*) this new demand for justice leads to the establishment of new law; and (*e*) the new law leads to new suffering, thereby starting the process all over again. The basic form of this process is depicted in Figure 3.3.

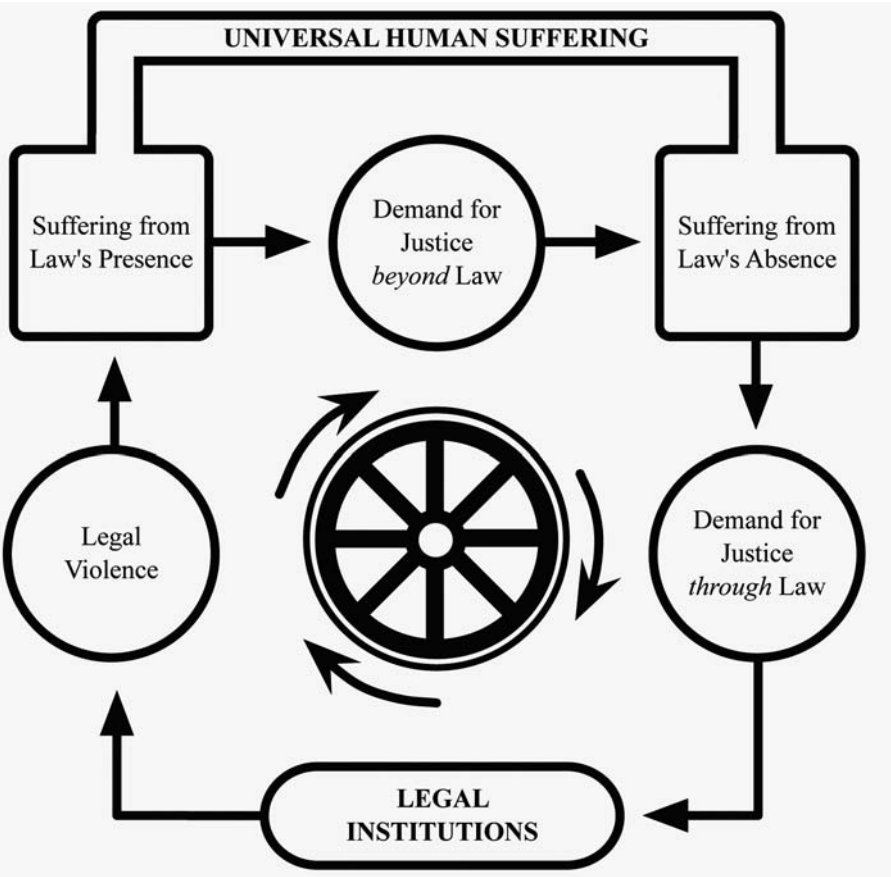

Figure 3.3 The tragic circle

The purpose of Figure 3.3 is to show how the destructive and creative forces unleashed by lawmaking violence can blend, almost seamlessly, into the conservative forces facilitated by law-preserving violence, and *vice versa*. The wheel in the middle of the drawing signifies fate, which for our purposes can be defined as the ceaseless interaction of time, chance and human desire. Another analogy: lawmaking violence relates to law-preserving violence in the way that an active fault line underlies the landscape. Once an earthquake ceases, the land above eventually settles down into a stable configuration until the gradual build-up of forces along the fault becomes large enough to trigger the next upheaval.

No one has expressed the latter point any better than Walter Benjamin (1978, 300):

> A gaze directed only at what is close at hand can at most perceive a dialectical rising and falling in the lawmaking and law-preserving formations of violence. The law governing their oscillation rests on the circumstance that all law-preserving violence, in its duration, indirectly weakens the lawmaking violence represented by it, through the suppression of hostile counter-violence … This lasts until either new forces or those earlier suppressed triumph over the hitherto lawmaking violence and thus found a new law, destined in its turn to decay.

Perhaps Hobbes (1914, 90) was the first Western thinker to fully appreciate the depressing implications of the dialectical legal hell that Benjamin describes when he observed that even in the best of political and legal circumstances, 'the estate of Man can never be without some incommodity or other'. In his famous statement, 'Soveraigne Power [is] not so hurtfull as the want of it', Hobbes (xxx) squarely places both the existence *and* the non-existence of law into the category of things that hurt. In conceding that human beings suffer when law is present as well as when it is absent, *Leviathan* established the framework for all future political and legal theory by accepting and valorising the rule of law as the lesser of two evils.

The lesser evil of law is the temporary coming to rest, in form, of contingency, violence, disorder and suffering in the minds of those who construct or accept it. Legal form exiles all that is 'extraneous' in reality, including the anguish (and rage) of the powerless and 'the tears that a civil servant cannot see' (Levinas 1996, 23). Like a cookie cutter, legal form stamps the dough of everyday experience into reassuringly regular shapes, leaving the irregular marginal bits to fend for themselves. Legal form allows 'relevant' costs and benefits to be calculated and weighed, decisions to be made, and actions to be launched. Ever since Hobbes's day, the overwhelming majority of political and legal theorists in the West have sought to perfect the form of law in this sense: to 'get law right' in one way or another. John Rawls's *A Theory of Justice* (1971) and Ronald Dworkin's *Law's Empire* (1986) – admittedly great works of philosophy – are cases in point, as are the countless exegetical works which feed upon and tweak the insights contained in these books.

In its relentless drive for closure, conventional political and legal theory conforms to Alain Badiou's startling definition of evil (2003, 66–7): it represents the will to name at any price, the desire for 'everything to be said'. Alexandre Kojéve's description (1980, 75) of the Hegelian 'Wise Man' makes this drive for closure explicit: 'that man is Wise who is capable of answering in a *comprehensible*

or satisfactory manner *all* questions that can be asked him concerning his acts, and capable of answering in such fashion that the *entirety* of his answers forms a *coherent* discourse'. The Wise Man's central aspiration is to theorise law and justice in such a way that, in the event the theory were realised, humanity's long history of injustices would come to an end and no one would ever again have to feel *personally* responsible for the suffering caused by the proper enforcement of just law. The Wise Man's promise of release from personal responsibility reaches its apex in Hegel's theory (1967, 70–71) that punishment is self-chosen, since this idea makes the agents who actually snap law's whip look as benign and considerate as a dominatrix giving her customers what they want.

The promise of release from personal responsibility through wisdom also seems to follow from what Robert Alexy (2003, 65) has called, with breathtakingly imperialistic overstatement, 'the regulative idea of legal philosophy': namely, the idea of constructing a 'deeply founded and coherent picture of what there is [in law], what ought to be done and is good, and what we can know'. In principle, whatever particular instances of human suffering might remain after the legal regime has been theoretically delimited and purified in the ways Alexy suggests would fall into the category of the necessary and natural; more importantly, this determination of residual suffering's logical status would justify *viewing* it dispassionately – as dispassionately as we view the April showers that bring the flowers of May. Of course, everyone remembers the basic truth that human beings are finite creatures whose intelligence is subject to perversion by ignorance, error and 'a thousand passions', as Montesquieu (1989, 5) puts it. But the belief that human beings have a 'nature' or 'purpose' to fulfil on earth is no less deeply ingrained in Western thought.

The expression of this belief has taken many philosophical forms, including Aristotle's thesis (192^{a}25–34) that each being has an inherent *entelecheia*[5] (principle or purpose) that it strives to fulfil; Spinoza's concept of *conatus essendi* (1955, 135), whereby each thing is represented as a mode or attribute of God which seeks to persevere in its being; Leibniz's theory (1934, 4) of monads, each of which contains the 'internal principle' of all of its subsequent changes; and Kant's argument (2000, xvii) that the principle of nature's *Zweckmässigkeit* ('purposiveness') is a condition of the possibility of practical moral reason. Colloquially speaking, the belief that each person has a purpose takes the form of the standard avuncular advice to find (or give oneself) 'ideals' and 'goals' to achieve, and always to act in a 'principled' manner. But regardless of what form the belief in a human teleology takes, the net result is always the same insofar as law and justice are concerned: the purpose of human beings is to strive towards perfecting and realising the Idea of Just Law.

No wonder science has dubbed our species *homo sapiens* (Latin for 'wise man'): science, like traditional legal theory, proposes a philosophical anthropology in which the idealised ultimate end of humanity is or ought to be the kind of knowing that leaves absolutely no room for ignorance and uncontrolled passion, and hence no room for making mistakes about what justice requires. No matter how many times traditional political and legal theory tries (and fails) to get law right, it always begins with the same attitude: the desire to lead self-interested elites and the benighted

5 A compound of *enteles* (complete), *telos* (purpose) and *echein* (to have).

masses they dominate towards the light of a perfectly just (i.e. rational) social world. Hence, for example, we read about Rawls's 'principles of justice' (1971, 54–117) and Dworkin's 'law as integrity' (1986, 225), and imagine that these concepts lay down rails which, if followed faithfully, will lead humanity towards a future world that is at least *somewhat* better and more just than the world it inhabits now.

One way or another, theoretical reason yearns to accomplish what Wittgenstein (1984, 41e) says is impossible: making the future that it dreams of come true by 'building clouds'. More to the point, the goals and directions of seeking and organising knowledge (our 'regulative ideas') are like blinkers on a mule, however necessary or useful they may be to achieving the ends of science and politics: they condition us not to see any phenomena lying outside the sphere of 'proper' research, and they teach us to interpret what we do notice as having been definitively disposed of by its categories. The categorically true thus blocks our view of those un-categorisable bits of reality that might otherwise trigger rationally inappropriate affective responses in us.

Reason's Condemnation of 'Excessive' Compassion

According to Kant, one of the greatest cloud-builders who ever lived, anyone who feels compassion for suffering judged necessary by the verifiably true criteria of justice and morality is inexcusably soft hearted and lacking in the 'dignity of virtue' (see Horkheimer and Adorno 2002, 80). To allow such compassion to exist would be 'foolish rather than noble', as Robert Solomon (2000, 261) puts it, inasmuch as the suffering on account of which this undignified compassion weeps possesses an impeccably just provenance. On this view, it would be worse than merely incorrect to equate, as the novelist Vasily Grossman (1985, 409) does, the 'stupid kindness' of irrational and needless compassion with 'what is most truly human in a human being … the highest achievement of his soul' – it would be a grave moral weakness: at best an irresponsible precursor to anarchy, at worst an invitation to tyranny. On the account given by reason's critique of excessive compassion, the tough love of obedience to the duty to punish wrongdoers must always prevail over the soft love of sympathy for their suffering.

The apogee of this way of thinking is Kant's thought experiment concerning a curious juridical-moral problem that would face a society the members of which have decided to dissolve their social bonds by mutual consent (see 1996, 474). Before these individuals can scatter to the four corners of the earth (where perhaps they will live in caves as antisocial troglodytes), they must solve the problem of what to do with the criminals they have previously convicted and sentenced, including the murderers they have justly sentenced to death. From the point of view of philosophers who think that punishment is an evil that can only be justified by the utility it will bring, the solution seems obvious: no punishment should be inflicted in such circumstances, since it cannot by definition serve to prevent future crimes in the society (see Bentham 1939, 843). But Kant was no utilitarian, and his solution to the problem presented by his thought experiment is unequivocal: 'The last murderer remaining in prison would first have to be executed, so that each has

done to him what his deeds deserve and blood guilt does not cling to the people for not having insisted on his punishment.' In other words, the members of this nearly defunct society have a moral duty to decorate their tall trees with the hung bodies of murderers before they ride out of town. And lest Bentham be taken as a paradigm of soft heartedness and reckless compassion when compared to Kant, it must be said that even as staunch a utilitarian as he was felt the need to justify the social obligation (and individual duty) to inflict the 'mischief' of punishment whenever the balance of individual utilities warrants it (see Bentham 1939, 846–52).

On most accounts of justice, which in this respect follow Kant, reason's primary task is to furnish correct concepts to the understanding so that it can use them to judge whether a particular instance of suffering is just or unjust. But traditional philosophy also gives reason two additional functions to perform in the sphere of moral action. Having laid down (or accepted) the abstract law, reason must now control our concrete interests and emotions in the way a good charioteer controls his potentially unruly steeds, as Plato's metaphor would have it (*Phaedrus* 246*a*1–*b*5). In the role of charioteer, reason's first and most important job is to restrain our selfish interests: to steer the will towards performing right (i.e. lawful) action, even though the will might actually benefit its master's immediate interests by doing wrong. The need to perform this particular social task gives rational moralists their primary claim to legitimacy, for everyone has been taught to believe from childhood that the chief enemy of moral rectitude is uncontrolled individual selfishness. From this point of view, anyone who dares question the need for unmitigated rigour (i.e. tough love) in the rational application of just law is probably naïve or disingenuous, if not a crafty special pleader looking for an angle to exploit.

Although conventional moral reasoning fights an open war against excessive egoism, it also wages a kind of covert counterinsurgency against excessive altruism. As Kant's example of society's duty to punish its last murderer shows, reason is required to rein in any tendency towards undue soft heartedness that it finds within. It must discipline and correct any rationally unjustified feelings of compassion that arise in the human heart, on the theory that an overly promiscuous sense of compassion is like a spoiled child: it does not know what is good for it.

'The heart has its reasons, which reason does not know', writes Pascal (1941, 95), and in this he is probably right. But at least one thing is clear beyond all possible doubt: what reason does not know it cannot accept as true or valid. The quintessential example of this position in modern times is Adam Smith's concept of the 'invisible hand' (1937, 423), according to which the apparently random pursuit of personal gain by every individual produces a better overall outcome than if those in power had affirmatively planned for a social utopia. When combined with Ayn Rand's striking image of a 'utopia of greed' (1999, 752), Smith's argument begins to make unreasonable compassion and altruism look like the worst kind of immorality.

More generally, reason in the form of this or that 'reasonable' sense of justice harbours deep resentment against irrational compassion for the suffering it regards as rationally justifiable. Operating on the basis of what Slavoj Žižek (1999, 146) calls a 'morbid masochist morality that perceives suffering as inherently redeeming', the conventional sense of justice conceives of just suffering on the model of *lex talionis*: to undergo it is to repay a debt of injustice that is owed by the sufferer to his

victims and to society, if not to being itself.[6] For deontologists such as Kant, this debt is presently due on account of past wrongs committed by the debtor. For teleological thinkers such as Bentham and Smith, it is due on account of future benefits that the debtor owes to society in advance. Either way, since theory stipulates that the debt must be paid, there is no sense (and indeed there is considerable danger) in cultivating a morbid sense of compassion for those who must pay it.

With unimpeachably persuasive rhetoric, reason says: 'Surely the intolerable suffering of innocent victims of torture and genocide cannot and must not be compared with the desirable suffering of evil perpetrators of these deeds who are punished or deterred by the righteous violence enacted by a reasonable sense of justice.' *Tout comprendre c'est tout pardoner* ('to understand all is to pardon all'): although this venerable saying is actually a *non sequitur*, reason believes that it may be true enough in practice to justify taking stern measures against 'excessive' understanding and the compassion that it risks creating in us. Levinas (1998, 231), the West's philosopher of compassion *par excellence*, once said that even 'an SS man has what I mean by a face', meaning that even human beings guilty of the worst sorts of outrages can suffer in a way that is (or ought to be) at least somewhat troubling to us. Yet despite the immense suffering that girdles the earth – a fact which suggests that all human beings, regardless of their moral status, have at least *one* thing in common – the hard logic of just deserts cannot bear to listen to a claim such as Levinas's.

There is more than just dispassionate moral rectitude in reason's condemnation of excessive compassion. Reason also secretly permits the appetites to enjoy a certain measure of pleasure in inflicting torment on 'bad' people, or observing others inflict it, on the theory that the tendency to relish the spectacle of just punishment lies in 'human nature', or that it has the useful effect of promoting 'social solidarity' (see Durkheim 1984, 62–3).

Religiously inspired reason can be particularly enthusiastic in discharging its duty to give evildoers their comeuppance. William James's psychological analysis of the way sixteenth-century European witch hunters treated their victims is a case in point. James observes that the canonical 1484 religious text *Malleus Maleficarum* (*Hammer of Witches*) inspired and guided 'a will that stuck at nothing in the way of cruelty, and a conscience raised to fever heat by the idea that the battle was directly waged with God's enemy Satan, there in the very room' (see Richardson 2006, 347). In such cases, the apparently disagreeable duty of making the unjust suffer their just deserts is in fact amply repaid by the pleasure of discharging it. Indeed, it is possible to cite no less an authority than Thomas Aquinas, one of the West's greatest philosopher-saints, for the proposition that those who are blessed by God will continue to enjoy this kind of sadistic pleasure for all eternity (see Heidegger and Fink 1993, 125). *Beati in regno celesti videbunt poenas damnatorum, ut beatudo*

6 The idea that the unjust owe a debt to being itself is found in the oldest philosophical text in the Western canon, the famous Anaximander fragment: 'Whence things have their origin, there they must also pass away according to necessity; for they must pay penalty and be judged for their injustice, according to the ordinance of time' (as translated in Heidegger 1975, 13).

illis magis complaceat, says Aquinas: 'the souls in heaven will be able to enjoy the blissfulness of paradise all the more because they can view the torment of the damned in hell'. If Aquinas is right – if it is true that the angels themselves get off from watching certain people writhe in agony – then why should any mere mortal not take pleasure in witnessing the righteous earthly punishment of the unjust?

Excessive compassion can take many forms, however, and training people to squelch it in 'obvious' contexts (e.g. the hanging of Rudolf Höss, the commandant of Auschwitz, in 1947) can also condition them to suppress it in other, less obvious ones. Logically speaking, one thing is never exactly the *same* as another; otherwise they would be one thing, not two. To mourn on account of the suffering of torturers brought to justice is certainly different from mourning on account of the men, women and children who died in the bombings of Hiroshima and Dresden, just as both of these forms of compassion are different from mourning for the suffering of sick children who lack access to affordable health care, or mourning on account of the despair experienced by workers who lose their jobs and self-esteem due to the effects of globalisation. But while these examples of compassion can always be compartmentalised by reasonably drawn lines of distinction, there is an important sense in which they are not strangers to one another. In each case the claim that the suffering in question is *necessary* – for justice to be done, for greater human suffering to be avoided, to stop the political drift towards inefficient 'socialised medicine', or for global humanity to prosper – can make compassion appear morose and foolish, at best, in the eyes of instrumental reason. When it comes to worrying about the effects of what is necessary, it would seem that reason gives the heart the same counsel that Lady Macbeth gave her Lord (*Macb.* A.III S.2): 'Things without all remedy/Should be without regard: what's done is done.'

The Difference Between Compassion and Pity

Fortunately or unfortunately, compassion, like selfishness, is a notoriously poor pupil that is always forgetting to follow its master's advice. 'History is debt, but not atonement', writes Marcuse (2007, 249), 'Eros and Thanatos are not only opponents, but also love one another'. Unreasonable compassion and the unreasonable pursuit of self-interest are like Eros and Thanatos in this respect: the aggression of the latter creates rationally unforgivable debts that the former is always irrationally tempted to forgive. Aggression and destruction serve our selfish cravings for the future; compassion works under what Marcuse (249) calls 'the sign of suffering, the past'. Like twins, however, they like to remain close to one another in the present: the one pugnaciously dares the other to comfort its inevitable regrets; the other never ceases to respond with kindness.

By common usage, to notice and have compassion for another's suffering means to be deeply touched by it in all of its concrete particularity. Compassion, from the Latin *compati* ('to suffer with'), is a genuine suffering-with-the-sufferer on account of his afflictions. Pity is capable of secretly enjoying the bittersweet pleasures of sentimentality when confronted with what Jankélévitch (2005, 123) calls 'the spectacle of rags'. Genuine compassion, however, brings pain without recompense

to the one who experiences it. Pity condescends from on high; compassion descends to touch what is low. Unwilled, at least in its purest form, compassion is experienced as a burden to be borne rather than an opportunity to feel sanctimonious. It effectively doubles the original sufferer's woe, spreading the resulting product between two people. From the standpoint of a hypothetical accountant seeking to minimise the world's overall stock of 'needless' human suffering, it must therefore come as a relief to learn that the suffering of compassion, though irrational, is always a unique and particularised experience.

Although the concept as suffering in general – *universal* human suffering – corresponds to the Enlightenment's concept of universal humanity ('the family of man'), there is no such thing as 'compassion in general':

> Compassion, by its very nature, cannot be touched off by the sufferings of a whole class or a people, or, least of all, mankind as a whole. It cannot reach out farther than what is suffered by one person and still remain what it is supposed to be, co-suffering. Its strength hinges on the strength of passion itself, which, in contrast to reason, can comprehend only the particular, but has no notion of the general and no capacity for generalisation. (Arendt 2006, 75)

Arendt's argument that compassion is irrational – in the precise sense of lacking the capacity to generalise – makes a point that is both logical (i.e. about the usage of the word 'compassion') and phenomenological (i.e. about the way compassion shows itself in experience). A kind act stimulated by a calculation of pros and cons, costs and benefits, is certainly 'substantively rational' in Max Weber's sense (1978, i. 85), inasmuch as it manifests the actor's conscious effort to bring about a consequence beneficial to another according to the criterion of the actor's ultimate values. But rational altruism is not, strictly speaking, the same as compassion.

Altruistic acts, like egotistic acts, participate in the logic of means and ends: their manifestations are consciously shaped and controlled by rational calculation. Margaret Spillane (2006, 22) provides a quintessential example of rational altruism in recounting an incident from the life of the playwright Samuel Beckett:

> Beckett was well-known among Paris street people as an easy touch. Once while on a stroll with a friend, a beggar offered his tale of misfortune, and the playwright produced a generous offering. Shouldn't you consider the possibility, the friend asked, that the beggar was taking advantage of you? Replied Beckett: 'I just couldn't take the chance.'

In the context of this story, Beckett's apparently *ex ante* weighing of the probability the beggar was in need versus the probability he was only pretending was an instrumentally rational deed. That is, it manifested Beckett's subjective 'preference' for soft-heartedness by harnessing the sentiment of pity into an act of rational altruism. But calculation of this or any other sort is completely foreign to the experience of genuine compassion.

The experience of compassion *as such* can and must be viewed separately from any compassionate deeds that may be triggered by that experience. In its proper moment, compassion shows itself as pure gesture. Considered from a phenomenological point of view, it can be described as a means without end: that is, the sympathetic grimace

of compassion is a gesture in which 'nothing is being produced or acted, but rather something is being endured and supported' (Agamben 2000, 57). Seen from the point of view of an external observer, however, compassion announces the advent of what can only be described as an end without means: that is, it calls for action 'determined by a conscious belief in the value for its own sake of some ethical, aesthetic, religious, or other form of behaviour, independently of its prospects of success' (Weber 1978, i. 24–5).

Neither sentimental nor calculating, compassion, as the name implies, is a true *passion* (from the Latin *pati*, 'to suffer'). It is possible, of course, to feel pity for an entire class of persons, and even to rebel against the causes of their suffering; but to do this requires one to abstract from the gritty singularities of each individual's particular suffering to the sorry situation of the class as a whole. The passion of compassion involves no such abstraction. Not only would a hypothetically limitless (i.e. 'general') compassion be emotionally unbearable, it would also be incapable of guiding action in any way. Such an impossible compassion would surely die of a broken heart, lost and disoriented within an eternal blizzard of human woe. Wanting to respond to everyone in general, it would be incapable of expressing itself to anyone in particular.

Although I am determined to come face to face with the troubling phenomenon of so-called 'necessary' suffering in this book, my objective is not to cure or redeem it, as if what is universally regarded as necessary and justified can suddenly be made unnecessary or redeeming by waving the magic wand of some oxymoronic theory of 'compassionate law' over it. To be sure, big law firms have been known to peddle such ideas to their clients, as in a recent magazine advertisement stating 'The best attorneys know how to balance aggression with delicate handling', showing a photograph of a large bear gently cradling a naked infant in its paws.[7] Even as acute a philosopher of suffering as Emmanuel Levinas (1999, 34) has advocated for the kind of justice that would act compassionately as it lays on the lash – one which would call on us to 'whisper in [law's] ear, "Remember the other"', as Amanda Loumansky (2000: 300) puts it. Undoubtedly the black widow spider loves her mate for an instant, too, just before she kills and eats him.

If it is true, as I have claimed here, that even the best law imaginable would inflict, *and must inflict*, suffering on some so that others will be saved or vindicated, how could anyone in good conscience ever avoid (and evade) law's tragedy by clinging to a theory of compassionate justice? Law is not a hell to which compassionate justice is the heavenly answer. Heaven is hell – and hell heaven. Levinas (1998, 105) proves this himself when he refuses to accept the idea of non-resistance to evil, acknowledging (as he must) that the evil 'executioner' who threatens our neighbour 'calls for violence and no longer has a Face'. If we do not take too distant a view of it, the actual day-to-day work performed by the agents of law and justice constitutes what Foucault (2003b, 109) calls 'an unending movement – which has no historical end – of the shifting relations that make some dominant over others'. For those who dwell at the bottom of the well, the sovereign at any given concrete moment in time

7 'The World in 2008', *The Economist* (2007), 136 (advertisement for the Bingham law group).

is not he who issues the abstract commands of law (Austin 1998, 102). Nor is the sovereign he who decides on the exception (Schmitt 1985, 5). Seen from the bottom of the well, the sovereign is always the one who is drawing out the water *right now* – the one who successfully mobilises the resources of the legal order to make the well-dwellers help him get what he wants.

Even supposing that all unjust domination were somehow completely eliminated from the earth, and a golden age of true justice established, the fact of domination as such would not disappear from human relations. On the contrary, the sheer animal urge to dominate others – what Nietzsche (1968, 341) famously calls the will to power – exhibits a stubbornly protean quality which assures that humans will never cease claiming the right to exercise 'just' domination over others, even if merely asserting the claim itself is the only thing left for them to do. Certainly this is the basic premise of classical sociology and its most brutally honest theorist, Max Weber. For Weber (1978, i. 214), the 'legitimacy' of inter-human domination is never a function of its moral status but rather of widespread popular *belief* in its legitimacy: 'What is important is the fact that in a given case the particular claim to legitimacy is to a significant degree and according to its type treated as "valid" [one should add here "because just"]; that this fact confirms the position of the persons claiming authority and that it helps to determine the choice of means of its exercise.'

Kant's famous categorical imperative (1993, 195) – enjoining each person to use humanity in his person and in the person of all others 'as an end and never *merely* as a means' – quietly supports Weber's thesis, inasmuch as the word 'merely' in the imperative presupposes that treating others as means (i.e. dominating them) is permissible or even mandatory so long as one *also* treats them as ends. To be sure, there will be a few hypersensitive people, like Benjamin (1978, 285), who doubt whether Kant's demand contains too little – that is, 'whether it is permissible to use, or allow to be used, oneself or another in *any* respect as a means'. But even as staunchly an egalitarian and humanistic a thinker as Friedrich Engels had to acknowledge that a certain degree of domination and subordination will be technically necessary for material production in society even after its final stage of justice has been achieved (see Feuer 1959, 481–5).

Weber (1978, i. 213) correctly observes that 'every [legal] system attempts to establish and cultivate the belief in its legitimacy'. For the past two centuries, every *liberal* legal system has done this by claiming to acknowledge and promote the interest of mankind in the person of each individual. History teaches, however, that all such systems, once securely established, somehow manage to interpret 'the interest of mankind' as requiring the representation and preservation of the presently existing relations of domination: the 'order imposed by fate', as Benjamin (1978, 285) puts it. This explains why most human rights declarations (e.g. the American Bill of Rights and the European Declaration of Human Rights) enshrine the preservation of property rights (and hence the relations of domination they establish) alongside the right to life, the right to freedom of speech and religion, and the right not to be tortured.

As if worried about what the Goddess of Justice (*Dike*) might see if she were allowed to peek from behind her blindfold at the real, concrete relations of domination and inequality that characterise liberal societies, the agents of the rule of law like to

appropriate *Dike*, with all her blindfolded impartiality, as their most iconic symbol. But impartiality, like partiality, is merely the name of a possible human affect or comportment the social and moral status of which cannot be safely evaluated in the abstract. This is why Anatole France's best-known and most corrosive aphorism still troubles as well as amuses us: 'The law, in its majestic equality, forbids the rich as well as the poor to sleep under the bridges, to beg in the streets, and to steal bread' (Bartlett 1980, 655).

In light of the ceaseless historical domination and counter-domination that the agents of law facilitate or let happen, it seems to me that an equally good symbol for what law-doers do is yet another mythical Greek figure: Oedipus the King. As depicted by Sophocles (1938, i. 369–418) in the tragic play by that name, Oedipus did everything he could, before he became a king, to avoid the terrible prophecy that he would kill his father and marry his mother. But of course he wound up doing just that in spite of all his careful precautions. Despite its hero's downfall, however, *Oedipus the King* provides no real support for those who advocate the 'Why bother?' attitude of a passive fatalism. It would be wrong to think of the destiny of Oedipus as 'a dome pressed tightly on the world of men', as Martin Buber (2000, 63) puts it, for destiny is not fate. On the contrary, destiny, when properly understood, shows itself as an ineluctable consequence of freedom. It is relatively easy to submit to fate, destiny's deformed doppelganger, since all fate asks is that one *believe* in it. Thereafter, one's fatalistic attitude operates in the manner of a sedative to suppress the free human movement which true destiny needs in order to become what it will be.

Oedipus was no victim: he freely brought destiny down upon himself (and others) by his unimpeachably rational and responsible deeds. His terrifying tale expresses the tragic essence of law, right down to his gouged-out eyes, which hauntingly mirror *Dike*'s sightlessness behind her blindfold. No matter what law does, someone will suffer from its actions and inactions; and *who* suffers in any given situation will always be up to the particular human beings who freely perform law's operations in that very situation. Looking at *Oedipus the King* from a post-modern standpoint (i.e. one that has become aware of Auschwitz), the protagonist's tragic experience of suffering is *not* also the vision of its mitigation, as if fate, or the gods or reason might still intervene and prevail. For the latter will not prevail, or if they do, their victory will always turn out to be short-lived. We know this because 'Auschwitz is the ultimate, is the refutation of Fate, the Gods, Reason; is the demonstration of total human freedom: the freedom to order, to organise, to perform the slaughter' (Marcuse 2007, 211–12). Before 1942, the concept of human freedom yoked to rational plans could still inspire unqualified hope and yearning. But ever since Auschwitz, the knowledge of what total freedom is capable of doing in the service of its various ratiocinations must also give one reason to shudder.

William James once said that the history of philosophy is not so much a history of ideas as a history of a 'certain clash of temperaments' (see Richardson 2006, 484). Add this to Nietzsche's insight (1927a, 383) that 'the greater part of the conscious thinking of a philosopher is secretly influenced by his instincts, and forced into definite channels', and it becomes possible to understand philosophy as a kind of long and unruly chorus (or cacophony) of points of view.

Thus, instead of trying to account for the tragic effects of law and justice in the usual way – which is to blow the smoke of justification or redemption around them – I will now attempt to elucidate a particular affective standpoint that I call *ethical distress*. To be perfectly clear, this standpoint is phenomenological in nature: it shows itself first and foremost as a particular kind of inner experience, rather than as a rationally attainable or normatively desirable ethical state. The standpoint of ethical distress can and will be described, but the point of the description is simply to gain access to the fact and problem of universal human suffering, not to self-righteously argue that people 'ought' to experience more ethical distress on account of it. With all due respect, what is at stake in these investigations is far too important to permit the pimping of yet another normative theory of law to cheapen it.

Passion, Sentiment and Sensibility

Ethical distress is a form of sensibility, like vision and hearing, rather than a passion or a sentiment. Once they are manifested, the passion of compassion and the sentiment of pity often (though not always) lead to the commission of other-regarding actions. Compassion acts compassionately; pity attends to the pitiable. The sensibility of ethical distress, on the other hand, remains purely receptive at all times. Never reliably leading anywhere in particular, it is an uncovered wound, always quivering and ready to throb if touched. A clear understanding of this distinction is absolutely essential if the present work is to be seen in its proper light. In order to make this point comprehensible, it will first be necessary to compare the passion of compassion with the sentiment of pity. Only then will it be possible for ethical distress to emerge as a distinct phenomenon in its own right – indeed, as the veritable 'point of view' from which this book was written.

If compassion is the noblest form of passion, as Arendt claims (2006, 85), it cannot be reduced to a mere sentiment. As we have already seen, true compassion is a form of suffering, whereas the sentiment of pity can be enjoyable, if only covertly. Indeed, in the extreme case of *Schadenfreude*, the sentiment of pity and the feeling of pleasure are actually indistinguishable. It is relatively easy to feign sentiment; compassion is harder to dissimulate. Sentiments keep their 'sentimental distance'; compassion is 'stricken in the flesh' (Arendt 2006, 79). Sentiments speak in words; compassion speaks in the language of gestures: the anguished or lachrymose demeanour, the comforting touch, the spontaneous embrace. Sentiments like to take the time to explain themselves; compassion comes on suddenly in an irrational urge that, like the kindred phenomenon of mourning, exhibits 'the deepest inclination to speechlessness' (Benjamin 1978, 329). Reason can talk sentiments into being reasonable; compassion tempts reason to throw caution to the wind.

The sentiment of pity asks reason to authorise a feeling of solidarity with the sufferer, and hence the will to do justice on his behalf. Compassion asks for nothing to be authorised – it simply *gives* kindness, whether or not justice demands it. Justice, like pity, is loquacious: it wants to glorify the suffering to which it attends. Justice and pity make martyrs out of those who suffer unjustly. Compassion, on the other hand, recognises a sufferer's pain regardless of his juridical status. The well-known

pleas of Albert Camus (2000, 277) and Sister Helen Prejean (1994) against the death penalty demonstrate this. Their anguished testimonies about the horrors of the execution process show that it is not necessary to feel a sense of 'social solidarity' with a convicted murderer on account of his heinous deeds in order to experience compassion for him as he waits in a prison cell for a rendezvous with the guillotine or the hypodermic needle. At the same time, their equally immense sympathy for the victims of the murderer's crimes is not a contradiction, but rather a vital clue about the true nature of compassion: it tends towards profligacy.

That genuine compassion possesses the characteristics attributed to it above can be illustrated by an incident from Vasily Grossman's *Life and Fate* (1985), an epic novel about Stalinist repression and the Nazi invasion of the Soviet Union during the Second World War. The recent discovery and publication of Grossman's wartime notebooks confirm that the war scenes in the novel are based on actual occurrences the author witnessed or learned about during the period 1941–1945, when he worked as a war correspondent for *Krasnaya Zvezda*, or *Red Star*, the official newspaper of the Red Army (see Grossman 2005, xvii). The incident in question involved a punitive action aimed at a Russian village by a German military unit bent on exacting vengeance for the murder of two of its soldiers. An *Aktion* like countless others perpetrated throughout the Soviet Union by the SS and the Wehrmacht, this particular event contains a small but striking detail that underscores Arendt's point that compassion as such is an essentially irrational phenomenon.

The operation began late in the afternoon. The Germans entered the village, ordered its women to dig a large pit at the edge of the forest, and rounded up and held twenty male peasants for execution at daybreak the following morning. One of the women whose husband had been seized was also forced to quarter several German soldiers in her hut overnight. The next morning, while the Germans were getting their machineguns ready for the massacre, one of them managed to pull his trigger by mistake, shooting himself in the stomach. His compatriots bandaged the wound as best they could, laid him on a cot in the woman's hut, and then went outside to begin killing the villagers. Before departing, however, they left the woman alone in charge of the wounded soldier, motioning for her to watch over him. Grossman (1985, 408–409) describes what happened next:

> The woman thought to herself how simple it would be to strangle him. There he was, muttering away, his eyes closed, weeping, sucking his lips … Suddenly he opened his eyes and said in very clear Russian: 'Water, Mother.' 'Damn you,' said the woman. 'What I should do is strangle you.' Instead she gave him some water. He grabbed her by the hand and signed to her to help him sit up: he couldn't breathe because of the bleeding. She pulled him up and he clasped his arms round her neck. Suddenly there was a volley of shots outside and the woman began to tremble. Afterwards she told people what she had done. No one could understand; nor could she explain it herself. This senseless kindness is condemned in the fable about the pilgrim who warmed a snake in his bosom. It is the kindness that has mercy on a tarantula that has bitten a child. A mad, blind kindness.

Many other gratuitous and unforeseen acts of kindness appear in Grossman's book. In a good illustration of form following content, they seem to occur almost randomly during the course of the narrative. To mention but one other example, there is a striking

scene in which a captured German officer and his men are removing decomposing bodies from a basement in Stalingrad in the winter of 1943, towards the end of the battle for the city. A woman in a crowd of Russian onlookers takes great delight in witnessing the obvious misery and suffering of the Germans, who have been forced by Russian troops to perform this odious task (803–806). After a while the Germans bring out the emaciated corpse of an adolescent girl on a stretcher, and the woman suddenly realises that it is the body of her daughter. At first she collapses and wails in grief. Then, getting to her feet, the woman begins to stride angrily toward the captive officer, and a Russian guard lets her pass. Sensing that she is about to take vengeance, the crowd cannot take their eyes off her. The narrative continues (805–806):

> The woman could no longer see anything at all except the face of the German with the handkerchief round his mouth. Not understanding what was happening to her, governed by a power she had just now seemed to control, she felt in the pocket of her jacket for a piece of bread that had been given to her the evening before by a soldier. She held it out to the German officer and said: 'There, have something to eat.' Afterwards, she was unable to understand what had happened to her, why she had done this.

Much later still, lying on her bed, the woman remembered what she had done outside the cellar in Stalingrad, and she thought to herself, 'I was a fool then, and I'm still a fool now' (806).

These striking incidents exemplify the essential inarticulateness and senselessness of compassion, at least when it is considered rigorously as a distinct phenomenological category. The will to do justice cannot act without first finding its voice: the voice of pity expressing solidarity with the pitiable against their oppressors. But compassion is tongue-tied and lacking in cleverness. This shows why the woman in the first story found herself unable to explain her actions, and why the woman in the second story could not understand what had happened to her. Viewed from any credible standpoint of morality, the German soldiers that the women comforted deserved no pity, and strangling them or denying them food would have been perfectly rational responses. But these incidents show that compassion bears no necessary relationship to the sense of justice. Compassion *wants* nothing – it simply happens. Justice, on the other hand, yearns to change the world. Justice has a dream, to paraphrase Martin Luther King, Jr (see Garrow 1988) – a dream that must be told, as well as sold, from the mountaintop.

The passion for justice reconciles people with life (and thus makes it bearable) by projecting the image of a just life to come as a goal worth living and fighting for. But while it may be nobly begun, the sentiment of pity which leads to the passion for justice can also be far more dangerous than compassion. The latter mutely reproaches life for its cruelties, and thus temporarily resists reconciliation with it. As a result, compassion quickly exhausts its passion in the particular case at hand, after which the previously compassionate one is able to reaffirm the value of living. Pity, however, lasts longer because it can be remembered and rationally articulated in terms of its grounds; it is also capable of being generalised into the incongruous form of a 'pity-inspired virtue', as Arendt (2006, 81) puts it.

In pity one can find what Julia Kristeva (1996, 393) calls the 'logic of an oppressed goodwill which leads to massacres' – a logic that in any case is determined

to overcome anyone and anything standing in the way of its noble crusade for justice. If compassion stands up against 'the revolutionary killing of the oppressor', this is not because it adheres to the doctrine that life is sacred, as Walter Benjamin (1978, 298) supposes. In contrast to pity, genuine compassion does not derive its affective responses from any doctrine. This is why Grossman characterised the sort of kindness associated with pure compassion as mad, blind and senseless. It is also why Levinas (1998, 230) was moved by the many descriptions of 'senseless kindness' in *Life and Fate* to assert that the compassion-inspired tendency to commit acts of '"small goodness" from one person to his fellowman … is lost and deformed as soon as it seeks organisation and universality and system'. In the court of reason, the proposition that existence (mere life) stands higher than the possibility of a just existence can be plausibly regarded as 'false and ignominious' (see Benjamin 1978, 299). But compassion is not a licensed advocate in the court of reason, and it has nothing to do with 'propositions' of this or any other sort.

From the standpoint of justice, pity and reason co-determine one another. Citing both the French Revolution and the Paris Commune as proof, Hannah Arendt (2006, 79) remarks that '[p]ity, taken as the spring of virtue, has proved to possess a greater capacity for cruelty than cruelty itself'. If it does not always result in the extreme case of the revolutionary killing of the oppressor, a pity-inspired virtue nonetheless cries out for justice *against* the unjust. Its motto is *fiat iustitia et pereat mundis*: 'let justice be done even if the earth should perish'. The extremism of this old Latin saying should not obscure the fundamental truth which lies in its core: justice, however resplendent, always winds up hurting *someone*. In the words of Levinas (1998, 203–204), 'In order to be just, it is necessary to know: to objectify, compare, judge, form concepts, generalise, etc.'. And this merely metaphorical violence of rational objectification ominously foreshadows the very real coercion – the 'necessary harshness', as Levinas puts it – that is implied by any sense of justice that aspires to be effective.

According to Cicero (1999, 120), 'We are inclined by nature to love others'. But even if it is possible to credit an entity called 'nature' with having produced this remarkable effect, it would certainly be naïve to claim, as Cicero's intellectual descendent Jacques Rousseau (1993, 91) does, that members of the human race are 'constrained by natural compassion from doing injury to others'. That human beings are capable of showing great kindness to one another is undeniable; nevertheless, our long historical record of inter-human hatred, violence, genocide and mutual destruction is ample enough to cast serious doubt on the universal validity of Rousseau's claim. 'There is no document of civilisation which is not at the same time a document of barbarism', says Benjamin (1968, 256), and he is right. Chattel slavery built the Pyramids and put the gilded Goddess of Freedom on the dome of the United States Capitol. The sweated labour of millions of anonymous toilers gave leisure time to Beethoven to write his symphonies and Gauss to write his equations. At least 100,000 Iraqis have died to date, and others continue to die daily, so that someone else's vision of democracy and the rule of law can be achieved in their country.

That said, however, there is clearly enough truth in Rousseau's remark to explain why most people actually feel *troubled* when circumstances require them to witness

the spectacle of acute suffering in others, and why theatregoers weep when presented with dramatic depictions of such suffering. Although human beings can try to seek relief from this feeling through the cathartic effects of tragic drama, memories of the tragedies of real life are much harder to get rid of. No wonder people are inclined to believe – and *want* to believe – in doctrines that explain why certain forms of real suffering are inevitable, necessary or just. Whether or not 'the justification of the neighbour's pain is the source of all immorality', as Levinas (1998, 99) claims, the fact is that conventional accounts of law and justice always give suffering an ideological use-value:

> It is said to be necessary to the teleology of community life, when social discontent awakens a useful attention to the health of the collective body. Perhaps there is a social utility in the suffering necessary for the pedagogic function of Power in education, discipline, and repression. Is not fear of punishment the beginning of wisdom? Do people not have the idea that suffering, undergone as punishment, regenerates the enemies of society and humankind? (Levinas 1998, 95)

In one way or another, justifications of this sort act like powerful narcotics, numbing or killing the anguish that can come from feeling responsible in some way for the suffering of others. Once internalised by an agent of law and justice, a justification is like the belief that justice has finally been done: it can and usually does put an end to any feeling of personal responsibility for what 'had' to happen at the agent's hands.

A Preliminary Indication of Ethical Distress: The Angel of History

In direct contrast to the feeling of justification that accompanies the will to justice, the phenomenon of ethical distress is inconsolable: it is constitutionally immune to the narcotising effects of any political or legal teleology. Although other-regarding, ethical distress must not be confused with the sentiment of pity, the passion of compassion, or the will to justice. Nor is it connected with any of the West's three principal theories of ethical behaviour: rationalist self-legislation (deontology), the calculation of happiness (utilitarianism) and the cultivation of virtue (virtue ethics). From the point of view created (or imposed) by the feeling of ethical distress, the ultimate consequence, if not the very point, of these theories is to allow law-doers (*a*) to feel comfortable with the decision to inflict suffering on some in the interest of 'being principled' and 'doing the right thing', and (*b*) to ignore or deny the suffering of anyone who cannot prove, under the theory, that he has a presently existing 'entitlement' to justice.

Sensibility in general (as opposed to passion, sentiment and rationality) can be defined well enough for present purposes as an affective comportment – a constantly activated ability to appreciate and respond to complex emotional influences. The sensibility of ethical distress is like an insomniac kept awake by constant worry about his loved ones: it is a bottomless capacity to appreciate the suffering of others. A step removed from the sentiments of pity and solidarity, ethical distress is also a step removed from the passion of compassion. As we have seen, pity can be generalised: it can create a feeling of solidarity with an entire class of sufferers,

thereby focusing and supporting the will to do justice on their behalf. Compassion, though it cannot be generalised in the way that pity can, focuses and supports the will to act compassionately towards this or that suffering individual. Ethical distress, however, does not focus or support the will in either manner, because it yearns to do the impossible: *it yearns to generalise compassion*.

In its proper moment, ethical distress wallows in a state of distress precisely because it realises that compassion cannot be generalised to all human beings without immobilising the will. Ethically speaking, a mobilised will to justice is bound to hurt *someone*; and yet an immobilised will cannot help *anyone*. Between this particular Scylla and Charybdis sails the only sort of sensibility that is capable of thinking law's relationship to universal human suffering. Anything less than this (e.g. pity) turns the will to do justice into a partisan hack; and anything more (e.g. compassion) loses sight of the whole.

As a phenomenon, ethical distress is closely related to Levinas's idea (see 1996, 114–15) of 'ethics as first philosophy', inasmuch as it is both other-regarding and pre-rational. However, ethical distress is not merely triggered by exposure to the 'face of the Other', for it burdens the one who experiences it even (or especially) when he is most alone. Even Robinson Crusoe is capable of feeling ethical distress, because his actions just might have negative consequences for others who have yet to make their appearance on the scene. Indeed, the sentence 'I am responsible' means, in this context, just this: *my actions and inactions have consequences, and not all of these consequences are good.* On the other hand, ethical distress *leads* nowhere in particular – not even to compassion – for whatever outcome might follow in its wake is fated to become fodder itself for still more ethical distress as newly created suffering enters the scene. Ethical distress, which cannot avert its gaze from suffering in the here and now, finds that '[t]he breaking of eggs in action never leads to anything more interesting that the breaking of eggs. The result is identical with the activity itself: it is a breaking, not an omelette' (Arendt 1994, 397).

Viewed from the perspective of those who are constitutionally unable, for whatever reason, to close their eyes to the world's overall sadness (i.e. those who experience ethical distress) the human condition, in all its complexity and multiplicity, at some level constitutes an undivided unity. If we do not take too distant a view of it, this world is full to the brim with 'loneliness, poverty, and pain', as Bertrand Russell (1967, 4) puts it. Although the concept of universal suffering is quite simple – as simple as suffering is ubiquitous – great effort is required to achieve a perspicuous view of it. That is because our ideas of right and wrong, good and bad, lawful and unlawful, and just and unjust focus our attention on particular *kinds* of suffering, and thus prevent us from contemplating the whole. Whenever we do notice the suffering of others we usually are quick to find fault and place blame. We stingily reserve our pity for the case of the 'good victim', as Gary Younge (2007a, 12) puts it. However, at that point something odd happens: our carefully husbanded feelings of pity for the sufferer are transformed, by means of some strange reverse alchemy in the human heart, into a powerful motive for inflicting still more suffering on 'bad perpetrators'. Our righteous indignation puts us out of touch with what Arendt (1994, 172) calls 'that distinctive melancholy that has characterised all but the most superficial philosophy since Kierkegaard'.

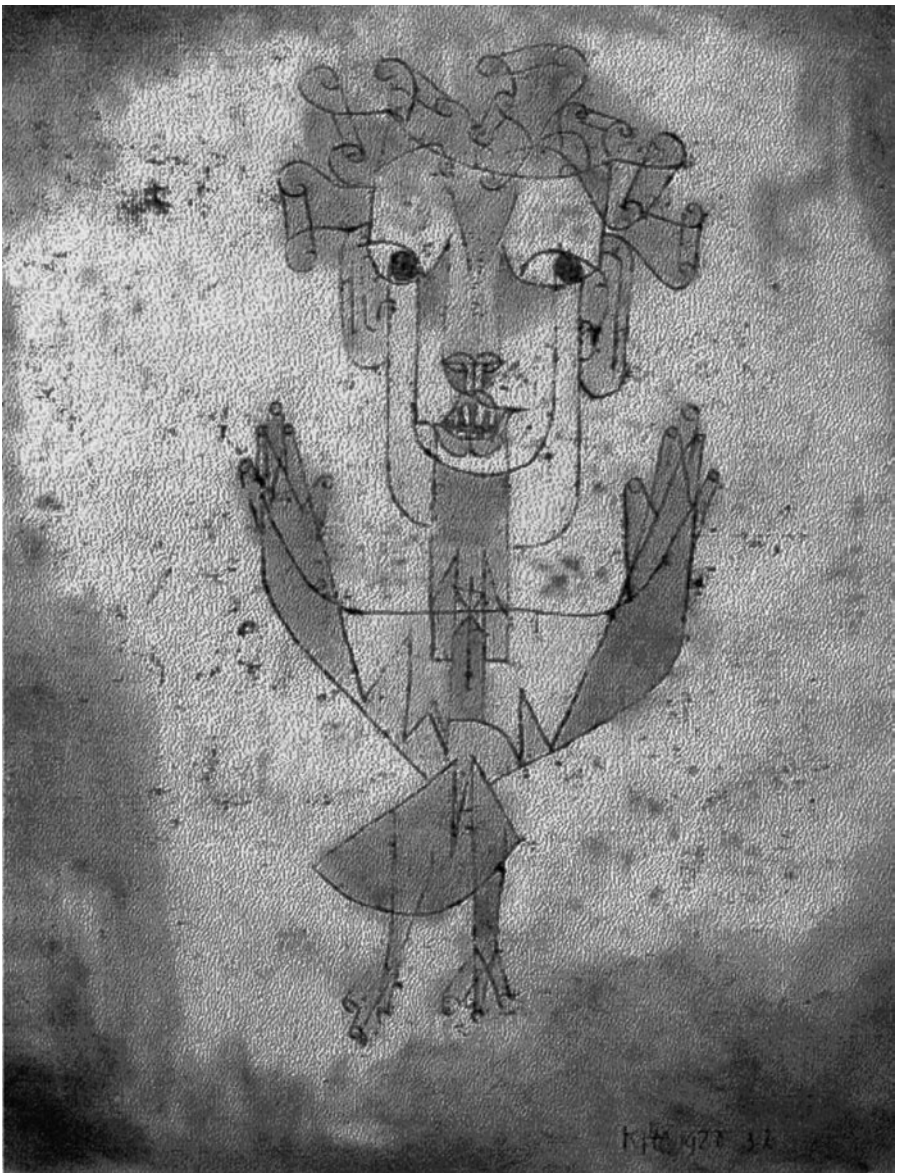

Figure 3.4 ***Angelus Novus***

Source: Paul Klee (1910), painting © 2004 Artists Rights Society (ARS), New York/VG Bild-Kunst, Bonn.

Walter Benjamin's description of the 'angel of history', which he imagines in the form of the creature depicted in Paul Klee's 1910 painting *Angelus Novus* (Figure 3.4), allows us to catch a glimpse of what the words 'universal suffering' are attempting to say. Benjamin purchased Klee's painting in 1921, and it soon became one of

his most prized possessions. *Angelus Novus* constitutes the imagistic ground, so to speak, of the ninth thesis in Benjamin's *Theses on the Philosophy of History* (1968, 253–64), one of his best known works. He completed this short text in the spring of 1940, not long before the fall of France and his own tragic death, in September of that year, while attempting to flee the Nazis by foot over the Pyrenees (see Benjamin 1999, 946–54). Nearly childlike in its conception and execution, Klee's painting is made to do service for an almost childlike spate of thinking on Benjamin's part – one that 'neither aimed nor could arrive at binding, generally valid statements', as Arendt puts it (Benjamin 1968, 13).

Of course, Arendt's characterisation (and still less my own use of the adjective 'childlike') was not intended as a reproach. On the contrary, fully 'mature' theories of history, however valuable or correct, always seem to refract one's vision through the lens of a pragmatic concept, and away from the important (but otherwise 'useless') task of paying attention to the tragic aspects of human existence. To paraphrase Joseph Joubert, the words of a theory are like eyeglasses: they blur everything they do not make clear. It is as if there is no room at the margins of theoretical and technological thinking for cemeteries or the work of grieving: an absence (or indifference) that Jacques Derrida (1994, 175) condemns as the 'absolute evil' of forgetting the dead – of letting the dead bury the dead, as the saying goes. Benjamin's rich and extremely concise meditation on Klee's painting shows that here, at least, is a thinker who lacks any interest in developing a theory that would presume to explain and justify the bloody march of history – including the many cruelties, both large and small, that have been (and are being) committed in the names of progress, justice, democracy and the rule of law. There is no hint of any relief within the four corners of Benjamin's thesis: no promise of rest or redemption that would give the angel of history grounds to hope for a respite from what Herbert Marcuse (2007, 69), in an unsettling homage to Proust, calls 'the terrible *remembrance* of things past'.

Benjamin's interpretation of the painting begins by quoting a short poem written by his friend Gerhard Scholem. The poem (in translation) is entitled 'Greeting from an Angel', and contains four verses: 'My wing is ready for flight/Although I'd rather turn back/If I tried to stop living time/I wouldn't have much luck.'[8] Scholem's verses suggest what Benjamin's subsequent interpretation of the painting confirms: the angel of history is completely powerless to halt or heal the ravages of time. The prose portion of Benjamin's thesis (1968, 257–8) immediately follows the poem, and consists in the following brief paragraph:

> A Klee painting named 'Angelus Novus' shows an angel looking as though he is about to move away from something he is fixedly contemplating. His eyes are staring, his mouth is open, his wings are spread. This is how one pictures the angel of history. His face is turned toward the past. Where we perceive a chain of events, he sees one single catastrophe which keeps piling wreckage upon wreckage and hurls it in front of his feet. The angel would like to stay, awaken the dead, and make whole what has been smashed. But a storm is blowing from Paradise; it has got caught in his wings with such violence that the angel

8 The translation is mine. The poem in the original German reads as follows: '*Mein Flügel ist zum Schwung bereit/ich kehrte gern zurück/denn bleib ich auch lebendige Zeit/ich hätte wenig Glück*' (Benjamin 1968, 257).

> can no longer close them. The storm irresistibly propels him into the future to which his back is turned, while the pile of debris before him grows skyward. This storm is what we call progress.

The most important lesson to be learned from Benjamin's allegorical analysis of historical suffering is really quite easy to express, although this does not mean that it is easy to accept. The lesson is just this: if it is always morally right and obligatory to struggle against injustice (as I believe it is), this does not imply that a successful campaign causes no pain. Nor does there hang in the sky an eternal balance in which the weight of one man's agony and death is cancelled out by the happiness of others, or even many others. As Horkheimer and Adorno (2002, 32) put it, 'Real history is woven from real suffering, which certainly does not diminish in proportion to the increase in the means of abolishing it'. Their point is not that people's future lives cannot or should not be improved according to this or that conventional measure of improvement. Rather, the point is actually a logical one: what has actually happened to those who have fallen by the wayside *has irretrievably happened*: no future – and certainly no weighing of costs and benefits – can ever make it un-happen.

In order to cancel *all* of mankind's real sufferings we would have to do the impossible: awaken each and every one of the dead, as Benjamin's thesis puts it, and make whole what history keeps on irretrievably smashing. Strictly speaking, the concept of 'progress' belongs neither to the past nor to the present: it belongs to an infinitely postponed future. Suffering, in contrast, has no future. Awash with present pain and unhappy memories of past pain, the phenomenon of suffering belongs to the present moment as such, which, from the standpoint of theory at least, is our sole guarantor of existence, that is, of reality itself (cf. Arendt 1994, 174).

Benjamin's thesis represents a decisive break with the dominant trend of twenty-first-century Western thought, which is governed by what Žižek (1999, 221) calls 'the all-pervasive predominance of "instrumental reason", of the bureaucratization and instrumentalisation of our life-world'. Law and politics demand the production of results, in promise and deed, whereas the angel of history is only capable of witnessing and remembering each and every result *as it happens*. Beholding the desperate struggles of a suffering humanity, there is no one on earth to whom the angel could speak without being misunderstood. This is because we humans tend to be practical beings who crave immediate solutions to our problems; whereas the angel sees precisely the problems that are caused *by* solutions, even the best of all possible solutions. Here is witness without voice, knowledge without power, and a mournful understanding that seems almost impossible to communicate to others. But the angel sees too much: fixated on all the past and present effects of human action and inaction, it remains powerless to prevent the repetition of historical outrages. It cannot turn its gaze towards the future, which in any case it knows is but an abstraction formulated in a now-time that never stops throwing wreckage upon wreckage at its feet.

If there really were an angel of history such as the one Benjamin describes, its principal occupation would be bearing witness to *everyone*'s suffering. Its staring eyes would see beyond the place where the most obvious victims of injustice dwell to notice what is going on with history's more than ample stock of anonymous

toilers, outcasts, failures, ne'er-do-wells, mediocrities, and yes, even villains. Not only would this angel see the true cost of what history's winners call 'progress', it would also see the many mundane moments of suffering that human beings experience every day, but that somehow never get written down in history books or noticed in courtrooms and legislatures. Little sufferings and big ones; suffering that is someone's fault and suffering delivered out of the blue by an impersonal fate; the mortifications of oppressors called to judgement as well as the agonies of the oppressed; the torments of the unjust and unethical as well as the passions of the righteous: the angel of history would see them all.

True suffering, if uncovered and viewed unblinkingly, is one of the very few things in life that really *is* as it *appears*. '[T]he bad and gratuitous meaninglessness of pain already shows beneath the reasonable forms espoused by the social "uses" of suffering', writes Levinas (1998, 95). Strictly speaking, Levinas is correct: suffering itself is meaningless because the category of 'meaning' has nothing to do with what is going on *right now*, in the present moment. Human beings construct the meaning of the past for the sake of the future: meaning explains, comforts, or discombobulates the living for the sake of what is to come and what they must endure. The phenomenon of suffering as such, however, belongs exclusively to the moment in which it is experienced. Considered from the point of view of the suffering individual, presently locked within the prison of his own pain, suffering as a phenomenological category is a 'fundamental malignity', as Levinas (95) puts it: an unwelcome vulnerability to a purely passive 'undergoing' rather than an active achievement of freedom. All meaning and all justification of suffering come later, as afterthought, or before, as authorisation. The angel of history not only knows this but *sees* it, which is why it is such a good symbol of the point of view I have been calling ethical distress.

Ethical Distress and Universal Human Suffering

Ethical distress does not derive from antipathy to reason as such, or even from some sort of antiauthoritarian aversion to the constraints that reason aspires to place on our liberty of action. Reason evokes ethical distress not when it reasons and plans, but when it unctuously offers 'good reasons' to harden the heart, so that the will can decide 'in good conscience' to hurt other human beings in the interest of the right or the good. In general, reason claims that being ethically responsible means acting in a principled manner – that is, acting on the basis of the texts we call 'principles' – and that only those who shirk their norm-derived duties have reason to feel guilty about the pain they inflict on others. Ethical distress arises from the experience of fundamentally doubting these 'reasonable' conceptions of responsibility and guilt. More to the point, it is inclined to feel responsible and guilty even when reason says it should not.

Ethical distress shows itself in an anxiousness that is not comforted by any of the Just-So stories told by law, justice and morality. Its concept owes an enormous debt to the thought of Emmanuel Levinas, although as we shall see, it differs in several important respects from his notion of 'ethics as first philosophy' (1989, 75–87). The

following brief excerpt from Levinas's essay, *Transcendence and Height* (1996, 23), sheds considerable light on the most important characteristic of ethical distress as a phenomenon:

> For me, the negative element, the element of violence in the State, in the hierarchy, appears even when the hierarchy functions perfectly, when everyone submits to universal ideas. There are cruelties which are terrible because they proceed from the necessity of a reasonable Order.

The proposition that what is universally *thought* necessary, reasonable and positive can also be *experienced* as gratuitous, terrible and negative touches the very core of ethical distress as a phenomenological category. Levinas once said, 'There is an anxiety of responsibility that is incumbent on everyone in the death or suffering of the other' (Levinas 1996, 164), and it is clear that for some people, at least, this anxiety remains unabated no matter how good the reasons are for why the other must suffer or die. Although the phrase 'incumbent on everyone' seems to imply a general moral duty to feel anxiety, it must be stressed that there is really nothing deontological or preachy about the phenomenon of ethical distress as such. Ethical distress, when it actually *is* experienced, gnaws at the heart first, and then moves to the head, where it proceeds to discomfit reason's most cherished schemes and certainties.

Modern economic theory holds that the heart delivers the head instructions called 'preferences', and that the head then calculates how best to achieve what the heart desires. Weber (1978, i. 24) calls action that is determined in this way 'instrumentally rational' (*zweckrational*): that is, the action in question is a *means* that the actor subjectively believes to be necessary or appropriate for achieving the *end* that his heart has chosen. Justice, considered as an ultimate end worth striving for, requires legal partiality and the selective application of legal violence as its principal means; and this, in turn, raises the ethical problem that is created whenever eggs are broken to make omelettes. If 'knowing' were all there were to this problem, then perhaps reason's casuistries would be sufficient to solve it or drive it away. But the phenomenon of ethical distress does not merely *know* about universal human suffering – it also *senses* it. It is not only *cognizant* of the tragic origins and consequences of law and justice, it also *feels* them. In sum, ethical distress is an unpredictable sort of static, so to speak, constantly threatening to disrupt the circuit of instrumental rationality that is supposed to run smoothly between what the heart wants and what the head says must be done to the minds and bodies of other people in order to get it.

Indeed, ethical distress is even deeply suspicious of Levinas's hopeful thesis that the highest politico-legal task of human beings is to found, or aspire to found, 'the justice that offends the face on the obligation with respect to the face' (1999, 34). For Levinas, the event of beholding the nakedness of the other's face is quite literally the origin of ethics; 'ethics', in turn, is his name for a pre-rational, asymmetric responsibility that the self owes (and feels that it owes) to the other, prior to any debt or trespass. His interpretation of ethics insists that the fact of human sociality – our sheer interconnectedness with our neighbours – precedes the existence of individual freedom. The result is that the word 'I', for Levinas, signifies being unable to escape from responsibility for a world that is chock full of needy neighbours, 'as if the

whole edifice of creation stood on my shoulders' (2003a, 33). His ultra-rigorous conception of ethics is associated with the feeling of 'guilt without fault' (Levinas 2001b, 52), and as such is closely related to the phenomenon of ethical distress.

There are more than two people (I and Thou) in the world, though – there are also billions of 'them', each one of whom is a potential Thou who suffers and is needy. Given the basic fact of human multiplicity, thinking the category of justice beyond or outside of ethics becomes co-equally important to Levinas. The imperfect, finite ethical 'self' always finds itself in the position of having to choose which needy neighbour to favour and help, and hence which ones to disfavour or ignore. The attempt to do justice between competing others simply must be made, argues Levinas, despite the fact that the very doing of justice inevitably requires 'a certain violence' (1999, 172) and 'a certain harshness' (1998, 203). Ethics may be in us, but justice is what we do outside of us. Here the concept of tough love becomes an oxymoron, despite Levinas's equivocal attempt to qualify the violence and harshness of justice with the adjectival phrase 'a certain'. Indeed, he is compelled to acknowledge that the use of violence and harshness in the moment of justice *ipso facto* negates the ethical impulse (or duty) to be kind to *everyone* (1998, 105):

> When I speak of Justice, I introduce the idea of the struggle with evil, I separate myself from the idea of non-resistance to evil. If self-defence is a problem, the 'executioner' is the one who threatens my neighbour and, in this sense, calls for violence and no longer has a Face.

This passage demonstrates that there is a fundamental contradiction between ethics and justice in Levinas's thought, at least when viewed from the standpoint of instrumental reason. More to the point, however, the pre-rational standpoint that I have been calling ethical distress cannot avoid feeling suspicious about the way he actually handles (or begs) the contradiction.

Levinas does not solve or dissolve the contradiction between ethics and justice – or more generally, between comforting pain and inflicting it – he wishes it away. The best he can do is vaguely call for a justice that is 'always to be made more knowing in the name, the memory, of the original kindness of man toward his other' – a justice that is 'always to be perfected against its own harshness' (1998, 229). His *oeuvre* is littered with many other similar formulations, but in the end Levinas never does more than hint or gesture at the possible excellence of a justice that would somehow occupy a position lying halfway between the kindness of ethics and the cruelty of law. Here justice is conceived of as the practice of 'ethics plus', or 'law-minus' – as if a polygon could be conjured into a being circle by calling it a circular polygon. Regrettably, this hazy way of thinking and talking seems to congratulate itself in advance for aspiring to set up a programme aimed at the compassionately harsh (or harshly compassionate) infliction of just suffering.

For whatever reason, ethical distress finds itself unable to congratulate (or fool) itself in this way. It realises full well that the bear of law that aspires to cradle the infant of humanity in its paws can *never* be made into a teddy bear without losing all claim to being just. And it also knows that a 'teddy bear' with working claws and fangs is simply a real bear that has been given a non-threatening name.

At the end of the day, therefore, ethical distress suspects that the compassionate justice for which Levinas yearns is ultimately like President George W. Bush's compassionate conservatism: not only a profound contradiction in terms, but also a *lie*. This kind of lie is first and foremost a form of self-deception. It wilfully ignores a reality that stubbornly refuses to depart despite the fact that the values and beliefs of one's political opponents have been decisively adjudicated, in the court of reason or in the chambers of the heart, as being fundamentally false, wrong, unjust and unwise. *This* sort of lie seeks to deny or obscure the very real sufferings of those human beings on whose account the incorrigibly incorrect, false and unwise values and beliefs (whether conservative, moderate, progressive, radical or otherwise) became plausible in the first place.

A good example of the anxiousness of ethical distress can be found in the biblical story of Jacob and his twin brother Esau, although I must stress that the motive for retelling the story here (it is also a great favourite of Levinas's) is merely one of conceptual clarification rather than religious or moral edification. According to the Book of Genesis, Esau had sworn revenge against his brother for tricking their dying father, Isaac, into blessing Jacob as his firstborn son by pretending to be Esau – this despite the fact that Esau, the firstborn twin, had earlier sold his birthright to Jacob for a bowl of soup. Years later, after Jacob had already received many signs and indications that God found favour with him, the angels of God were sent to meet Jacob as he neared the land of Canaan; whereupon Jacob resolved to send messengers and gifts to his estranged brother in an effort to restore harmony between them. But when the messengers returned they told Jacob that Esau was marching to meet him at the head of 400 men. Unsure whether his brother's intentions were benign or hostile, Genesis 32:8 describes Jacob in the moment of his uncertainty as being 'greatly afraid and anguished'.

Apart from saying he was afraid, why does the text say that Jacob was *anguished*, given his awareness that God (traditionally the ultimate justification) was on his side? The eleventh-century rabbinical commentator Schlomo Yitzhaqi (better known as Rashi) gave an answer that, if inconclusive, at least can be made into a powerful illustration of the phenomenal nature of ethical distress. According to the great medieval rabbi, Jacob was *afraid* that he and his loved ones might be killed by Esau's army, but he was also *anguished* at the possibility of having to kill others (see Levinas 1999, 135). Jacob was anguished in spite of the fact that he knew (or suspected) that killing his brother and his brother's men would have been just in the eyes of the Lord. Of course, it is possible to interpret the story in a way that preserves the conventional thesis that absolute justifications justify absolutely; one need only say that Jacob was anguished because he was uncertain about what God wanted him to do. Replace Jacob's uncertainty with apodictic certainty, on this view, and his anguish will depart, allowing him righteously to slaughter – and with a clear conscience, to boot – those of his fellow men whom he 'knows' that God abhors.

According to this convention-preserving interpretation, tragedy is a product of human ignorance and imperfection rather than a consequence of universal suffering as such: let action be guided by certain knowledge of what justice requires, and all that is tragic about the human condition will disappear in a puff of smoke. Ethical distress cannot accept this interpretation. For ethical distress, which is perversely

antinomian, Jacob's anguish juts most clearly into view at the very moment when the highest and most persuasive possible justification for committing violence against others fails to assuage the human heart in the face of knowing what it 'must do'. Ethical distress both disturbs and irritates. Like sandpaper, it grates against all certainty, not to mention all indifference, thereby creating the kind of irritation that usually follows when either certainty or indifference is challenged (cf. Arendt 1994, 249). What is more, there is no enduring remedy for *this* sort of irritation: not the acquisition of more and better certainty, and not the creation of more and better justifications for remaining indifferent.

The anguish experienced by Jacob, although clearly not the same as compassion or pity, originates in the sensibility that I have been calling ethical distress. The basic principle of this sensibility is guilt. For ethical distress, genuine human freedom, if not the human soul, is the possibility of guilt becoming aware of itself (cf. Horkheimer and Adorno 2002, 161). Inconsoled by any secure feeling of innocence or self-righteousness, those afflicted with ethical distress associate guilt with the simple fact of living and acting as such, however one chooses to live and act. Ethical distress suspects that the price of survival in *any* form always includes practical complicity in all of the real consequences of doing what it takes to survive. It is hard to think too much about how sausage is made without wanting to become a vegetarian. By the same token, the mere existence of ethical distress as a phenomenon shows that it is hard to think too much about how justice is done without wanting to become neither a victim nor an executioner.

The history of Western thought is full of attempts to naturalise the sufferings of the unjust, as in Leibniz's contention that 'sins carry their punishment with them by the order of nature, and by virtue of the mechanical structure of things itself' (1934, 19). But ethical distress manifests a decisive break with this history. Experience with the irremissibility of universal human suffering, and with the depth of law's indifference to it, has taught ethical distress to appreciate two of Nietzsche's most important lessons: (*a*) what human beings call 'knowledge', 'truth' and 'justice' are not all they are cracked up to be; and (*b*) the contrary view, though ubiquitous, is 'one of the most potent seductions there is' (1968, 247–8).

For one thing, ethical distress can only see the hands of particular human law-doers – and not those of Mother Nature, God, or the Legal System – whenever law starts poison flowing into the veins of heinous killers, seizes the property of deadbeat debtors, or enforces UN sanctions against state sponsors of terrorism. From the standpoint of ethical distress, linguistic signs such as 'heinous', 'deadbeat' and 'terrorism' – however validly and justly applied by conventional criteria – serve only to conceal the particularised, voiceless human suffering underlying *all* forms of legalised violence. These words, like a layer of quicklime thrown into a mass grave, tend to sanitise and conceal the bodies which lie beneath their use.

More than a few great thinkers have advanced the disconcerting thesis that action – *any* action, regardless of its moral-juridical status – always brings with it the sort of responsibility and guilt that I have been trying to describe here. The following pastiche of excerpts, assembled almost at random and ordered alphabetically by author, will serve as an *ad hoc* reminder of this melancholy yet brutally honest strand in Western thought:

> Guilt is the category of all human activity … in that I always take on responsibilities whose implications I cannot foresee, and in that, by the decisions I make, I am always obliged to neglect something else. (Arendt 1994, 175)

> The tree of knowledge did not stand in the garden of God in order to dispense information on good and evil, but as an emblem of judgment over the questioner. This immense irony marks the mythical origin of law. (Benjamin 1978, 328)

> To choose one's conscience means at the same time, however, *to become guilty*. As Goethe once said, 'He who acts is always without conscience, irresponsible'. Every action is at the same time something marked by guilt. For the possibilities of action are limited in comparison with the demands of conscience, so that every action that is successfully carried out produces conflicts. To choose self-responsibility, then, is to become guilty in an absolute sense. Insofar as I am at all, I become guilty whenever I act in any sense. (Heidegger 2002d, 169)

> Having to answer for one's right to be, not by appealing to the abstraction of some anonymous law, some juridical entity, but in the fear for the other person. My 'being in the world' or my 'place in the sun', my home – are they not a usurpation of places that belong to the other man who has already been oppressed or starved by me? (Levinas 1998, 130)

> There is no place, no purpose, no meaning, on which we can shift the responsibility for our being, for our being thus and thus. (Nietzsche 1968, 402)

> *Mine, thine*. – 'This dog is mine', said those poor children; 'this is my place in the sun'. Here is the beginning and the image of the usurpation of all the earth. (Pascal 1941, 102)

> The true sense of the tragedy is the deeper insight that what the hero attones for is not his own particular sins, but original sin, in other words, the guilt of existence itself. (Schopenhauer 1969, i. 254)

The foregoing passages bring into view the concept of a guilt that cannot be argued or willed away. *This* sort of guilt, at least, seems permanently stamped on the human heart, like a tattoo on the epidermis. In contemplating the relations among law, justice and human suffering, those who experience ethical distress are chronically beset by a bad conscience that will not depart despite all attempts to cleanse it with arguments (however valid and persuasive) deduced from widely admired political principles such as the 'social contract' or the 'greatest good for the greatest number', or from beloved ethical doctrines such as the golden rule or the categorical imperative. To paraphrase Pascal (1941, 151), ethical distress finds its own theory-mongering, doctrine-clinging self to be hateful.

On the one hand, the self of ethical distress becomes hateful to itself whenever it acquiesces, in thought or deed, in the currently dominant ideology of progress. This ideology holds that the task of law and politics is to *manage* human beings (and their sufferings) in the service of that oft-repeated abstraction called 'society'. Progress, on this view, is a matter of using correct techniques aimed at maximising the happiness of the whole. But ethical distress knows, deep down, that 'the whole' is an abstraction that cannot feel, cannot suffer. Moreover, it knows that if people can be convinced that law, politics, and economics have already solved or are on the way to solving a 'problem of human suffering' that is defined once and for all by concepts that permit suffering to be managed bureaucratically and treated

technologically, then the possibility of transformative social change on the basis of progressive conceptions of justice and human rights is greatly reduced. Knowing that the aspiration for an inchoate justice to come can be a revolutionary force, those with strong conservative instincts will do everything they can to reduce justice to the status of a well-defined abstraction, or better still, to an output that the existing legal system is already producing.

But on the other hand, the self of ethical distress also looks on itself with disgust whenever it is on the verge of advocating for the kinds of transformative political change that conventional discourse is wont to call 'social justice'. It is a fact that the number of needy and voracious strangers in the world is frighteningly large. And if the powers that be are ever tempted to pay 'too much' attention to the innumerable problems afflicting the oppressed, the lessons of history will always pop up to warn them about a depressing truth: namely, that laudable and compassionate political beginnings have all too often (or even usually) degenerated into disasters or self-defeating tyrannies. In other words, there is such a thing as the law of unintended consequences.

Levinas, who was certainly no friend of plutocrats, unequivocally expressed the implications of the law of unintended consequences for the utopian project of achieving social justice and ameliorating universal suffering. He once said that if the requirements of the Rights of Man are held to extend across the entire field of life-in-the-world – if they go so far as to guarantee weekends and paid vacations, not to mention 'the right to well-being and the beautiful, that makes life bearable' – then 'the validity of that charter would continually clash with what we may call the mechanical necessities of the social reality known to the positive sciences, which are mainly attentive to causal laws' (1999, 146–7). In other words, if the political system starts giving the poor and downtrodden 'too many' rights, its good deeds might imperil the health of the socio-economic goose that lays the golden egg of material progress for everyone.

Conservative pundits and social scientists are always eager to reinforce this fear by warning anyone who will listen about the many recorded instances in which well-meant measures to reduce present suffering actually increased future suffering owing to the perverse incentives created by the reversals of fortune they enacted.[9] Despite the thinly veiled class interest that obviously motivates many of these warnings, and notwithstanding their general lack of philosophical sophistication, ethical distress worries that they might conceal a kernel of truth. While it is by no means a matter

9 See, for example, the following stentorian warning against overdoing the current social movement for 'corporate social responsibility' ('CSR'):

> If companies need to be vigilant about the limits of CSR, the same applies even more to society as a whole. A dangerous myth is gaining ground: that unadorned capitalism fails to serve the public interest. Profits are not good, goes the logic of much CSR; hence the attraction of turning companies into instruments of social policy. In fact, the opposite is true. The main contribution of companies to society comes precisely from those profits (and the products, services, salaries and ideas that competitive capitalism creates). If the business of business stops being business, we all lose.'Ethical capitalism: How good should your business be?', *The Economist*, 19 January 2008, 12–13.

of course for the spectacle of misery to move men to pity, history teaches that a pity aroused to virtuous action can become a force that is both more cruel than cruelty itself and more stupid than stupidity itself (cf. Arendt 2006, 60, 78).

In sum, ethical distress is afflicted with a fundamental mistrust of the relationship between *all* conventional conceptions of just action – that is, action derived from a mere theory or doctrine of the right or the good – and the ceaseless historical production of human suffering. To believe in a doctrine of right or good action is *eo ipso* to submit to what the doctrine 'says' and 'means'. But *who* says, and *who* hears, what a piece of paper with ink on it says and means?

The classical conception of sensibility as pure receptivity – as a mere inclination that gets in the way of purely moral action and demands repression – is no longer as persuasive as it once was (see Marcuse 2007, 152–3). As we shall investigate more fully in Chapter 6, Kant (1998, 211) had an inkling of the coming breakdown between sensibility and reason when he observed that synthesis in general is performed not by the faculties of reason or understanding, but by the time-bound power of *imagination*, which he called a 'blind though indispensable function of the soul, without which we would have no cognition at all, but of which we are seldom conscious'. But it took Hegel and Marx to make the essential interpenetration of sensibility and reason fully visible to critical reason. Ever since the nineteenth century it has grown increasingly apparent that sensibility – the *way* we experience things – is also partly constitutive of *what* we experience and think about.

One name for the organic linkage between sensibility and reason, history and understanding, is 'ideology' (see Mannheim 1985); another is 'the social construction of reality' (see Berger and Luckmann (1967). But whatever phraseology is used, it is clear that most sophisticated social theorists now recognise that an individual's sensibility (and not just his cognitive processes) manifests a distinctly social dimension: that the I's way of perceiving things contains layers or sediments of a 'we'. A product of each individual's concrete historical and social situation, this 'we' pre-orients the individual's attention to certain fields of possible experience and colours the way objects of perception in those fields are received and processed. The sensibility that I have been calling ethical distress is a peculiar consequence of the very recognition of this fact. Ethical distress is haunted, so to speak, by the historical contingency of the relationship between knowledge and power. After Nietzsche, Heidegger and Foucault, the old Platonic hierarchy condemning sensibility and its historical conditions to separate and distinctly inferior roles *vis-à-vis* reason no longer sounds as convincing (or as ethical) as it once did.

While they are performing the work of law, justice and morality, those who are beset by ethical distress realise in panic (and sometimes with horror) that the abstractions 'law', 'justice' and 'morality' – not to mention 'society' – are utterly without agency. The mere expression of these abstractions in a legal context has never once ignored, responded to, or inflicted *anyone*'s particular suffering. Rather, it is always individual human beings who choose to do these things in just the ways they do them, day after day, year after year, century after century. Seen from this point of view, the suffering produced or tolerated by habitual ways of being are not perpetuated (passive tense) by society and its institutions; rather, in each and every singular case there is always someone in particular who keeps on actively

perpetuating them. For all of these reasons (and more), the phenomenon of ethical distress remains irremissibly troubled about the essential sadness of the world. For it, freedom is not primarily a gift, but rather an incredibly burdensome responsibility.

Feeling responsible for something can only have meaning in relation to that *for* which responsibility feels itself responsible. Only a hair's breadth separates indifference from irresponsibility, for there seems to be a direct and almost linear relationship between the depth of one's ethical sensibility and the scope of one's sense of responsibility. Traditional theories of law and justice are like flashlights in the dark: they illuminate only the sufferings they call 'unjust', leaving everything else in darkness. The narrower the flashlight's beam, the smaller the area for which its holder is inclined to feel responsible. Ethical distress, on the other hand, is like a blazing sun at high noon: it pitilessly illuminates the entire landscape of human suffering and responsibility, leaving nothing in the shade.

Chapter 4

The Problem of Legal Meaning

> Knowledge is not *translated* into words when it is expressed. The words are not a translation of something else that was there before they were.
>
> Ludwig Wittgenstein, *Zettel* (1970, 33e)

'In the Beginning was the *Deed*'

The juridical justification of legalised human suffering is linked to the proposition that legal norms 'mean' something in advance of their application, and that this meaning – this stable content – is the true and proper ground of legal violence. Cicero's claim (1999, 157) that 'a magistrate is a law that speaks, and a law is a silent magistrate', naïvely interprets the legal order in a way that is with us still, notwithstanding the claim's obvious falsity as a literal statement of fact. According to legal tradition, meaning consists in the 'contents' of a legal norm as applied in this or that concrete situation. These contents, in turn, are accessible to reason (whether historicised or conceived of as 'natural') by means of what Descartes calls the 'inborn light' (*lumen ingenitum*) of the intellect (see Heidegger 2005, 167).

Cicero's interpretation of legal meaning remains influential despite the fact that his thesis was incomplete and misleading even when he wrote it, inasmuch as Aristotle ($1137^{a}32$–$1138^{a}2$) had already described the juridical category of equity, according to which magistrates are allowed (and required) to 'correct' the letter of the law in cases where it produces injustice as a consequence of its generality of expression. Moreover, Cicero's thesis continues to beguile law-doers despite the severe beating it has received from contemporary philosophy of language. Long before Derrida first gave the term 'deconstruction' its current usage, Hegel had offered the opinion that '[i]t is only a blunder, an incompetence of reason' if one cannot logically manipulate Kant's categorical imperative (and by inference, any other abstract norm) in such a way as to justify just about any determination at all, and therefore just about any action at all (see Hyppolite 1996, 47). If Hegel is correct, then one can only conclude from the facts of day-to-day legal practice that the law is simply chock full of blundering and rational incompetence.

However, I am not interested in rehashing the terms of the old debate about whether legal norms are 'really' determinate or indeterminate in some abstract, metaphysical sense. To say, as I will in this chapter, that no case, not even an easy one, 'follows' from the expression of a legal norm is not a metaphysical pronouncement – it is an *ethical* pronouncement arising from the phenomenological facts of the case. Methodologically speaking, indeterminacy is the becoming apparent, to ethical distress, of the *appearing* of rational indeterminacy – it is not the mere cognition

of some hypostatised content of what has appeared. In short, indeterminacy shows itself in thinking law's 'how', not its 'what'.

In this chapter and the next we will pay close attention to a familiar and important subset of legal phenomena: the kind of activity in which state officials (primarily judges) decide cases according to legal norms. To be even more precise, we will look at one particular temporal *phase* of judicial practice: the moment of transition between what I call a judge's final 'reception' of authoritative legal language and his movement to impose (or forbear from imposing) legal sanctions. As we shall see, the existence of the phenomenon of reception refutes Aristotle's argument (432^{a}1–9) that when the mind is aware of anything it is necessarily aware of it together with its image or representation. In the moment of reception, the representation of the law shows itself concretely as what Husserl calls an 'image-object' rather than as an 'image-subject': an image only, and not what the image depicts (see Heidegger 1997c, 277–9). When reception holds sway the judge merely responds to *what is said*, and he no longer looks into *what is talked about*.

My goal is to illuminate the outer limits of reason – of human rationality itself – in the context of the concrete historical process that convention calls 'the enforcement of law'. It would be quite easy to let the phenomenon of reception slip off the philosophical hook, so to speak, by lazily reducing it to a mere 'means' or 'effect' of something else. When properly understood, however, this phenomenon is neither a rational means to some preconceived end nor the effect of a historical cause. Considered in its own right, reception is a pure manifestation of what Walter Benjamin (1986, 294) calls 'mythical violence': the pre-rational blend, or oscillation, between lawmaking and law-preserving violence that properly characterises the event of law's judicial enforcement as a phenomenological category. The point of investigating this phenomenon is not to launch a normative attack against crude legalism, which Hyppolite (1996, 30) defines as 'the spirit of servitude before the letter of the law'. Rather, the point is to understand how fidelity to the law is actually experienced, and thus to realise, at long last, that genuine human servitude before the letter of the law (i.e. what the law 'says') is not possible.

Before going further, I should identify the general phenomenological horizon within which this project will unfold. It is, of course, quite possible for judges consciously to manipulate the techniques of legal interpretation so as to justify results that they have reached on purely personal or political grounds, and undoubtedly this has occurred more than a few times during the long history of law as a human institution. But pretending to enforce the law is not the same as enforcing it, and this chapter is concerned only with the latter activity, leaving for another day the task of developing a philosophically robust account of the interesting phenomenon of judicial pretence (cf. Kennedy 1986). Hence, we will focus on the paradigmatic situation of a judge who seeks, in subjective good faith, to determine 'what the law requires', and to apply this determination to the case before him without consciously attempting to smuggle in his own personal values and preferences. Although it is obviously true that such values and preferences affect the result through psychological and social mechanisms of which the judge who acts in good faith is unaware (see Frank 1970, 113–14), this chapter focuses on the phenomenal point of view of judges who aspire

to ground their interpretations in the law, rather than the point of view of an observer who wishes to explain judicial behaviour by imputing it to its causes.

Ordinarily, to investigate a 'phenomenal point of view' means to inquire into and describe what typically shows itself in (or as) an actor's consciousness while he is engaged in the particular kind of human activity that is being investigated (see Husserl 1990). Here, however, we will catch sight of a phenomenon that is curiously privative in nature: something that does *not* show itself in the final phase of law's judicial enforcement. The phenomenon of reception is what William James would have called an 'unclassified residuum' (Richardson 2006, 296), lying somewhere between the categories of ground and cause. Of course, the true significance of this phenomenon has to prove itself in the course of the discussion. But for now it will be sufficient simply to declare that the phenomenon's significance comes from the confrontation (or contradiction) between the brute and inarticulate fact of reception, on the one hand, and, on the other hand, the hyperbolic claims that convention is wont to assert about legal rationality and the rule of law. If catching sight of the outer limits of legal reason becomes a profoundly humbling experience, as I think it should, then this chapter and the next will have accomplished their primary purpose.

We will attempt to think the relationship between legal language and legal violence by examining the precise point at which judges stop reasoning and start unleashing the violence of the state. The following translation of Goethe's *Faust Übersetz das Evangelium* ('Faust Translates the Gospel') (1964, 185) begins to indicate where I will be going with this investigation:[1]

> It is written: 'In the beginning was the *Word.*' Here I am stuck already! Who will help me on? To set so high a value on a 'word' is impossible: I must translate it some other way, if the spirit is giving me real enlightenment. It is written: 'In the beginning was *Mind.*' Consider the first line well, let your pen not move on too fast! Is it by *Mind* that all things are done and made? It should read: 'In the beginning was *Energy.*' And yet, at the very moment of writing it down, something warns me not to leave it at that. The spirit moves me! I suddenly see the answer, and boldly write: 'In the beginning was the *Deed.*'

Significantly, this passage does not deny that words can be powerful, especially since it uses them, rather powerfully, to assert that deeds are prior to words. Goethe would never have agreed with Oliver Wendell Holmes's well-known 'bad man' theory (1920, 173), which holds that what courts 'do in fact' is all there is to the law, or even with Jerome Frank's thesis (1963, 136) that '[t]he law of any case is what the judge decides'. Rather than advocating a doctrine that collapses the distinction between legal norms (words) and judicial behaviour (deeds), as Holmes and Frank do, Goethe simply states, 'In the beginning was the *Deed*'. From this he does not draw the conclusion that deeds are also something *other* than themselves, such as

1 The original Greek text of John 1:1 reads '*En archē en ho logos*', which is conventionally translated into English as 'In the beginning was the Word', and into German as '*Im angfang war das Wort*'. Both translations ignore the fact that *logos* denotes (and connotes) far more than just a 'word': it also means 'reason', and even signifies, at least for some Greek authors (e.g. Heraclitus), the event or activity of collecting and gathering something together as a unity (see Inwood 1999, 21).

'the law'. In short, to suggest that deeds always lie at the origin of legal phenomena, as law's 'how', is not to say that deeds alone define law's abstract 'what'.

Simple almost to the point of banality, Goethe's text invites us to think the event of law's enforcement slowly and simply, by trying to uncover the phenomenological relationship between legal deeds and legal words. I must stress that the purpose of this thinking is not, as Karl Llewellyn (1930, 449–51) famously puts it, to comprehend judicial behaviour as real law, or 'law in action'. Rather, the purpose is to understand what is called judicial reason*ing* in its own right, considered as a lived phenomenon.

The Problem of the Linguistic Sign

'The law' in the narrowest sense of the term – authoritative norms appearing in official texts – is always required to assume the outward form of a linguistic sign. Grammatically speaking, a legal norm must first be *expressed* in order to be what people are wont to call a 'legal norm' – that is, an actual or potential guide to human behaviour (see Fuller 1969, 47). Fuller's idea that legal norms are 'guides' to behaviour is the minimum content of any credible theory of law, inasmuch as it determines law as a more-or-less authoritative 'other' in relation to human beings, whether they are conceived of as citizens (see Austin 1998, 18), or as officials of the state (see Kelsen 1992, 26–8). Here the concept of *being guided* by a legal norm and the concept of a legal norm's *legibility* stand in what Wittgenstein calls an internal, or grammatical, relation to one another.[2] That is, our language is set up in such a way that you cannot think of the former without presupposing the latter. Words exhibit the form, but not necessarily the content, of sense: that is, they must first and foremost be capable of showing themselves in time as some*thing*, whether material or ideal, to those who aspire to understand them.

In the context of these investigations, the idea of a 'legal norm' embraces *any* statement that the judge takes to be legally authoritative, whether the statement is a rule or a principle, a statute or a holding, a major premise or a minor premise. It is beside the point, for present purposes, that legal 'rules' (e.g. statutes of limitations) apply in an all-or-nothing fashion, whereas legal 'principles' (e.g. the doctrine of fairness) exert a much subtler influence on legal decision making (see Dworkin 1977, 22–8). Likewise immaterial is the fact that some legal norms (e.g. statutes) seem to constrain judges from the 'outside', so to speak, while others seem to require the judge's active participation in creating them, either through statutory interpretation or through the articulation of a binding precedent's holding. It may well be true that judges engage in a 'value synthesis' in the course of deciding cases, as the Slovenian legal philosopher Marijan Pavčnik (1997, 481) puts it, dialectically moving to and fro between an ever-evolving description of the facts and an ever-evolving characterisation of the relevant legal norm. But however important this process of synthesis may be in the context of some theoretical inquiries, it is not germane to the present investigations.

2 Internal relations are 'relations which could not [logically] fail to obtain, since they are given with or (partly) constitutive of the terms (objects or relata), such as white's being lighter than black' (Glock 1996, 189).

In the usual case, an expression of the law and an expression of the facts will *eventually* be brought together as the major and minor premises of the *modus ponens*, which constitutes the ideal-typical final form of normative justification in general.[3] An expression taking the form of the *modus ponens* typically characterises the end-moment of legal justification regardless of what went before – that is, regardless of how elaborate, messy, and/or confused the actual process of judicial decision making may have been. We are interested in examining, concretely, what happens *after* all of the preliminaries occur, while the judge is making the transition from the expressions of the major premise ('the law') and the minor premise ('the facts') to the legal conclusion (the imposition of a sanction). Moreover, even if Ronald Dworkin (1986, vii) is right that legal reasoning is (or should be) an exercise in constructive interpretation that aims at 'the best justification of our legal practices as a whole', this would still leave the phenomenon of taking a justification *as* the 'best' unaccounted for. Whatever forms a legal norm may take, however it may have been generated, and whoever may have generated it, at some point it becomes *the* norm (or set of norms) upon which the judge acts. *This* precise point – the very last one before decision – is what interests us here.

Linguistic signs are the irreducible form of all language, and at their most basic level they are mere things: historically contingent and logically arbitrary spatiotemporal entities. For example, although bread is consumed every day in France, Germany and England, the Germans call it *Brot*, the French *pain*, and the English *bread* (cf. Benjamin 1968, 74). In general, a linguistic sign is that part of the phenomenon of language that can be perceived by the senses, such as the sounds made by speaking out loud, the ink marks on the pages of law books, the regular-looking gouges on the stone tablets that Moses allegedly brought down from Sinai, and even the smoke written on the sky by a skywriter. Indeed, even mental images can be characterised as signs, inasmuch as they must show themselves temporally, however fleetingly, to the mind's eye. The sheer materiality and fragility of linguistic signs create a serious problem for the law, for taken as mere things these signs do not 'say' what they mean or how they can or should be used. H.L.A. Hart (1961, 123) alludes to this obvious (and disquieting) fact when he says that no norm, as such, can 'itself step forward to claim its own instances'.

Although common sense tells us that the numeral '3' would signify the number three even if it were written as 'III', common sense does not care about philosophical questions. 'It is very noteworthy that *what goes on* in thinking practically never interests us', says Wittgenstein (1970, 17e), and he is right. But contrary to the habits and instincts of common sense, the question that we put to the law now *is* filled with wonder and interest. We aspire to understand how, *concretely*, a mere linguistic sign – what Anthony D'Amato (1996, 196) calls 'a lot of marks of ink on lots of pieces of paper' – can actually seem to generate the violent (and sometimes terrible) outcomes that characterise the moment of law's enforcement.

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3 The logical structure called *modus ponens* consists of a major premise, a minor premise and a conclusion, and can be represented symbolically as follows: *If A, then B* (major premise). *A* (minor premise). *Therefore B* (conclusion).

The Structure of Reasons

The principle of reason (also known as 'the principle of sufficient reason') stands behind the *modus ponens* as the ur-form of all legal thought, not to mention all thought about the law. According to Leibniz, who is generally credited as its discoverer,[4] the *principium rationis sufficientis seu determinationis* (the 'principle of sufficient reason or determination') is one of the two 'great principles' which underlie all knowledge and truth, the other being the principle of contradiction (*principium contradictionis*). As Leibniz (1934, 8–9) expressed it in the *Monadology*, the principle of reason holds that 'no fact can be real or existing and no proposition can be true unless there is a sufficient reason, why it should be thus and not otherwise'.

In one of his later writings, Leibniz made the principle of reason appear less ontological, and more anthropological, by re-characterising it as the principle of *rendering* reasons (*principium reddendae rationis*). The well-known example of Angelus Silesius's rose, which is 'without why' and 'blooms because it blooms' (Heidegger 1991, 35), ironically suggests the reason why Leibniz may have felt the need to make this transformation: as far as we know, the only beings that are inclined to render reasons for things are *human* beings. Thus, as revised, the principle of reason simply states that for every truth a reason can be rendered (*quod omnis veritas reddi potest*).[5]

This way of expressing the principle of reason uncovers a profound ambiguity in the concept and practice of rendering reasons – an ambiguity that actually begins with the question 'Why?' itself. Sometimes 'Why?' asks for a causal explanation, and other times it seeks an explanation in terms of grounds. Christian Wolff, Leibniz's immediate intellectual heir, was the first to clarify this ambiguity by separating the principle of reason into its two main significations: the principle of causation (*principium fiendi*) and the principle of ground (*principium cognoscendi*) (see Schopenhauer 1974, 24–5). The first belongs to the practice of explaining something as an effect of its causes; the second belongs to the practice of claiming that something is entailed by the argument that entails it. In legal theory, the principle of causation corresponds to the 'external' point of view on law, which imputes legal outcomes to historical factors such as culture or ideology, whereas the principle of ground corresponds to the 'internal' point of view, which evaluates legal outcomes according to the criterion of their rational consistency with legal norms. In both cases a legal phenomenon can be explained by its reasons (its causes *or* its grounds) only because the principle of reason stipulates in advance that absolutely nothing is permitted to be without reason (*nihil est sine ratione*).

Since it lacks an antithesis, the principle of reason is not 'true' in any ordinary sense of the word. A true statement is true by virtue of stating something that could

4 Aristotle, in the *Posterior Analytics*, mentions the important role that reasons play in producing understanding (71^b9–12), but he does not articulate this point in the form of a principle or law of thought. According to Schopenhauer (1974, 24), Leibniz was the first thinker to express the principle of reason *as* a formal 'principle' (see also Heidegger 1984, 109).

5 For a discussion of this transformation, as well as several quotations from Leibniz's original Latin texts, see Heidegger (1991, 21–2).

be false, either empirically or logically. Long before Wittgenstein coined the term 'bipolarity' to express this basic point,[6] Nietzsche (1968, 270) had remarked, 'If there is nothing material, there is also nothing immaterial. The concept no longer contains anything'. Ordinarily, to say that a statement is 'true' is to say that its truth excludes some other imaginable possibility: without the prospect of 'not-P', the utterance of 'P' becomes purely a gesture – a sort of means without end. This is not meant to be dogmatic: it merely summarises the role that the opposition between 'true' and 'false' generally plays in everyday discourse, both legal and non-legal.

Consider the statement 'Marie Antoinette did not grow a new head after she was executed': as far as we know, it is *empirically* impossible for a decapitated human body to grow a new head; but it is *logically* possible for this to occur, in the precise sense that this state of affairs is imaginable and capable of being described or depicted. Thus, the proposition about Marie Antoinette's head can, *logically*, be held to be *empirically* true because it excludes an imaginable and describable antithesis: namely, a state of affairs in which the queen sprouted a new head, like growing a cabbage, to replace the one that the guillotine took from her in 1793.

In contrast to this example, the words which express the principle of reason allow for no antithesis. They stipulate that *all* beings – without qualification – *must* be linked as an *explanandum* (what is to be explained or justified) to an *explanans* (the explanation itself). But here it can be seen that by including everything, the principle excludes nothing. To try to determine whether the principle itself is true or false would be to demand proof for the right to demand proof, as Schopenhauer (1974, 33) scornfully puts it, and this would involve us in a vicious logical circle. To distinguish the principle of reason from statements like 'It is raining outside' (which could possibly be false), it is therefore quite useful to interpret it as 'a norm of expression', as Wittgenstein (1979, 16) puts it: a rule of grammar, analogous to 'never end a sentence with a preposition', that pre-structures the human linguistic practice of rendering reasons for things.

The point of distinguishing 'Nothing is without reason' from statements like 'It is raining outside' is to achieve clarity of understanding, for the two kinds of statements play completely different roles in our lives. If a so-called 'necessary truth' is true, it is true in a different sense than a statement that *could* be false is true. Unlike the case of 'It is raining outside', no amount of experience will refute the proposition that nothing is without reason, at least for those who accept it as their master. Even if we do not know a particular phenomenon's 'reason', we are inclined by the principle of reason to ascribe this to our own ignorance and not to the phenomenon itself. The principle of reason wants us to think that everything under the sun (and even the sun itself) *must* have a reason, 'even though in most cases these reasons cannot be known to us' (Leibniz 1934, 9).

'Whenever we say that something *must* be the case we are using a norm of expression', writes Wittgenstein (1979, 16); 'The statement that there must be a cause [of every phenomenon] shows that we have got a rule of language.' Thinking about

6 Cf. Wittgenstein (1995, 47): 'What I mean to say [by the word "bipolarity"] is that we *only* then understand a prop[osition] if we know *both* what would be the case if it was *false and* what if it was *true.*'

absolute 'must' statements such as the principle of reason as *grammatical stipulations* rather than statements of fact does not try to 'prove' anything metaphysical. Instead, this method is merely intended to shed new light on the actual function that the principle of reason performs in legal theory. It frees us to compare the principle to a norm instead of to a proposition: a pre-stipulated grammatical 'reason' for what we call legal 'reason*ing*'. The principle of reason is logic's only answer to the wag's ironic question, 'Why ask why?' In this sense, the principle operates as the unofficial law of the law: a norm of expression that predetermines the form of every purported justification for legal violence.

The Internal Point of View in its Descriptive and Normative Aspects

As we have seen, the distinction between reason-as-ground and reason-as-cause within the meaning of the principle of reason corresponds to the distinction between the internal and external points of view on law. But what is the point of drawing these distinctions in the first place? In trying to answer this question in the legal context, it is important to realise that these distinctions are products of *philosophical*, not juridical, thought: they reflect a philosophical view of views, so to speak, on the nature of law. If, as Graham Priest says, 'Philosophy is that theoretical inquiry whose own nature falls within its scope' (Pyke 1993, text with photograph), then one might reasonably expect to find different philosophical ways of viewing the basic internal/external distinction – different philosophies of the philosophy of law. And indeed one does find them.

The central problem of conventional political and legal theory is how to attribute right outcomes to *grounds* rather than causes, *reason* rather than history. John Rawls's concept of 'stability for the right reasons' is a case in point. For Rawls (1999, 16), it is not enough that social stability is 'merely a *modus vivendi*' produced by contingent historical forces: 'Stability for the right reasons means stability brought about by citizens acting correctly according to the appropriate principles of their sense of justice, which they have acquired by growing up under and participating in just institutions' (13 n. 2). In other words, the specific contents of particular grounds and reasons may indeed ultimately owe their existence to history, but the category of right action as such does not. Reason acts *on* (as opposed to *in*) history: the category of right action is defined as action grounded on the 'correct' reading of historically produced principles. 'Reason and consequence are *not* equivalent to cause and effect', says Heidegger (1991b, 21), and in this one respect, at least, conventional legal theory would agree with him.

Two motivations seem to predominate in those thinkers who favour the internal over the external perspective on law: (*a*) the desire to secure the objective conditions of the possibility of legality or justice, and (*b*) the desire to accurately describe the phenomenal (subjective) world of law-doers. Kant's notion of the 'good will' (1999, 154) provides an important clue about the nature of the first motive.

According to Kant (159), the good will does not simply act '*as* duty requires' – it acts '*because* duty requires'. The prudent thief forbears from stealing only if he knows that the police are likely to catch him; but the law abiding citizen will not

steal even if he knows he can get away with it. Apart from illustrating the factual distinction between acting in conformity with reasons and acting according to reasons, this example shows why Kant applies the adjective 'good' only to the latter sort of behaviour. Hardly anyone likes a thief, even other thieves. For Kant (187), morality consists in willing ourselves to obey norms that we rationally derive from the categorical imperative: 'Act as if the maxim of your action were to become by your will a general law of nature.' Conceived of as a 'fact of reason', the operational principle of the categorical imperative is consistency. And since universalising theft arguably makes property (and hence theft itself) impossible (188), it follows that forbearance from stealing is *ipso facto* a moral duty from Kant's point of view. It may be that moral judgement always aims at solving new problems, given that the world is always changing. But to paraphrase Horkheimer and Adorno (2002, 19–20), Kant does not seem to think that moral judgement *recognises* anything new, inasmuch as it merely endeavours to repeat what reason has placed into objects beforehand.

The concept of acting because of (and not just in conformity with) right reasons can ultimately be traced to Plato's assertion that people ought to do justice whether or not they possess the fabled ring of Gyges, which allowed its wearer to become invisible (*Republic* ii. 612*b*2–3). The distinction between the external and internal points of view is thus an essential corollary of the ontological/moral proposition that it is possible for human beings to decide and choose to behave justly and morally, even if their appetites and personal interests counsel them to do otherwise. The traditional conception of legal and moral responsibility thus draws a subtle but important distinction between the *normative* and the *prescriptive*: the former merely says what ought to be done, while the latter consists in an additional phrase that is produced only by someone's particularised decision to obey. The normative says to the individual, '*One* ought to do X'; in prescription, the individual goes a step further and says to himself, '*I* ought to do X'. As Derrida (2001, 219) observes, this distinction shows why 'it is customary to say that the obligation entails the freedom of the one who is obligated'.

In contrast to Kant and Rawls, 'external' thinkers are inclined to attribute justice in general, and judicial behaviours in particular, to factors other than judges' objectively correct subjective decisions to accept this or that legal reason (ground) for their behaviours. The premise of the external perspective is that historical causes trump rational grounds, or rather, unmask and explain them for what they really are. A good example is Marx's thesis that all past history is really 'pre-history': a benighted era in which human beings did in fact control their affairs, but without the sort of autonomous self-determination that can come only to those who realise, at long last, that their historically produced 'reasons' are but ideological reflexes and echoes (i.e. effects) of their concrete life-processes (see Marcuse 2007, 242).

The argument that our existing forms of social practice are not what they could and should be – no matter how well-grounded they appear to be from the inside – constitutes a serious affront to instrumental reason. The argument seems dangerously disrespectful of the conventional proposition that legal and moral responsibility can be completely discharged by the correct derivation of right action from just principles. It also seems to lend credence to the gang member's irresponsible excuse, in the musical *West Side Story*, that 'I'm depraved on account of I'm deprived'.

Kant's third antinomy of pure reason, which proves the existence of both freedom *and* its antithesis (1998, 484–9), thus reproduces itself in legal theory in the form of the opposition between the internal and external points of view.

On the other hand, the external perspective does tend to break the spell of immediacy that the law casts over its operations, freeing the observer to notice the injustices (and the pain) produced by what the existing legal order calls 'justice'. The law confuses freedom with the business of preserving existing legal relations (i.e. preserving itself), which is why Horkheimer and Adorno (2002, 12) interpret the blindfold over the eyes of the Goddess of Justice to mean 'not only that justice brooks no interference but that it does not originate in freedom'. The internal point of view sees words which are not calculated means to officially certified (well-grounded) legal ends as meaningless, and it is always impatient to get down to what it takes to be the real business of the law: *correct administration*.

The following passage, in which Ronald Dworkin (1991, 360) expresses his honest antipathy towards the external perspective and his strong normative preference for rationally grounded 'internal' explanations, typifies this administrative mindset:

> We should now set aside, as a waste of important energy and resource, grand debates about whether law is all power or illusion or constraint, or whether texts interpret only other texts, or whether there are right or best or true or soundest answers or only useful or powerful or popular ones. We could then take up instead how the decisions that in any case will be made should be made, and which of the answers that will in any case be thought right or best or true or soundest really are.

The imperative of correct administration to which Dworkin alludes is subverted by the external point of view, which insists on talking about what *might have been* in addition to *what was*, and *what might be* in addition to *what is*. Historians, sociologists and psychologists (not to mention Marxists, critical race theorists and feminist legal theorists) explain legal norms, arguments and outcomes by tracing them to their proximate or ultimate causes rather than to their legal grounds, which they suspect of being ideological. Seen from the external point of view, the question of a juridical result's rationality cannot be separated from an assessment of the rationality (or irrationality) of its historical origins and consequences.

In contrast, Dworkin's above-quoted condemnation of the external perspective essentially reverses and negates the old Latin saying, *necissitas non habet legem*, to read *lex habet necissitas*. The text seems to be saying that the law we presently have is necessary, so let's get on with it. In its impatience for results, the internal perspective consciously or unconsciously subordinates the brutality and sadness of the underlying facts to the necessity of giving legal form. It represses awareness of real human torment so that 'reasons' can be given for the torment's existence. What the internal perspective reveals – the 'reason' for this or that bit of legalised suffering – is designed to conceal what it justifies from any further scrutiny.

Apart from its relevance to the problem of legal administration, the external/internal distinction is also widely felt to be important to the philosophical practice of accurately describing the 'inner' (phenomenal) world of law-doing, which humans experience as no less real, and no less valid a subject of discussion, than facts in the 'outer' (causal) world. For example, some social scientists, occupying an external

point of view, have recently hypothesised that people who have experienced stressful childhoods are drawn to 'liberal' political ideas as adults, whereas those whose childhoods were secure are drawn to 'conservative' ideas; other scientists come to exactly the opposite conclusion.[7] No matter what the correct answer to this social-scientific question might be, however, its point of view is completely irrelevant to understanding how people actually experience and deploy the words 'liberal' and 'conservative'. Being a 'good liberal' or a 'good conservative', in the way people actually use these terms, has nothing to do with an external causal hypothesis, and everything to do with the perceived relationship between a person's avowed political principles and his political actions. Thus, our actual patterns of language use also appear to underwrite the external/internal distinction, making its employment seem mandatory for anyone who aspires to give an adequate description of the rich complexity of human behaviour.

Legal theory in most of its traditional forms draws the distinction between the external and internal points of view for both of the reasons discussed above. In its two principal manifestations (legal positivism and natural law theory), mainstream legal thought demands that philosophical accounts of judicial explanations and justifications always be couched in terms of rational principles – whether deontological or teleological – and it strenuously seeks to exorcise any effort to attribute judicial behaviour to the contingent historical forces which frame both the social and psychological context of judges and the plausibility of the options they think are available to them. In a phrase, the theories of positive law and natural law share a preference for derivation over imputation. The positivist insists on deriving results from authoritative legal materials, the natural lawyer insists on deriving results from authoritative moral materials, but *both* of them reject the idea that legal theory's task is to impute juridical outcomes to their causes.

Apart from the goal of accurately describing judicial decision making, the political stakes of trying to draw the external/internal distinction in this way are clear: the project of attending to *grounds* pertains to the much-lauded values of human rationality, the rule of law, and justice, whereas the project of attending to the *causes* of legal phenomena tends to be much less respectful of the legal order's normative claims. Causal (including ideological) analysis can unmask the irrational, or at least the pre-theoretical, historical factors (revolutions, invasions, wars, imperialisms, genocides, class interests, racisms, patriarchies, etc.) that 'illegally' found, and thereafter 'legally' preserve, the various forms of domination that exist in every society.[8] The external point of view can also lay bare the phenomenon of rationalisation, which Jerome Frank (1930, 32) defines as the 'process of making ourselves appear, to ourselves and others, more rational than we are'. If the internal point of view, as it is conventionally understood, is concerned with the project of

7 Based on empirical studies reported in 'Security Check', *The Economist*, 19 May 2007, 85.

8 Cf. MacKinnon (1989, 168): 'The law of privacy treats the private sphere as a sphere of personal freedom. For men, it is. For women, the private is the distinctive sphere of intimate violation and abuse, neither free nor particularly personal. Men's realm of private freedom is women's realm of collective subordination.'

legitimising law's task, then the external point of view tends to de-legitimise it, or at least to encourage scepticism or agnosticism about its claims to legitimacy.

As mentioned earlier, the external/internal dichotomy is a product of philosophical thought *about* the law rather than juridical thought *within* the law. One might say that philosophy is the ultimate 'external' point of view – the last, best hope of those who aspire to think about their world in addition to just pragmatically calculating within it. Jurists, however, do not have philosophy's luxury of remaining intellectually detached from the infliction of legal violence in the here and now – from what they feel required by their offices to *do* to other people. As Hart (1961, 10) puts it, jurists typically take a legal norm as their ground and justification for acting, and not merely as a link in the infinite chain of historical causes and effects which lead (or probably will lead) to their future decisions. The jurist's official job is to evaluate the legal arguments – the proposed grounds – for particular outcomes, rather than to impute those arguments and outcomes to their historical causes. On the other hand, to say that jurists generally conceive of their job as purposive in this way is to make a descriptive claim that is no different, in principle, than any other descriptive claim, including, for example, the claim that ruling class interests cause judges to think the way they do (cf. Weber 1978, ii. 891–2), or the claim that the job of a poisoner is to determine the most effective way of poisoning his victims (cf. Hart 1965, 1284–6). All three claims play the language game of describing *facts*, not values. They say what is, not what ought to be.

Consider, for example, the account that Dworkin (1986, 13) gives in *Law's Empire* of the difference between the internal and external points of view in legal theory:

> [The] crucial argumentative aspect of legal practice can be studied in two ways or from two points of view. One is the external point of view of the sociologist or historian, who asks why certain patterns of legal argument develop in some periods or circumstances rather than others, for example. The other is the internal point of view of those who make the claims. Their interest is not finally historical, though they may think history relevant; it is practical … They do not want predictions of the legal claims they will make but arguments about which of those claims is sound and why; they want theories not about how history and economics have shaped their consciousness but about the place of these disciplines in argument about what the law requires them to do or have.

This excerpt appears merely to *describe* (not evaluate) the facts of judging, unlike Dworkin's earlier-quoted *cri de coeur* about the moral and political superiority of the practice of rational grounding over causal inquiry. Despite the descriptive text's dry tone, if we read it together with the previous normative text a theoretical convergence emerges that Dworkin himself seems more than happy to embrace, judging from the explicitly 'moral' claims asserted in the preface to *Law's Empire* (1986, vii–ix). The theory comes down to this: what judges in liberal democracies for the most part *actually do* is also what they *ought to do*. In sum, Dworkin and his followers have somehow 'managed to derive obedience to authority from their theories' (Horkheimer and Adorno 2002, 197).

The many politicians and political theorists who are eager to see the Western (or Anglo-American) conception of the rule of law colonise the earth could hardly

disagree with the moral claim that others need to obey whatever authority is validated as 'just' by their beliefs and theories.[9] From their point of view, the Western judicial 'Is' is equivalent to the world's judicial 'Ought', or, to put it somewhat more diffidently, a description of the former has the alleged 'virtue' (Dworkin's word) of being a persuasive argument for the latter.[10] Of course, I do not mean to accuse Dworkin, at least, of ignoring the need to make an argument for why this is so: his books are nothing if not carefully crafted arguments for the excellence of a particular liberal conception of legal rights and the rule of law. I wish only to point out that for our purposes, at least, there is no *necessary* connection between the sheer existence of judges' internal point of view and the ethical status of the human suffering that is created or sustained by those who occupy that point of view.

The Phenomenological Aspects of the Internal Point of View

To be abundantly clear, I am not interested in trying to identify Is with Ought in this book. This is not because I cling to the questionable thesis that, since there is no necessary connection between law and morality (see Coleman and Leiter 1996, 241), therefore there should not be such a connection. My claim is just the opposite: it is precisely *because* the law creates and guarantees what it calls 'legal rights' through the selective application of force that there is always an element of ethically noteworthy suffering that is produced (and/or ignored) by what law-doers do. The deeds of law's practitioners are inescapably ethical in nature *not* because the law contains moral principles that judges should recognise as the 'grounds' of their decisions, but because the intended and unintended effects of law put the phenomenon of rationally grounding legal violence itself into question. In other words, the law touches ethics not because it excludes moral principles (positive law) or contains them (natural law), but because the pre-critical glorification of responsibility-relieving 'principles' for the infliction of legalised suffering is *itself* a matter of grave ethical concern.

The foregoing observations are not part of a normative argument against legal rights, the court system, due process, judicial independence, and whatever else conventional legal thought associates with the concept of the rule of law. These abstract determinations of the legal system merely describe the formal setting or milieu within which law's task is actually performed. The ethical concern at the heart of this book is not institutional, but deeply personal; it is not about law's institutions and abstractions, but about law's concrete task, and the situation of the real human beings who perform it. Only a clear-sighted and unprejudiced look at the very moment of justifying legal violence as such can put us in a position to understand and appreciate this ethical concern.

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9 John Rawls's paean to the rule of law in *A Theory of Justice* (1971, 235–43) is a case in point, as is President George W. Bush's ongoing war to install 'democracy' and 'the rule of law' in Iraq and Afghanistan.

10 See Dworkin (1977, 90): 'The thesis [that people have legal rights even in hard cases] presents, not some novel information about what judges do, but a new way of describing what we all know they do; and the virtues of this new description are not empirical but political and philosophical.'

Although I applaud Dworkin's desire (1986, viii) to emphasise what he calls 'the phenomenology of adjudication', I am not willing to equate a description of the legal and moral obligations that judges often say they 'feel' with a genuine phenomenological description of the moment of judicial decision making as such. Rigorous phenomenological research is not to be confused with personal narrative. The external point of view on judging is indeed irrelevant to our investigations, but not because it raises extraneous or uncomfortable normative questions about the legal system. It is irrelevant because it is simply inadequate, methodologically speaking, for the phenomenological project of understanding and describing the internal point of view, and with it, the outer limits of human reason. To paraphrase the French phenomenologist Gaston Bachelard (1969, xxvi), the external point of view explains the flower by the fertilizer, thereby occupying the detached perspective of a mere observer of the legal system.

Perhaps the cartoon shown in Figure 4.1 will make the conceptual difference between an experience and its causes more vivid and immediate. Phenomenally speaking, the difference between the internal and external points of view on law is analogous to the different perspectives on the moon exhibited by the boy and his father in Gail Machlis's cartoon. The father wants to *explain* the moon. The boy wants to *look* at it. The one who explains does not look; the one who looks does not explain. Moreover, it seems clear that the boy realises (or suspects) that the beauty of the moon is no more identical to gravity, or to the moon's orbit around the earth, than a flower is the same as the fertilizer that produced it. One could even say that only the boy really notices the moon as it shows itself *right now*, in all of its breathtaking phenomenal actuality. The boy, not the father, symbolises the kind of philosopher who (as Heidegger says somewhere) is almost childlike in the power and simplicity of his thinking.

The difference between the non-causal (internal) and causal (external) points of view on law is a corollary of the law of identity, which holds that 'everything is what it is' (Lacey 1986, 99). Succinctly stated in the form of a purely logical principle, if a thing is always just itself, and not some other thing, then it follows that a thing is also not the same as its causes or effects. Of course, it is relatively easy to see that the beauty of the moon and the scent of a flower are capable of showing themselves as phenomena in their own right, and that as such they can be viewed and understood without reference to their causes and conditions. Were this not so, there would be nothing to distinguish art and philosophy from science. The judicial experience of rationally grounding a decision and unleashing legal violence follows the same basic pattern, although less visibly so.

The moment of judgement inscribes an experience of uncritical immediacy in which the judicial mind believes fervently in what it believes it sees: namely, its own representations (cf. Derrida 1994, 146). This moment, in turn, can lead to the bad infinity of a never-changing judgement (cf. Horkheimer and Adorno 2002, 161). However, it is not the dialectical progress of judgement in the moment of justice that interests us now, but rather the phenomenological structure of that moment itself. A description of the moment of justice *as such* makes the attempt to represent what Benjamin (1999, 462) calls 'dialectics at a standstill'. It attempts to free itself from the potent ideological image of a well-grounded legal result by questioning *how* well-groundedness actually shows itself in experience.

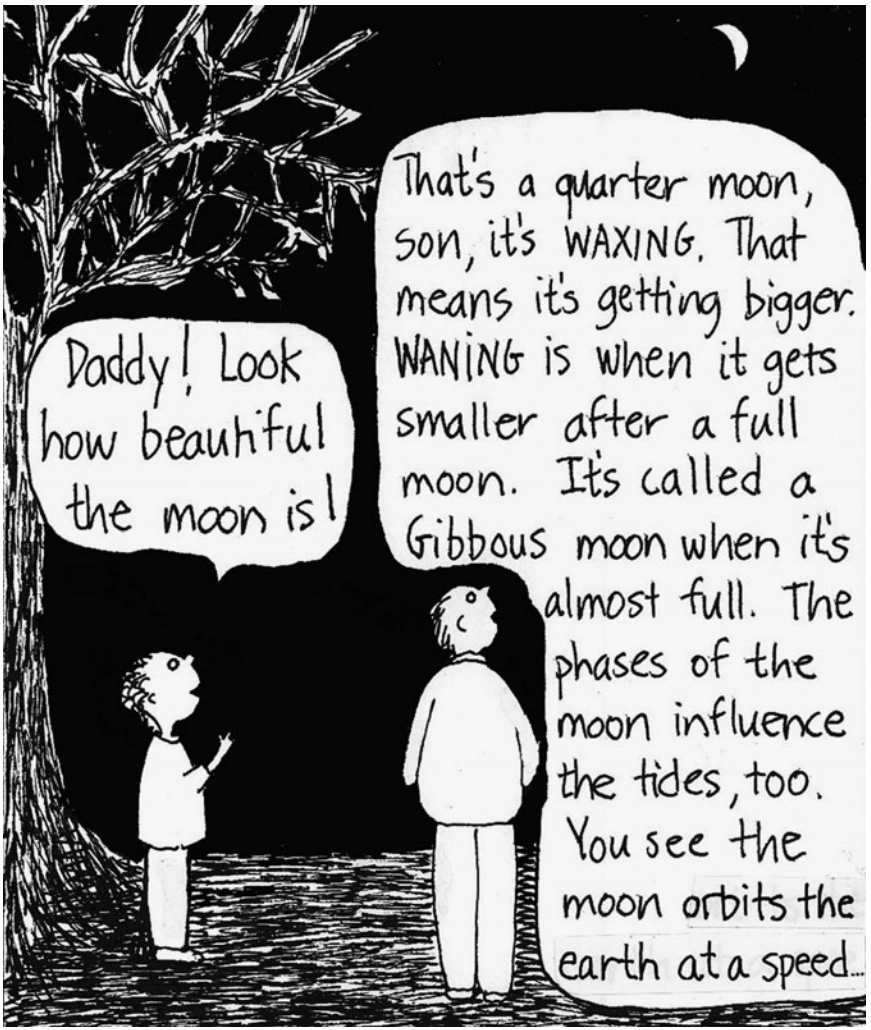

Figure 4.1 ***Moon***

Source: Gail Machlis, cartoon © 1993 by Gail Machlis. Reprinted by permission of the artist.

The phenomenon of judicial judgement is admittedly a manifestation of the ceaseless becoming of the historical and natural forces which make it what humans occupying this particular place and time happen to call 'rationally grounding a legal judgement'. But in addition to being that, it also happens to be a concrete individual experience. When considered in the latter mode, it is just itself – a phenomenal state of affairs that need not (and should not) be confused either with its causes and conditions or with its effects. To study this phenomenon *as such* is to study what Foucault (1980, 97) calls 'power … at the point where it is in direct and immediate relationship with … its object, its target, its field of application, there … where it installs itself and

produces its real effects'. It is to study definitive legal words and coercive legal deeds at the precise moment when the judicial mind encounters the relationship between them most immediately and intimately.

The first thing to notice about this moment of judicial decision making is the logical relationship that it has already established in advance between the categories 'ground' and 'meaning': grammatically speaking, the concept of a legal ground (or reason) for a given result is internally related to the concept of a legal norm-sign's meaning. That is, judges are inclined to say that a legal norm's *meaning* constitutes the legal *ground* on which they base their decisions. A mere linguistic sign seems too flimsy an entity to support what John Adams (1851, iv. 106) famously called 'a government of laws, and not of men'.[11] Hence judges are wont to say (and believe) things like this: 'The law applicable to this case means such and such, and so that is what I must and will do.'

This way of thinking and talking tempts us to believe that a great deal depends on the truth of the proposition that legal norms have meanings and not just causes, or at least that they are capable of acquiring meanings through rational interpretation. A number of related concepts also appear to depend on this proposition being true, including the rule of law, judicial fidelity to the law and the objective reality of legal rights and duties. What is more, even the theories of positive law and natural law find common ground in the thesis that legal norms mean something. Both theories equate meanings with grounds on the basis of the shared belief that it is not possible to determine *either* what a legal norm requires *or* the extent of its justness unless and until one grasps its 'meaning'.

In legal argumentation and theory, there are few words that are more easily deployed or more readily recognisable than 'meaning'. Nevertheless, the sheer ease and familiarity with which this word is bandied about in legal practice makes the problem of investigating *how* (not what) legal norms mean all the more difficult. This is because what is most obvious and closest at hand to us in everyday life is usually what we have the most difficulty understanding and explaining. What Augustine (1961, 264) says of the question 'What is time?' can also be said, with equal force, of the question 'What is meaning?': 'I know well enough what it is, provided that nobody asks me; but if I am asked what it is and try to explain, I am baffled.'

To overcome the feeling of disquiet that can be created by noticing that there is a logical and empirical difference between legal norm-signs and the violence of legal sanctions – words and deeds – there is a strong temptation to say that norms are *symbols*. That is, one is inclined to think that they stand, so to speak, for their meanings, and that these meanings, in turn, constitute the criteria – the grounds – on which people rely (and should rely) in determining legally right judgements and actions. What is more, one also feels pressure to believe that the meaning of a legal norm must be relatively stable through time: it cannot be constantly changing, for in that case 'the' law would lose the unity it requires to guide behaviour and determine judgement in advance. The integrity of the rule of law thus appears to depend on the unity of the law that rules.

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11 Adams credits the origin of this phrase to the seventeenth century English political theorist James Harrington (see Bartlett 1980, 381).

The Greek word *archē* makes this connection between law and unity uniquely visible by signifying at once both an origin and a rule: law can be the *origin* of lawfulness only if it shows itself (and only itself) as the unified *rule* according to which right actions are derived and right judgements are made. Of course, it is always possible, if one is so inclined, to trace law's existence to its historical antecedents. But once law authoritatively enters the world in the form of a legal norm, it is conventionally believed that its unity – taken as its meaning or content – can transcend history by furnishing a rational and authoritative measure of what *ought* to be.

The Magical View of Language: 'S' R ❐

The powerful urge to believe that a norm's meaning is or must be an objective entity capable of grounding legally correct action stems from what Wittgenstein calls the magical view of language. Succumbing to this urge 'is one of the most fundamental mistakes in the whole of philosophy', he once said, so much so that 'one might exhaust oneself giving examples in order to highlight the real depth of this error' (Wittgenstein and Waismann 2003, 485). The magical view subscribes to the thesis that the linguistic signs which express legal norms stand for 'meanings' conceived of as sign-independent entities in their own right (see Phillips and von der Ruhr 2005, 173). The temptation to think in this way should not be underestimated, as Wittgenstein notes:

> It sounds so natural to say: 'Each sign must designate something'. And yet, there lives in this mode of expression only a primitive and obsolete conception of language, which would like to make the relationship between a personal name and its bearer the model for all signs. … A substantive misleads one into looking for a substance. One populates the world with ethereal beings, the shadowy companions of the substantives. … Some words refer to things, so we create ghosts for other words to refer to. (Wittgenstein and Waismann 2003, 159–60, 384)

The naïve idea that meaning *must* consist in the relation between a word and a referent (the referential theory) is one variation on the magical view. Unfortunately, the referential theory is notorious, at least in analytic philosophy, for having 'led philosophers into many blind alleys', as William Alston (1967, v. 234) puts it. Embarrassing rhetorical questions arise, such as 'What, then, are the references of "the", "of" and "not"?', and these questions all too obviously refute the premise that every word must have a referent. Likewise, comparing non-synonymous expressions such as 'the morning star' and 'the evening star' shows that words can have the same reference (in this case the planet Venus) without also having the same meaning. As we shall see, the point of this critique is not to contest or deny that legal meanings exist as a matter of fact, but rather to understand what sense is actually attached to such an assertion, that is, what sorts of criteria are used and what is actually happening when lawyers and judges *say* that legal meanings exist.

Locke's theory (1939a, 281) that words 'stand as outward marks of our internal ideas' represents another variation on the magical view, inasmuch as it presupposes

a kind of mysterious link between (*a*) language and (*b*) well-formed, non-linguistic thought-entities located in our heads. But it turns out that the ideational theory is just as leaky a bucket as the referential theory. This is primarily because it lacks any sign-independent criterion for the identity of what it calls an 'idea', such that one could determine whether two people are presently thinking the same idea, or even whether the idea I am thinking now is the same as the idea I was thinking last week, or a few moments ago.

It is obvious that agreement (or disagreement) about the linguistic sign that expresses the alleged idea-entity will not do as a criterion of what an 'idea' is. This is because saying that sign 'X' means idea Y is essentially the same as saying sign 'X' means what sign 'Y' means. While this stipulation undoubtedly authorises us to substitute the latter sign for the former in speech and writing, it does not give us any criterion for what the *idea itself* is, independently of its expression.[12] Human beings are speaking beings in the purest sense of the term: they have always already entered into language without knowing it. And as Agamben (1998, 50) says, perhaps unconsciously channelling Wittgenstein,[13] everything that is presupposed for there to be language – in the form of something non-linguistic, for example – shows itself first and foremost to the human mind as a presupposition *of* language.

Nor can one rightly 'infer' from a mere consensus of behaviour that people share the same sign-independent idea-entity, for this procedure illicitly conflates the concept of a thing's *criterion* with the concept of *evidence* for the existence of that thing (a very important distinction to which we will return in the next chapter). A *kritērion*, in the original Greek sense, was essentially a metonymic device rather than an ingredient of judgement: the word originally signified a distinctive mark on something that corresponds to its character (see Nancy 2003, 159), such as the wax seal of a crown on the king's official correspondence. However, the English word 'criterion' has come to have a broader usage: it pertains not just to things but to the act of judgement itself. A criterion is the way we are supposed to tell what something would look like if it did exist – in this case, what kind of thing the word 'idea' signifies.

The concept of evidence, on the other hand, relates to *whether* something exists, and not to what kind of thing it would be if it did exist. Certainly an idea is not the same as the various chemical and electrical processes that occur in people's brains when they think, any more than a fern is the same as the process of photosynthesis. The evidence cannot intelligibly confirm that ideas 'really exist', metaphysically speaking, unless we already know *what* exists – unless, that is, we already know what kind of thing an idea is in its own right, independently of our knowing the correct linguistic sign for expressing any given particular idea.

Finally, it is demonstrably untrue that every meaningful expression refers to an inner mental state which is regularly associated with that expression. The best known proof of this is Bishop Berkeley's tongue-in-cheek challenge (1939, 516) to anyone who subscribes to Locke's ideational theory of language. Berkeley asks

12 Cf. Wittgenstein (2005, 130e): 'The explanation of the meaning of a sign takes the place of the sign that is explained.'

13 Cf. Wittgenstein (2005, 142e): 'One cannot point to a proposition and reality and say: "*This* agrees with *that*."'

such a person to try to imagine 'the general idea of a triangle, which is "neither oblique nor rectangle, equilateral, equicrural nor scalenon, but all and none of these at once"' (quoting Locke). The implication is plain: even if one does manage to think up a particular mental image of such a triangle – a formidable task in itself – it is ridiculous to think that this image *must* be exactly the same as everyone else's mental image of it. And even if many people occasionally did have mental images of the general idea of a triangle that were all exactly the same, the ideational theory implies that the objective reality of that idea would depend on whether at least one person on earth happens to be thinking about what the word 'triangle' means. Let everyone fall asleep at once, and the objective validity of all things triangular would magically disappear, so to speak, in a puff of smoke. Although this conclusion seems to be validly drawn from the premise of the ideational theory (i.e. linguistic meaning = mental state), it would hardly be comforting to anyone who thinks that the objective reality of mathematics (and more generally, the world itself) is guaranteed by something more real than the existence of intermittent subjective idea-pictures passing through the minds of particular human beings (cf. Derrida 1989, 94–5).

Finally, the thesis that meaning is to be found in publicly observable aspects of the language situation (the stimulus-response theory) also leads to a philosophical dead end (see Alston 1967, v. 235–6). The all-too-casual formula 'meaning = use', which is based on an unsophisticated reading of Wittgenstein's later philosophy, provides no criterion for meaning that is any different than the behaviour that the meaning is supposed to explain. That is, while it is possible, and may even be desirable, to investigate the regular responses that a linguistic sign evokes, to go beyond this sort of simple behaviourism and identify the responses themselves with the sign's meaning – as if meaning were a mysterious third entity existing apart from both the sign *qua* material object and the responses *qua* behaviour – is to leave the distinction between cause and caused, and ground and grounded, completely undetermined.[14] Logically speaking, meaning cannot be identical to use if meaning is also supposed to explain use.

In the first paragraph of the *Philosophical Investigations*, Wittgenstein (1953, 2e) begins to analyse these and other forms of the magical view of language by quoting from Augustine's description of how he learned to speak as a young child. In the *Confessions*, Augustine (1961, 29) recounts that his elders used words to name objects, and that 'by hearing words arranged in various phrases and constantly repeated, I gradually pieced together what they stood for'. For Wittgenstein, this description offers 'a particular picture of the essence of human language', which he characterises as follows:

> [T]he individual words in language name objects – sentences are combinations of such names. – In this picture of language we find roots of the following idea: Every word has a meaning. This meaning is correlated with the word. It is the object for which the word stands.

14 Cf. Wittgenstein (2005, 221e): 'No psychological process can symbolise better than signs on paper … The description of what is psychological ought to be usable in turn as a symbol. The behaviourist aspect of our discussion consists only in our not distinguishing between "outer" and "inner".'

This passage uses Augustine's primitive thesis that a word's meaning is its *bearer* (a discrete person or physical object literally capable of being tagged with a name) to uncover a somewhat more sophisticated idea: namely, the object for which a word stands is not (or at least not necessarily) its bearer, but rather some other entity called its *meaning*. In other words, even if the magical view of language is forced to concede the insufficiencies of the standard referential, ideational and stimulus-response theories of meaning, it still keeps on stubbornly insisting that the meaning of a linguistic sign must be *some* kind of sign- and behaviour-independent entity in its own right.

The magical view can be represented symbolically as the argument 'S' R ❒, where: (*a*) 'S' signifies a linguistic sign, defined as that part of language which can be perceived by the senses; (*b*) ❒ signifies the meaning body (*Bedeutungskörper*) that is supposed to be correlated with the sign (see Wittgenstein 1978, 54); and (*c*) R signifies the magical event of containing, referring or correlating itself, an event which can be expressed in any verb tense, depending on the speaker's purpose.[15] The logic displayed in 'S' R ❒ makes perfect sense in the context of a proposition such as 'The word "Rover" means my dog'. However, it starts getting dodgy when applied to statements which express norms, such as 'Thou shalt not kill' (Exod. 20:13).

This is not *just* because it is possible to give an ostensive definition of the former expression, but not of the latter. It is true that in the case of the proposition, 'The word "Rover" means my dog', one can literally point to a particular spatial-temporal being corresponding to ❒ in the logical schema 'S' R ❒, and that one cannot do this in the case of the Sixth Commandment. However, this difference, while real enough, is not decisive, for there is nothing to guarantee that a mere gesture (☞) will be understood, or that it can logically determine its object any better or worse than any other linguistic sign. That is, a pointing finger and a description are both linguistic signs which determine their object in exactly the same way: unless some particular human being concretely *receives* them as being 'about' something, they are no different than any other bit of inarticulate matter.

Phenomenally speaking, law shows itself as immanent to life, and not independent of it. Judges do not in fact stand on the meaning of a legal norm, as on a marble pedestal. Nor do they in fact hide behind a norm's meaning, as if it were a wall. Neither a pedestal nor a wall, the meaning of a legal norm seems to float in the air like a spectre between real human law-doers and the ink-on-paper that they are wont to confuse with the law, or with what the law commands.[16] Yet the embarrassing absence from being of any discernable meaning bodies corresponding to legal norm-signs is hard to deny, and this vexes the magical view of language to its worst nightmare. In this, its most frightening dream, the violence of law-doing – the

15 Some simple examples: 'Yesterday you ran a sign that said "Stop", which meant [*past tense*] that you should have come to a halt before driving on'; 'The sign "No Smoking Allowed" means [*present tense*] that you are not supposed to smoke'; and 'I intend to post a "No Trespassing" sign tomorrow that will mean [*future tense*] that you should not come on my property'.

16 Cf. Wittgenstein and Waismann 2003, 17): '[In the magical view of language one thinks] if not the order, then the *sense* of the order contains the execution of the order in some way or other. And here one pictures the sense once more as a shadowy entity which stands behind the expression of the order.'

painful pummelling of the lawbreaker by the law, or of the unjust by the just – takes place in an eerily empty space, where a gap yawns between power and its exercise that no rational decision seems capable of closing, and where human actions that have no relation to legal meaning stand before mute legal norm-signs that have no relation to life (cf. Agamben 2005, 56, 86).

The sheer existence of a widespread emotional aversion to this dream indicates why it would be insufficient to say that the magical view is simply wrong or naïve as a matter of disinterested philosophical inquiry. In addition to being that, the magical view is first and foremost a manifestation of *fear* and *desire* in the hearts of those who cling to it: (*a*) fear that what Agamben (71) calls 'the secret solidarity between anomie and law' will be exposed unless people can rightly believe that legal meaning bodies really do exist, and (*b*) the desire to shift ethical responsibly for legalised human suffering from the narrow shoulders of real human law-doers onto the *terra firma* of what legal norms objectively 'mean' to those who apply them.

The Difference Between Norms and Propositions

Generally speaking, the magical view of language invents metaphysical ghosts in an effort to explain and fortify its affective commitment to the rule of law. But there is another reason why this view is particularly ingenuous when applied to linguistic expressions of *legal norms*, for the latter do not play the same role as ordinary propositions do in the way law-doers actually use them. Propositions are representational: we use them in everyday discourse to say something *about* particular states of affairs. The point of using a legal norm, however, is different. We apply legal norms *to* particular states of affairs, and this means that any given verbal description of the facts relates to, but is not the same as, the verbal statement of the norm.

None of this is meant to deny the well-known truism that a reciprocal relationship subsists between legal norms ('the law') and legal propositions ('the facts'). As every trial lawyer knows, in legal practice how the facts are described is intimately connected to how the law is described, and *vice versa* (see Stone 1968, 268–74). But at the end of the day, wherever legal norm X is found as the major premise and factual proposition P as the minor premise in a legal syllogism, the norm and the proposition are no more identical to one another than a wrench is identical to a nut, or what the numeral '10' signifies is identical to a particular tally of the number of fingers I have on my hands. In the philosophy of language, as in so many other things, attention must be paid to differences as well as similarities.

In relation to the category 'meaning', legal norms can be analogised to the rules of a board game, and legal practice to the actual playing of the game. This analogy is related to, but should not be conflated with, Wittgenstein's well-known concept of 'language games' (*Sprachspiele*). For Wittgenstein, the rules organising the use of words in a given context are implicit to the social practice that regularly goes on in that context, and these rules for the most part are already pre-understood (more or less unconsciously) by those who participate in the practice. This is why he defines the concept 'language-game' as 'the whole [process of using words], consisting of

language and the actions into which it is woven' (1953, 5e). From Wittgenstein's standpoint, the use of words in *any* situation – propositional, normative, or otherwise – is a 'rule bound' activity, but only to the extent that it exhibits regularly recurring features. A description of these features is what he calls the 'grammar' of the words. The participants in a language game do not necessarily (or even usually) 'follow' the grammatical rules of the game – rather, they first and foremost *exhibit* the rules in and by their behaviours. Thus, a philosophical account of grammatical rules in Wittgenstein's sense merely describes how, concretely, language does what it does in this or that particular context (cf. Wittgenstein 2005, 145e).

In comparing legal norms to the rules of a game, however, I do not need to rely on the general concept of a language game. Unlike the rules of a language game, legal norms *are* explicitly 'followed' by judges in most cases. The whole point of the present analogy is to distinguish the use of norms from the use of propositions, rather than to show that these two forms of discourse are both rule-bound activities and therefore at some level are alike. For example, the rule, 'Bishops can only move on a diagonal', allows the game of chess to be played in a certain way. But no one would say that the naked expression of this rule as it appears in an official chess rule book is trying to describe (or 'means') this or that move that so-and-so just made while playing an actual game of high speed chess in New York City's Battery Park. A particular chess move can comply with the rule, or violate it, but unlike the case of a genuine proposition, we do not say that the expression of the rule itself is either 'true' or 'false' in relation to that move.[17] To be sure, if we altered the rule to allow bishops to move as the knight does from the tenth move onward, the result would be a *different* kind of chess game. But surely we would not call the new rule itself true (or false) when compared to the original rule: different, maybe, or better or worse, but not 'true' or 'false'.

For exactly the same reason, it is hard to see what the point would be of saying that a norm which is acknowledged as legally binding is either true or false. Legal norms do not represent anything – they are more like gravel paths than sculptures. And of course, a gravel path does not state that one is to walk on it (and not on the grass), or even that people usually go that way (cf. Wittgenstein 2005, 189e). Although a given norm could be different than it is, or better (or worse) than some other legal norm, it is not trying to describe anything in particular that could, by any stretch of the imagination, correspond to ❒ in the logical schema 'S' R ❒.

Consider, for instance, the statement 'Ms A wrongfully killed Mr B at 3:30 pm on the afternoon of 15 January 2008'. It would be possible, perhaps, to judge whether this legal *proposition* is true or false according to the application of a legal *norm* such as 'Thou shalt not kill'. However, the expression of the norm itself does not purport to describe, as the proposition does, what went on between Ms A and Mr B on 15 January 2008, or on any other date.[18] A legal norm no more refers to or

17 Cf. Wittgenstein and Waismann (2003, 263): '[N]obody will call a rule true or false … With true and false we always think of the agreement or non-agreement [of a proposition] with reality, and there is no talk about this here.'

18 Cf. Wittgenstein and Waismann (2003, 263): '[A rule] *describes* neither a specific move nor does it describe all moves.'

mentions all (or even any) of the cases to which it can be applied than a geometric curve consists in all (or even some) of the points that can be constructed on it. A curve in the mathematical sense is not 'made up' of points. Rather, its equation is a law indicating the possibility of *constructing* points on the curve, should one so desire (Wittgenstein 2005, 491e). So too a legal norm is not 'made up' of cases. Instead, the norm is the linguistic expression of a rule that can be *used* to decide cases, should one so desire.

This is not to deny that someone could try to make up a list containing all of the past instances ('cases') where the Sixth Commandment was applied. But no matter how long such a list might be, it would take the form 'A, B, C', with each letter corresponding to the name of a different case. A mere list is *extensional* rather than *intensional*: it does not indicate on its face whether the listed cases have any property (such as 'meaning') in common. As Jorge Luis Borges's notorious list of Chinese animals proves,[19] all that a list as such shows is that a bunch of names just happen to appear on the same piece of paper.[20]

Nor would it be right to say that the meaning of a legal norm such as 'Thou shalt not kill' consists in its logical product or conjunction. That is, no one would say the 'meaning' of the norm is made up of all of the past, present and future instances of its correct application, from the beginning to the end of time. Until we live in a world like the one described in the 2002 science fiction film *Minority Report*,[21] this assertion would leave the criterion of the norm's meaning completely undetermined in the only cases that really matter: *cases that have not yet been decided*. A simple list of past cases to which the Sixth Commandment has been applied says nothing whatsoever about the status of any uncommitted future homicides, which cannot in principle be identified or listed until they occur.

If any new case *does* arise, it would be a human law-doer, and not the list as such, that makes the connection between the norm and its application:

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19 In an essay entitled 'John Wilkins' Analytical Language', Borges (2000, 231) describes 'a certain Chinese Encyclopaedia', called the *Celestial Emporium of Benevolent Knowledge*, in which it is written that animals are divided into: '(a) those that belong to the emperor, (b) embalmed ones, (c) those that are trained, (d) suckling pigs, (e) mermaids, (f) fabulous ones, (g) stray dogs, (h) those that are included in this classification, (i) those that tremble as if they were mad, (j) innumerable ones, (k) those drawn with a very fine camel's-hair brush, (l) etcetera, (m) those that have just broken the flower vase, (n) those that at a distance resemble flies'.

20 Cf. Wittgenstein (1978, 461): 'The mistake in the set-theoretical approach consists time and again in treating laws and enumerations as essentially the same kind of thing and arranging them in parallel series so that the one fills in gaps left by the other. The symbol for a class is a list.'

21 The website *Ruined Endings* (http://www.ruinedendings.com/film2386plot) provides the following summary of the movie's plot: 'For six years, Washington D.C. has been murder-free thanks to astounding technology which identifies killers before they commit their crimes. But when the chief of the Pre-crime Unit, John Anderton, is himself accused of a future murder, he has just 36 hours to discover who set him up, or he'll fall victim to the perfect system he helped create.'

> If I have been given a general (variable) rule, I must recognise each time anew that this rule can be applied *here* too (that it holds for *this* case as well). No act of foresight can spare me this insight. For the form to which the rule is applied is in fact a new one at each step. – But here it's not an act of *insight*, but an act of *decision.* (Wittgenstein 2005, 379e)

The point Wittgenstein is making here is simple to the point of being childlike: *no norm can touch its next application on its own.* Nevertheless, the sheer simplicity and obviousness of this observation belies the fact that it can be very difficult for many (or even most) people to comprehend, especially when it comes to thinking about matters of law and justice.

Imagine a big warehouse filled with boxes. Each box corresponds to one particular legal norm or binding judicial precedent. Inscribed on the lid of each box are the linguistic signs which express the norm or precedent, right next to the inscription of an ellipsis ('…'). Inside the box lies a scroll listing every single case to which the norm or precedent has already been applied. Each time a new application is made, a new case name is added to the list. In this thought experiment, the verbal expression of the norm or precedent (together with the ellipsis) would be analogous to a *rule* instead of a *law*. The distinction between rules and laws comes from Wittgenstein's philosophy of mathematics. In mathematics, a law is regarded as timeless, in the sense that it always already shows, right now and within the confines of its own expression, where it leads. A rule, on the other hand, says to follow it if and only if future circumstances call for its application.

For example, the binary fraction '0.011011011…' is a law as well as a rule; one can see at a glance where it leads and 'must' lead, if one wishes to extend it in a way that most mathematicians would accept as correct. In contrast, a command to write down a binary fraction each succeeding digit of which is to be determined by the flip of a coin (if heads, write '0', if tails, write '1') announces a mere rule, not a law. This is because the extension of the series depends on presently unknown future events that may or may not occur. At any given point in time, the coin-flip fraction is exactly as long as it has been written down and no longer (cf. Wittgenstein 1978, 472). Indeed, if no one ever flips a coin again, the rule for the fraction, like an archaic and obsolete legal norm, becomes petrified. The rule ceases to be used, and the fraction stops being extended.

Legal norms are rules, not laws, in the foregoing sense. No general legal pronouncement can reach into the future in advance to 'complete' the series of *all* the cases that it governs. 'There is no secret power inherent in the expression "etc." [or '…'], by which the series is then continued without being continued' (Wittgenstein 2005, 258e). Strictly speaking, a legal norm that leaves something open, while at the same time suggesting the possibility of future applications by means of signs such as 'It is unlawful to …' or 'We now hold …', is not *undecidable*. Rather, it is *undecided* in the purest sense of the word: any future decisions under the norm are simply absent. Only after a decision takes place will it have been decided.[22] Until

22 Cf. Wittgenstein (2005, 235e): 'A proposition doesn't follow from [another proposition] until it exists. It's only when we have formed ten propositions from the first one that ten propositions follow from it … "*etc. ad infinitum*" only refers to the possibility of

then, any real or metaphorical ellipsis that purports to connect the legal norm to its future applications is exactly what its primary etymological meaning says it is: *ek-leipō*, Greek for 'I avoid' (see Nancy 2003, 105). In essence, legal norms simply *avoid* being applied until some human being applies them.

A legal norm can exist or not exist; it can be in force or not be in force; but it does not have 'being true or false' as one of its properties. More importantly, the magical view of language fails to understand the phenomenon of applying legal norms to particular cases because it fails to see that human beings do not in fact use legal norms to make statements about the world in ways that would make the magical picture ('S' R ❒) even remotely comprehensible. The belief that legal norms mean their meanings in advance is based on an illusion;[23] and the illusion itself is based on the craven fear of anomie and the craving desire to avoid personal responsibility.

What are Propositions 'About' Law?

To be sure, there is such a thing in legal theory as a 'proposition about the law'. Judges, for example, sometimes make statements of the form, 'The legal norm applicable to this case is X rather than Y', and this form of words *looks* like a genuine proposition such as, 'Today it is raining rather than dry'. But in this case, as in so many other cases in philosophy, appearances can deceive. Ronald Dworkin, for example, attempts (see 1977, 87–90, 110–23) to show that certain propositions 'about law' in this sense can be true or false because they cohere better or worse than other propositions do with what he calls the 'soundest theory of law' available to or constructed by his hypothetical judge Hercules. Hercules's soundest theory of law is supposed to contain both political and moral elements, and it must plausibly explain and justify the entire field of settled law within which he operates. Unfortunately for Hercules (and Dworkin), the logical distinction between norms and propositions cannot be abolished by combining it with a coherence theory of truth in this way.

For one thing, once the judge's soundest theory of law is actually in place, it is not *itself* then treated as a proposition about the law that could be true or false. Instead, it plays the role of a meta-norm that the judge is supposed to use to generate the result he thinks best expresses what the governing legal norm in the case before him 'really is'. The soundest theory of law operates as a sort of measuring device in Wittgenstein's sense of the term: 'A rule establishes a unit of measurement, and an empirical proposition says how long an object is' (2005, 189e).

Once adopted, the soundest theory of law is like a unique metal bar that establishes a unit of measurement, or like a group of strokes (e.g. ///) that serves as our paradigm of the number three. The metal bar itself is neither one standard unit long, nor is

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forming propositions that follow from the original; but it doesn't produce a specific number of such propositions.'

23 Cf. Wittgenstein (2005, 503e): 'Time and again there's this picture of the meaning of a word as a full box, whose contents are brought to us along with the box and packed up in it, and now all we have to do is examine them.'

it not one standard unit long.[24] Likewise, the group of strokes that serves as our paradigm of three does not *itself* consist of three strokes.[25] Although this may sound enigmatic, it really is not. What measures does not measure itself; nor is it measured by something else while it is doing the measuring. In this sense, and this sense alone, the theoretical stipulations that a judge uses to represent something about the law are not themselves conventions that can be justified by further propositions (cf. Wittgenstein 2005, 188e) Thus, once it is adopted and used, the soundest theory of law itself is neither true nor false; instead, it offers to play the role of the standard for deciding which propositions about law are to be *called* 'true' or 'false'.

What is at stake in philosophical theories such as Dworkin's is nothing less than an ontological question that many (if not most) people regard as being politically and morally fundamental. Of course, since the question presupposes the classical Western distinction between subject and object, it is not fundamental in Heidegger's sense of *Fundamentalontologie*, or the inquiry into being as opposed to beings (1962, 34). Nevertheless, it is fundamental in an *affective* sense; it is related to the problem of personal responsibility, and thus belongs to the phenomenon of ethical distress.

The question itself is Kantian in form: Is the judicial utterance of genuinely objective truths about law possible? As Dworkin (1991, 359) himself says, the answer to this question is connected to the juridical question whether right answers and legal rights really do exist:

> The only reason anyone has to say that there can be right answers in hard cases is that this has been denied, sometimes in an interesting, internally legal way, by many legal philosophers, and it is of great legal importance that their sceptical claim be understood to be false because practice would have to radically change if it were true. I said that there are right answers, that is, only because and after others said that there are not.

For thinkers like Dworkin it is not enough that this or that judge or legal theorist happens to believe (subjectively) in the truth of a given legal proposition; the proposition must *really* be true in such a way as to ground objectively correct legal judgements. Only then can the violence of law rise above historical contingency and be justified by the truth, or rather, $\square_{\text{The Truth}}$. Only then can law-doers hope to inflict legalised suffering on others with a clear conscience, secure in the knowledge that they have done what the truth itself required them to do. In short, whenever judges apply legal norm-signs, it is felt that the true *meaning* of the norms must be present at the same time.

Unfortunately, this way of thinking fails to distinguish between a description of what is called 'the rule of law' and a description of the moral and political importance of the rule of law. Prior to asking the fundamental question whether propositions about legal norms can be true or false lies a *more* fundamental question, one which goes to the very sense or intelligibility of the question that is asked.

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24 Cf. Wittgenstein (1953, 25e): 'There is *one* thing of which one can say neither that it is one metre long, nor that it is not one metre long, and that is the standard metre in Paris. But this is, of course, not to ascribe any extraordinary property to it, but only to mark its peculiar role in the language-game of measuring with a metre-rule.'

25 Cf. Wittgenstein (2005, 408e): 'One cannot say of a group of strokes serving as a paradigm of three that it consists of three strokes.'

An inquiry into sense asks *how* (i.e. in what way) a given proposition 'about law' as such could be true or false. To decide whether an ordinary proposition is true or false we can (and often do) compare it with reality: for instance, we might compare the proposition, 'It is raining', with the current weather by looking through the window at the sky outside. Coherence theories of truth such as Dworkin's, on the other hand, *compare propositions with one another* (see Kress 1984). And it seems so plausible, so natural to say and believe that some propositions are truer than others because they 'fit' better with what we know to be the case. One wants to say, for example, that proposition P ('Water-boarding terrorist suspects is a cruel or unusual punishment') either coheres better than proposition Q ('Water-boarding terrorist suspects is a permissible government activity') with the theoretical proposition R ('The Eighth Amendment to the United States Constitution prohibits cruel or unusual punishments'), or else it does not. But of course, saying and believing what most people in general feel comfortable saying and believing is not the same as thinking about fundamental questions.

Let us then ask the question that Dworkin himself does not ask: what is it, exactly, that pertains to a legal norm such that just *this* aspect of the norm is capable of cohering (or not cohering) with the judge's soundest theory of law? *How* do we compare norm X with norm Y to see which one coheres better, and which one worse? Surely no one would say that we are supposed to compare the shapes and colours of the linguistic signs which express the norms, for these are but arbitrary material objects. The Roman numeral 'II' does not cohere better than the Arabic numeral '2' with the number of thumbs I have just because it looks more like two distinct entities than the sign '2' does. In order for theories such as Dworkin's to work, it would seem that what must cohere or fail to cohere are *the meanings* of legal norms. Not the material norm-signs 'X' or 'Y', but their meaning-bodies ($\square_x$ and $\square_y$), are what must 'cohere' better (or worse) with the judge's soundest theory of law.

In short, the philosophical belief that propositions 'about law' can be objectively true or false is simply one more variation on the magical view of language. Propositions about 'the law' treat legal norms as pseudo-facts, the truth or falsity of which can be decided by applying some other norm (e.g. Dworkin's 'soundest theory of law'). This view of legal decision making only *seems* to avoid speculative metaphysics by vigorously denying, as Dworkin (1991, 364) himself does, that the meanings of legal norms are 'out there', floating in some ethereal or transcendent plane of being. Instead of trying to conjure up metaphysical meaning bodies that even a child can see do not exist in reality, this slightly more subtle version of the magical view tries to guarantee the objectivity of the law by treating legal norms as if they were pieces of a jigsaw puzzle that either fit, or do not fit, on the puzzle backing that the judge has constructed with his soundest theory of law.

But of course, a puzzle piece is a three-dimensional being that can be given a name, after which there are *two* things: (*a*) the puzzle piece, and (*b*) its name. Whereas the signs which express legal norms are not attached to anything other than pieces of paper – and no one would say these pieces of paper *qua* material beings are what the norms mean. What shows itself in reality is only *one* thing: a legal norm-sign. The coherence theory of legal judgement is not derived from phenomenological investigation into how judges concretely encounter these signs in deciding cases.

Instead, it reflects the unwarranted philosophical prejudice that legal norms must mean what they are 'about' in the same way that propositions like 'It is raining' and 'I have two thumbs' seem to mean what they are about.

Examples and the Ability to Apply Norms

It is always possible to give examples of a legal norm's correct application, and these examples can be enlightening as well as comforting to those who must apply the norm to a new case. But an example is not a meaning, and in reality no mere example can carry us any farther than it itself extends (cf. Wittgenstein 2005, 140e). An example neither defines the norm of which it is an example nor constitutes the norm's meaning. Instead, the purpose of offering examples is to show how a norm has been (or might be) used. Logically speaking, two examples and two hundred examples stand on exactly the same level in this regard, just as the series '1,2,3…' means exactly the same thing as the series '1,2,3,4,5…' (cf. Wittgenstein and Waismann 2003, 163).

Wittgenstein (505) makes a seemingly banal phenomenological observation when he says, 'No sign leads us beyond itself; nor does any argument'. How *could* any mere ink-stain of the form 'X' lead beyond itself on its own? Among other things, this small linguistic point suggests the possibility of defining the category of human freedom epistemologically rather than ontologically. That is, freedom might consist in the fact that the future cannot be known in the present. This definition has the virtue of pointing out that the vehicle of all knowledge and thought – language – is powerless to tie us down without our consent. Were it otherwise, we would all be slaves of signs; were it otherwise, we would all be lickspittles of language, living in utter denial about what *we ourselves* (and not words) have done.

As every law professor knows, examples of actual and hypothetical cases can be used to train students in the application of legal norms. But this fact alone does not prove, or even imply, that some entity called the norm's 'meaning' is transferred from hand to hand (like a rash or a magic ring) every time a course of training has been successful. The prehistory of a legal norm's application is not the same as its application, just as the effect of a legal norm-sign on a judge's feelings and instincts is not the same as its sense (cf. Wittgenstein 2005, 35e).

The Kantian idea that there must be a 'schematising precognition' (*Vorblick*) of the concept of X before one can see or recognise something *as* 'X' (see Heidegger 1997a, 71) is an interesting psycho-physiological hypothesis that might some day be verified (or refuted) by scientists who study brain processes.[26] We might someday find, for example, that explaining the meaning of language to people causes them to understand it 'in the sense in which the training of a dog is the cause of its reacting to certain signals in such-and-such way' (Wittgenstein and Waismann 2003, 217). Indeed, we might even learn that language in general operates on us in essentially the same way that perforations on a roll of paper turn a pianola cylinder (cf. Wittgenstein

26 Cf. Wittgenstein and Waismann (2003, 469): 'It would be a completely groundless assumption that to the perception of a red light there is added a special process of knowing about this perception.'

2005, 149e). But none of this has anything to do with the conventional idea that legal norms 'mean' something in advance. What *causes* human beings to understand a sign's meaning is simply not the same as what traditional legal theory wants the sign's 'objective meaning' to be.

Nor can we say that a person's ability to apply a legal norm, however skilfully, is identical to the norm's meaning. That language serves to set off various reactions in us is an undeniable fact. But the ability to apply a linguistic sign is not a 'hypothetical reservoir from which applications flow forth' (Wittgenstein and Waismann 2003, 357). Phenomenally speaking, linguistic capability is not a paler, lest robust form of actuality that shows itself to the inner self before words are used, or even while they are being used. I did not consult my ability to write this sentence before I wrote it. Human beings are not living scarecrows into which the hay of their competencies has been stuffed. Nor are their possibilities prefabricated moulds into which their actualities can be poured.

Wittgenstein (see Waismann 1979, 154–5) tries to make a similar point from a slightly different perspective when he argues that it is impossible to lay down a completely interpretation-proof rule for applying another rule:

> The essential thing about [a rule], its generality, is inexpressible. Generality shows itself in application. I have to *read* this generality *into* the configuration ... A rule is not like the mortar between two bricks. We cannot lay down a rule for the application of another rule. We cannot apply one rule by means of another rule.

In this passage, Wittgenstein does not mean to deny that one can construct canons for construing norms if one is so inclined. Indeed, the law is full of secondary norms for reading primary legal norms, such as *expressio unius est exclusio alteris* ('the expression of one thing is the exclusion of another') and 'Judges should find the plain meaning of the statute'. Instead, Wittgenstein is making a very simple logical point: there is no such thing as a norm (including a norm for reading norms) that is capable of reading and applying itself *as* a norm. Any set of signs can show itself as a legal norm: it all depends on what people actually *do* with the signs.

Interpretation and Projection

Despite (or perhaps because of) the obvious muteness and inefficacy of naked legal norm-signs taken as material beings, one feels sorely tempted to fall back on the concept of interpretation as a surrogate for the concept of legal meaning. At least the act of interpretation seems to be something *else* – something other than ink on paper. Everyone knows that judges interpret legal norms all the time in the legal system. Perhaps these interpretations themselves are what constitute (or stand for) the law's 'meaning'. This seems to have been the view of John Chipman Gray (1997, 62–5), for example, who famously identified the law not with statutes and precedents, but with what judges presently decide the statutes and precedents 'mean'.

Adhering to the thesis that meaning is interpretation would be a philosophical evasion, however, for as Wittgenstein (1978, 45) remarks, 'an answer to the question "How is that meant?" [merely] exhibits the relationship between two linguistic

expressions'. To be understood at all, any judge-imposed meaning must be given in a language that is itself free of misunderstanding; otherwise the interpretation would need further interpretation, and so on *ad infinitum*. Nor can meaning be identified with the 'thought' behind the judge's interpretation. Even if a thought is somehow 'translated' by a linguistic interpretation (a very dubious proposition, as we shall see), what is it that would stand behind the thought-entity as *its* 'meaning'? Thought processes, after all, show themselves concretely as images and expressions, too, and no magical meaning body can be found behind *them*.[27]

This indicates why Wittgenstein (Wittgenstein and Waismann 2003, 27) tended to treat 'thoughts' no differently than public expressions of language. He did this not because he believed that there is no metaphysical difference between the inner world of experience and the outer world of discourse, but because he knew that any other view of 'thoughts' mythologizes them: 'When I'm thinking in a language I don't have additional meanings in my mind running alongside the linguistic expression; rather, language itself is the vehicle of thought' (Wittgenstein 2005, 283e). Thinking is a specific use of symbols – or rather, that is how thinking actually shows itself in experience. It turns out that the 'magical conception of thinking' (Wittgenstein and Waismann 2003, 442) is simply a corollary or extension of the magical view of language.

In sum, conflating meaning with interpretation, or with the thought behind the interpretation, begs the question of meaning by shifting the magical view of language to yet another level of signs or images. Anyone who believes that the sign which comprises the judge's *interpretation itself* (e.g. the sign 'Norm X means Y') refers to or contains its *own* extra-linguistic 'meaning' simply reaffirms the magical view of language at a different level of signs. The premise of the magical view – that the meaning of a text is something other than the sign which expresses it – remains the same regardless of what value is inserted into the first place of the argument 'S' R ❐. The proposition that judicial interpretation provides the law with its meaning is a grammatical remark, not a metaphysical assertion.[28] It says that this is the way law-doers happen to talk within the language game of applying legal norms – that is, they frequently talk about the judicial practice of 'finding the meaning of legal norms through interpretation'. But of course, proving that there is a juridical system of talking about legal norms in terms of their 'existing meanings' is not the same as proving that what the system calls 'legal meaning' actually *exists*.[29]

I will use an analogy drawn from a field of mathematics known as projective geometry to show precisely how the magical premise collapses into nonsense in cases where a judge self-consciously interprets a legal norm, and then calls the interpretation itself the norm's 'meaning'. That judges sometimes (or even often) act and talk this way in legal practice is undeniable, and the temptation to go along with them – to help them do law – can be quite strong. It is probably true, as Habermas

27 Cf. Wittgenstein (2005, 52e): 'A thought is just an expression, and there can be no magic hidden behind an expression.'

28 Cf. Wittgenstein (2005, 320e): 'Phenomenology is grammar.'

29 Cf. Wittgenstein and Waismann (2003, 157): 'Proving that a number exists in a system is not the same as proving that the numbers *of a system* exist.'

(2003, 249) says, that the so-called 'linguistic turn' in philosophy has 'shifted the standard of epistemic objectivity from the private certainty of an experiencing subject to the public practice of justification within a communicative community'. But the real question here is not whether law-doers verbally conflate law's interpretation with its meaning in everyday legal discourse, or whether we ought to help them conflate these concepts more justly or more elegantly. The real question is what we are to make of the equation 'interpretation = meaning' in the context of this book, given that we are seeking to understand, and not just mimic, what legal actors say they are doing when they inflict suffering on others in the name of the law.

A simple geometric projection of the type shown in Figure 4.2 exhibits no less than three distinct elements: (*a*) there is the shape that is to be projected (figure A on plane I), (*b*) there is the method or methods used to project the shape (in this case M_1, which is orthogonal, and M_2, which is non-orthogonal), and (*c*) there is the projection itself (figures A_1 and A_2 on plane II, each figure being the product of a different method of projection). In the context of *this* example, at least, it makes perfect sense to talk about the shape that is to be projected (figure A) as something separate from the projections of that shape (figures A_1 and A_2), because there are independent criteria to identify each of them as existing entities in their own right. Each method of projection (M_1 or M_2), in turn, is a different rule for transforming

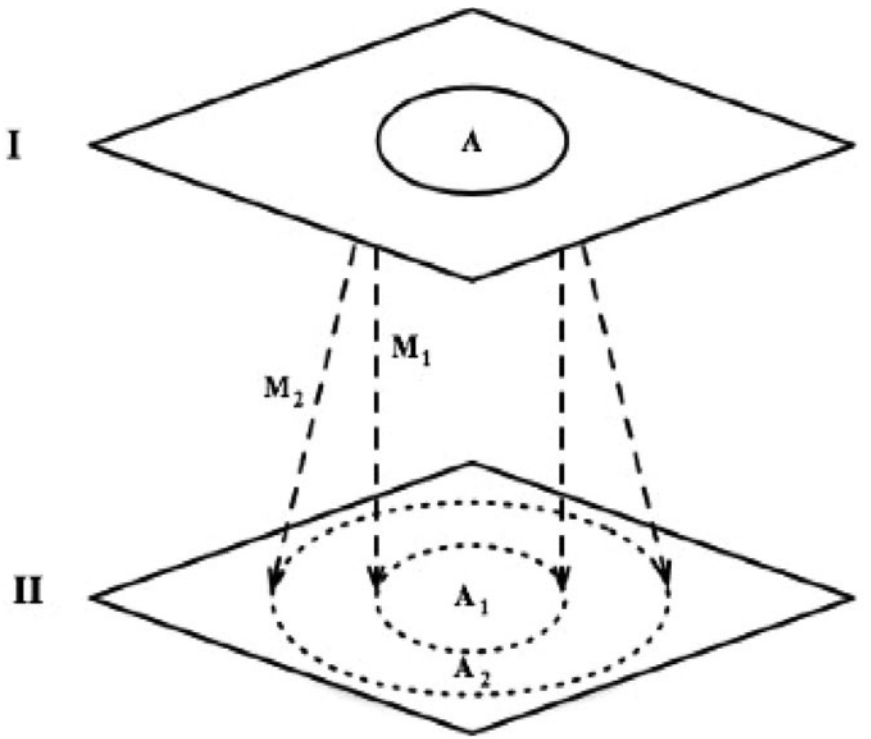

Figure 4.2 Geometric projections

one shape (A) into another shape (A_1 or A_2). In sum, in this case it is always possible to compare two *different* things: (*a*) what is to be projected, and (*b*) its projection according to this or that method of projection.[30]

The situation is otherwise in the case of a judge interpreting a legal norm. Suppose the judge says, 'I interpret legal norm X to mean Y'. Whatever method of interpretation the judge has used (or has passively let happen), the claim that the norm-sign 'X' stands for a meaning of which the interpretation-sign 'Y' is a projection provides no criterion for identifying the *meaning itself* as something different from the signs 'X' and 'Y'. In contrast to a geometric projection, in the case of the judicial interpretation of canonical legal language we have no criterion for – nor do we 'see' – anything that would be analogous to shape A in Figure 4.2. *There is no meaning of the norm (e.g.* $\square_{\text{Meaning of Sign 'X'}}$*) that the judge translates or projects with his interpretation-sign* 'Y'. Transforming sign 'X' into 'Y' by means of a process of interpretation is simply not the same as transforming something called *the meaning* of sign 'X' into 'Y'.

Since we do not see *two* things – meaning and interpretation – there can be no possibility of comparing the one with the other to determine whether the interpretation is a correct or incorrect projection of the meaning. A judge's interpretation of a legal norm has nothing to do with describing its 'meaning'. Meaning is not a real mountain that can be painted; nor is it a painted mountain, which anyway consists of nothing more than daubs of paint on canvas. Viewed in terms of *how* meaning actually transpires (as opposed to 'what' it is), the equation 'legal meaning = legal interpretation' shows itself as a rule of substitution authorising judges to substitute one linguistic sign for another.

It might seem that the foregoing discussion has left much-cherished concepts such as the rule of law, fidelity to law, and the existence of legal rights and duties teetering on the brink of meaninglessness, given that it has established: (*a*) no legal norm-sign contains or refers to any credible meaning body ($\square$) that is 'present' at any particular moment along with the sign; (*b*) no amount of examples could itself constitute a legal norm's meaning; and (*c*) no other norm could ever tell us how to read and apply this one in a way that is logically immune to further interpretation. Indeed, the resulting mystery of meaning appears insoluble, and one can almost be forgiven for doubting whether legal norms could ever mean anything at all.[31]

Well, so be it. If it really is the case that the linguistic signs which express legal norms can do nothing at all, in and of themselves, then nothing has been lost that

30 This paragraph exploits a metaphor used by Wittgenstein (1978, 205) in his posthumously published book, *Philosophical Grammar*. See also Wittgenstein and Waismann (2003, 329): 'If I verify the statement "this is yellow" by taking a look, then the word "yellow" means something other than if I admit as verification the measurement of the wave-length.'

31 Cf. Kripke's account (1982, 22) of what he calls the 'Wittgensteinian paradox', which Kripke elucidates in the context of adding numbers in accordance with the mathematical sign '+': 'The infinitely many cases of the table [of numbers] are not in my mind for my future self to consult. To say that there is a general rule in my mind that tells me how to add in the future is only to throw the problem back on to other rules that also seem to be given only in terms of finitely many cases. What can there be in my mind that I make use of when I act in the future? It seems that the entire idea of meaning vanishes into thin air'.

we ever had the right to rely on in the first place. Meaning is not a metaphysical property of legal language, or something that legal words 'have'. Rather, the word 'meaning' is just like the words 'haemorrhoid' and 'oatmeal'; it is a mere sign that is used within language:

> In philosophy the words 'sense', 'language', 'world', etc. occur again and again. Now it is very important to ask: Are we here dealing with *exceptional* words, which in some sense stand above or below other words? Is the word 'language' a metalogical word? Not at all. The words 'language', 'sense', etc., if they are at all used correctly by us, are again only words like the words table, armchair, and window. They are in no way whatever *privileged* words. (Wittgenstein and Waismann 2003, 121)

The magical view of language, in contrast, attempts to *privilege* the word 'meaning'. It treats words as if they 'were labels of bottles with particular contents, and if [people] take down the bottles [they] thereby have [their] hands on the stated fluid contents as well' (Wittgenstein and Waismann 2003, 35).

The Perils of Scepticism

The primary motivation behind the philosophical impulse to treat words as vessels full of meaning (i.e. to privilege the sign 'meaning') is to defeat what Saul Kripke (1982, 55) calls the 'sceptical argument [that] … [t]here can be no such thing as meaning anything by any word'. But scepticism about meaning needs to preserve the ghostly image of a meaning body in order to make itself understood, for sceptics deny precisely what non-sceptics affirm. If the latter say P, the former say not-P. This implies that sceptical arguments are trying to exclude something that looks an awful lot like what the sign 'P' itself *means*.

Compare a sceptic's denial that there was a conspiracy to kill President John F. Kennedy. Such a denial might say, for example, that no one recruited Lee Harvey Oswald to kill Kennedy; in that case it would exclude a particular imaginable state of affairs (e.g. someone recruiting Oswald in a secret meeting, etc.) by saying that just *this* state of affairs did not exist. Wittgenstein (1979a, 55e) had this sort of proposition in mind when he said, 'In order for a proposition to be capable of being true it must also be capable of being false'.

Unlike someone who denies that there was conspiracy to assassinate Kennedy, however, the meaning-sceptic cannot say what he is trying to exclude without contradicting himself. The absolute assertion, 'Legal norms have no meaning', tries to negate something (what the word 'meaning' means) that it cannot in principle describe. *What is it, exactly, that a sceptic knows does not exist, if he knows that meaning does not exist?* To be sure, the meaning-sceptic also notices, as we have done, that legal words are not in fact attached to discernable meaning bodies. But simply knowing this modest little fact is not enough for him. He wants to go on and say that *meaning itself* does not and cannot exist. But here one feels entitled to ask: *no meaning as opposed to what?*

One might say that someone who denies that meaning exists is like Don Quixote jousting at a windmill. Instead of simply saying that meaning bodies do not exist,

phenomenally speaking, the sceptic says, in effect: 'The *absence* of meaning ($\exists_{\text{Meaning}}$) exists'. But if 'meaning' is not a privileged word, neither should it be regarded as an inferior one to be crossed out, or lanced through and through like an evil enemy. Among other things, this is why Wittgenstein (1974, 73) said, in the *Tractatus*, 'Scepticism is *not* irrefutable, but obviously nonsensical'. If the magical view of language cannot give us a criterion for meaning bodies, this does not imply that the word 'meaning' has no use.

Instead of discarding the magical view of language altogether, however, most legal philosophers continue to frame the problem of meaning *in terms of* that view. It is as if the magical view were grounded in a metaphysical opposition that is ineluctably binding on all rational beings: either legal norms 'have' meanings or they do not. The result, predictability enough, is a regrettable tendency to advance absurd claims, and to cultivate a particularly fierce kind of self-deception, about the nature or essence of meaning and rationality in legal theory.

But the importance of this result does not primarily consist in the fact that it reflects a general academic unwillingness to acknowledge the limits of reason in legal interpretation. Far more important than this is what the magical view of legal language does to the human heart. Interpreting the cacophony of the millions and billions who occupy law's empire as the song of the angels singing the praises of law's exquisitely just meaning bodies, those who cling to the magical view are incapable of understanding the deep truth conveyed by one of Kafka's most pungent epigrams on the nature of ethical self-deception. 'No people sing with such pure voices as those who live in deepest Hell' says Kafka; 'what we take for the song of the angels is their song' (see Banville 2004, 38).

Chapter 5

The Limits of Reason in Legal Interpretation

> Custom is the lord of everything,
> Of mortals and immortals king.
> High violence it justifies,
> With hand uplifted plundering.
> Pindar, *The Power of Custom* (1938, 296)

'Seeing' Plato's Ideas versus 'Inferring' Legal Grounds

As applied to the problems of legal theory, the magical view of language projects a faint but badly degenerated image of Plato's theory of ideas. In his cave allegory, Plato (*Republic* 514*a*–18*d*) famously maintained that only the few – the philosophers – are capable of transcending the shadow-world of appearances (becoming) to behold the true world of ideas (being). The philosopher's *periagogē*, or turning-around from becoming to being, is consummated when he comes face to face with the ideas, and most especially the idea of the good, in a pure act of seeing and contemplation (*theoria*). Plato (518*b*5–*d*1) makes it clear that this glorious beholding of the ideas is not *homoēosis* – that is, it is not a mere likeness or correspondence between the ideas and something else, such as a proposition *about* the perceived ideas that could be learned or otherwise inserted into the mind. For Plato, the philosopher participates in an event of perceiving (*noēin*) in which the ideas he perceives are *alētheia* – the Greek word for truth that literally means 'un-hidden' (see Heidegger 2002, 7).

The connotation of un-hiddenness is lost whenever *alētheia* is translated into English as 'truth' or into Latin as *veritas*, for both of these terms have come to be identified with propositions. Generally speaking, *truth* and *veritas* signify the mere correctness of a proposition about something. Understood in its original Platonic sense, however, *alētheia* indicates that the being of the idea (*eidos*) of a being emerges from obscurity to stand in truth, *right now*, before those who are able to behold it. Among other things, this explains why Plato disliked writing so much. Although written words 'seem to talk to you as though they were intelligent', he said, they can neither 'speak in their own defence or present the truth adequately'; only 'living speech' (*logos*) can uncover what is to be seen, whereas words written in 'that black fluid we call ink' merely 'go on telling you the same thing forever' (*Phaedrus* 275*d*–276*e*). Properly understood, a Platonic idea is not a meaning body that is mysteriously attached to a proposition *about* it: rather, it *is* the thing (*on hē on*, or 'being as being') itself. One does not just 'believe' in the existence of Plato's ideas. Nor does one have to 'infer' their existence from other evidence. Instead, Plato holds that one actually *sees* them.

The case is otherwise in conventional legal theory. When mainstream legal philosophers apply the magical theory of language to the law, the existence of the meaning bodies that the theory associates with legal norm-signs is *inferred* rather than seen. For instance, according to certain proponents of the magical view the sheer pervasiveness of 'easy cases' indicates that most legal norms can (and do) have determinate meanings (see Kress 2003, 260; Schauer 1985, 409–14). Thus, Ken Kress (2003, 268) tries to cast doubt on the deconstructive claim that legal norms are radically indeterminate by arguing that '[o]bjectivity could be a consequence of essences that were not humanly perceivable, but which nevertheless exist. They might be inferable, even if not directly perceivable'. The logical basis of this argument seems to be the well-known saying that the absence of direct evidence is not evidence of absence. In other words, just because objective legal meanings (or meaning bodies) are not humanly perceivable does not imply that they do not exist; and indeed, the indirect 'evidence' supplied by easy cases tends to prove that they *do* exist.

Read uncritically, Kress's argument creates the illusion that the meanings of legal norms might exist in the same way that atoms exist. Neither meanings nor atoms are visible, on this view, but their existence can be inferred (and confirmed) by measuring their effects. If Einstein was able to prove the existence of atoms, and thereby explain Brownian motion, by measuring the average distance that particles suspended in gas travel in a given amount of time (see Lindley 2007, 27–8), then the magical view of language attempts to prove the existence of 'meanings' by measuring the degree to which different rational actors (e.g. judges) agree that there is a 'right answer' to hard cases, or arrive at the same conclusion from the same premises in easy cases.

Now as far as I know, no other legal theorist has ever compared the existence of atoms to the existence of meanings, and therefore I admit that the foregoing comparison is a bit of a straw man. Nevertheless, in this case the use of a straw man argument is fully justified by the clarity that it brings to our problem. The saying, 'The absence of evidence is not evidence of absence', makes perfect sense when the kind of thing that is absent is a *cause*. The fact that people did not know before Einstein what caused Brownian motion, for example, does not imply that Brownian motion had no cause. But it requires only a moment's reflection to realise that the comparison between the allegedly inferable existence of legal meanings and the genuinely inferable existence of atoms is inapt, for these two concepts belong to different branches of the principle of sufficient reason.

Atoms *cause* things to happen. Legal norms are supposed to *ground* judgements. Given that the magical view of language insists on maintaining a strong distinction between the internal and external points of view on law – a distinction which holds that the 'meaning' of a rule-sign must be a decision's reason rather than its cause (see Dworkin 1986, 13) – the idea that the existence of meanings can be 'inferred' from a consensus of judicial behaviour is a gross category mistake. In the end, the analogy between the atomic theory of matter and a legal norm's meaning fails for one very simple reason: the existence of regularities of behaviour, like that of regularities of motion, at best entitles us to infer a common cause, not a common reason.

For example, although many people write books, and although there may be many common social, psychological and evolutionary causes of this kind of human behaviour, it is obvious that people's *reasons* for writing books are not all the same. As Wittgenstein notes, a person cannot be mistaken in knowing his reason for writing a book, even though he may not (and usually does not) also know the causes of his writing-behaviour:

> Now we generally notice that a person does not generally know the *causes* of his activities. If asked for the cause he is unable to tell us anything in particular, or, if he tells us something, he will frequently be mistaken in specifying the cause. Strangely enough, he cannot be mistaken in specifying the *reason.* Rather, he is *the only one who knows the reason*. That is, we *call* the reason that which he gives as his reason. The cause of an action is established by observation, namely *hypothetically*, i.e. in such a way that further experiences can confirm it or contradict it. An outside observer will often be able to determine the cause of an action more easily than the agent himself: but the agent alone can state his reason. (Wittgenstein and Waismann 2003, 109–11)

Thus, if we give a hypnotic suggestion to someone to open an umbrella later, and he does so ('to check if it works', as he might put it), then 'what the experimental subject is deluded about is the cause of his action, not its motive [or reason]' (425). That is, the fact that we have manipulated this subject (causally) into opening the umbrella does not make his reason for doing so any less *his reason*.

Now suppose it is true that every judge on earth has always responded the same way to a particular kind of 'easy case' – say, a motorist running a stop sign – by slapping a fine on the defendant. This fact would give us evidence for imputing judges' identical past and future responses to certain similarities in their individual backgrounds and training. In that event we would be able to generate a perfectly ordinary external (causal) explanation of why the judges behave the same. But an observed regularity in judicial behaviour does not permit us to conclude that all of the judges who exhibit it have the same reasons, and still less that they see (in Plato's sense or any other sense) the same 'meaning' (❒) while they are interpreting and applying the same legal norm-sign.

To understand why this is so, and to see how the magical view of language can lead so easily to self-delusion and the utterance of philosophical absurdities, we will analyse two of the best known examples of the magical view of language in the philosophy of law: H.L.A. Hart's theory (1958, 607) that legal norms do (and must) have a large 'core of settled meanings' and a much smaller 'periphery' of debatable meanings, and Ronald Dworkin's theory (1986, viii–ix) that 'in most hard cases there are right answers to be hunted by reason and imagination'. Hart conceives of meanings as *ex ante* constraints on judicial practice; Dworkin conceives of meanings as present ingredients and products of that practice (see 1986, 410). Although obviously dissimilar in many important respects, both theories share the same premise: that there are two things about judicial decision making worth philosophising about: (*a*) the *behaviours* that constitute judicial practice and (*b*) the *meanings* of legal norms. And therein lies the problem.

H.L.A. Hart's 'Core Meanings'

Hart (1958, 607) expresses the essence of his core/periphery theory as follows:

> [T]he [American] Legal Realists of the 1930s … opened men's eyes to what actually goes on when courts decide cases, and the contrast they drew between the actual facts of judicial decision and the traditional terminology for describing it as if it were a wholly logical operation was usually illuminating; for in spite of some exaggeration the 'Realists' made us acutely conscious of one cardinal feature of human language and human thought, emphasis on which is vital not only for the understanding of law but in areas of philosophy far beyond the confines of jurisprudence. The insight of this school may be presented in the following example. Consider the following example. A legal rule forbids you to take a vehicle into the public park. Plainly this forbids an automobile, but what about bicycles, roller skates, toy automobiles? What about airplanes? Are these, as we say, to be called 'vehicles' for the purpose of the rule or not? If we are to communicate with each other at all, and if, as in the most elementary form of law, we are to express our intentions that a certain type of behaviour be regulated by rules, then the general words we use – like 'vehicle' in the case I consider – must have some standard instance in which no doubts are felt about its application. There must be a core of settled meaning, but there will be, as well, a penumbra of debatable cases in which words are neither obviously applicable nor obviously ruled out.

The theory of legal language exhibited in this passage rests on a casual, commonsensical attitude about the meaning of 'meaning'. For what could be more natural than to believe that human beings are able to understand and cooperate with one another through language because most of the time (i.e. in the 'core') they share the same meanings? Indeed, one of Hart's primary goals in announcing the core/periphery theory was to get legal theorists to stop obsessing about 'penumbral' cases to the exclusion of the vastly more numerous cases that reside in 'the core of legal rules whose meaning is settled' (614–15).

As Aristotle (1137^{b} 6–32) was the first to notice, the result in a penumbral ('hard') case seems to depend on the judge's discretion rather than on the clear meaning of a legal norm. The appearance that raw judicial discretion (and not the law) decides cases can undermine popular faith in the integrity of the rule of law. The fear of this political consequence helps to explain why Ronald Dworkin, for one, has spent so much time and energy trying to prove that hard cases really do have legally right answers. Frederick Schauer's argument (1985, 409–14) that the concept of 'easy cases' covers the vast number of legal situations that no one ever litigates has a similar structure and tendency, if not purpose. For his part, Hart also seems to believe that the sheer ubiquity of easy cases in the legal system ought to be sufficient to assuage any doubts about the integrity of the rule of law that may be created by the intermittent appearance of difficult cases.

But here, as elsewhere in philosophy, it is what a thinker takes for granted as obvious that sheds the most light on his thought. As Schelling (see Heidegger 1985, 9) once said, 'If you want to honour a philosopher, you must catch him where he has not yet gone forth to the consequences, in his fundamental thought; in the thought from which he takes his point of departure'. Hart's point of departure is very simple and basic: he takes it for granted that results in easy cases can be explained by legal

grounds (derived from core meanings) and not just by historical causes. Seen from an external point of view, legal outcomes have causes but not grounds; seen from the inside, however, the causes of their outcomes do not appear to judges, so therefore their decisions *must* be based on grounds. What gives Hart the right to think this way? Why must legal norm-signs have core meanings that yield grounds, even (or especially) in easy cases?

Hart's attempt to answer these sorts of questions takes the form of a *non sequitur*. Here, once again, is his premise: 'If we are to communicate with each other at all, and if, as in the most elementary form of law, we are to express our intentions that a certain type of behaviour be regulated by rules, then the general words we use … *must have some standard instance in which no doubts are felt about its application*' (607) (emphasis added). Anthropologically speaking, Hart is correct: if everyone always doubted how to apply language, human beings would be like the builders of the tower of Babel after God confounded their speech so they would not understand one another (Gen. 11:7–9).

Yet as plausible as this premise may be, it is insufficient for the conclusion that Hart draws from it: namely, the conclusion that '*[t]here must be a core of settled meaning*' which accounts for *why* people do not experience doubt. This is because the absence of doubt about how to apply a norm has no necessary connection to the presence of something called the norm's 'meaning'. In other words, although Hart is right that people regularly do not doubt how to use certain simple legal norm-signs, this fact is no more explained by a pseudo-entity called 'meaning' than the fact that opium induces sleep is explained by a question-begging *virtus dormitiva*, or 'power of making-sleepy', that mysteriously inheres in the substance of opium (cf. Nietzsche 1927a, 392).

Both ways of thinking and talking create a vicious logical circle because they fail to distinguish between the categories 'criterion of' and 'evidence of'. A criterion establishes *what* a thing is, or rather, what it would be *if* it existed. Evidence pertains to *whether* something, the identity of which is secured in advance, actually does exist. To illustrate: there is no evidence that gryphons exist, but at least we would know how to look for them if we ever wanted to decide the question as a matter of fact.[1] This is because we have a widely-shared public criterion for what a gryphon would look like if it did exist. A gryphon is a creature with the body of a lion and the head and wings of an eagle, and if it existed it would look more or less like the being depicted in Figure 5.1.

Hart's theory of the core and the penumbra is altogether different than the case of the gryphon. Although Hart imagines that regularities in judicial behaviour are *evidence* of the existence of core meanings, he offers no *criterion* to identify these meanings as sign- and behaviour-independent entities in their own right. To repeat: it is illicit, or at least a symptom of philosophical confusion, to infer the existence of something from the evidence without having *some* idea of what kind of thing that 'something' is.

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1 Cf. Wittgenstein (2005, 329e): 'To be sure, we can't show anyone a centaur because there is no such thing, but it is essential for the meaning of the word "centaur" that we can paint or sculpt one.'

Figure 5.1 Gryphon

It is very important to realise that this last remark does not advance a version of the notorious 'semantic sting' argument that Dworkin (1986, 45) identifies and attacks, in *Law's Empire*, as having 'caused such great mischief in legal philosophy'. The semantic sting is the argument 'that unless lawyers and judges share factual criteria about the grounds of law there can be no significant thought or debate about what the law is' (44). If judge A is an originalist and judge B is a pragmatist, then they probably have different factual criteria for determining the legal grounds of their decisions. But, Dworkin correctly argues, this does not imply that they cannot meaningfully think and debate with one another about what those grounds are in any given case. Since judges possessing different criteria for determining legal grounds do in fact think and talk with one another about the law all the time, Dworkin's critique of the semantic sting argument seems persuasive. Philosophically, however, it is obvious that his critique takes the general concepts of 'ground' and 'meaning' completely for granted. That is, Dworkin, just like Hart, does not say what the criterion of a 'ground' or 'meaning' is, such that people could agree or disagree about what kind of thing 'it' is in the first place.

Compare the assertion that two or more judges share the same *alma mater*. This proposition is capable of being true or false, to be sure, but not because (or only because) we have a way to demonstrate that it is true or false. The sentence would *make sense* to us even if the judges in question were utterly destroyed, together with all information about their lives, before anyone could begin investigating its truth or falsity. On the other hand, the statement that two judges share the same tvbuxl (another silly word I just made up) would leave us scratching our heads. The difference is that we already know (i.e. possess a criterion for) what kind of thing an '*alma mater*' is, but not what kind of thing a 'tvbuxl' is. In short, the sense of a

sentence – *its very intelligibility* – is different from both its decidability[2] and the method that can be used to verify it.[3]

The semantic sting argument tries to be *semantic*: that is, it tries to make sense in the way the statement 'Judges A and B share (or do not share) the same *alma mater*' makes sense. It is also a *philosophical* critique of law, rather than an argument made by legal agents in the course of practicing law. As Dworkin (1986, 45) describes it, the semantic sting leads to the following dilemma: 'Either, in spite of first appearances, lawyers actually do accept roughly the same criteria for deciding when a claim about law is true or there can be no genuine agreement or disagreement about law at all, but only the idiocy of people thinking they disagree because they attach different meanings to the same sound.'

But this dilemma is not *false*, as Dworkin thinks it is. It does not even rise to the level of a genuine paradox. Instead, the way Dworkin expresses the dilemma makes it unintelligible, for it does not let us know what kind of thing a legal claim's 'meaning' is in the first place.[4] It is as if Dworkin had said, in describing the second prong of the dilemma, that people 'attach different tvbuxl to the same sound'. As a philosophical claim, the dilemma is senseless (not false) because lawyers and judges can express agreement or disagreement about the law without 'attaching' *any* meaning (or tvbuxl) to legal norm-signs. For example, a judge who believes that authoritative legal texts should be construed for their 'plain meaning' and a judge who believes that the meaning of a legal text depends on its unwritten 'purpose' do not share the same criterion for deciding whether a given claim about law is true or false. But this does not imply that they have (or even need) any notion of what a meaning as such is. They only need to know how to use the word 'meaning' in legal practice; they need only be able to articulate, in signs, this or that *particular* meaning of a legal norm, as in the statement, 'Legal norm X means Y'.

A philosophical statement *about* legal meaning, such as the semantic sting argument, is different. Such a statement, at least the way Dworkin renders it, presupposes that the word 'meaning' in legal practice refers to something that

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2 Cf. Dworkin (1986, ix): 'the question whether we can have reason to think that an answer is right is different from the question whether it can be demonstrated to be right'.

3 There was a time when Wittgenstein thought otherwise. In 1930, for example, he said: 'it is only the method of answering the question that tells you what the question was really about' (see Waismann 1979, 79). See also Wittgenstein (1975, 200): 'the verification is not *one* token of the truth; it is *the* sense of the proposition'. He later came to reject this, his most dogmatic form, of verificationism, which seemed to offer a theory of meaning in which the expression 'the meaning of P' is equated with the expression 'the methods used to verify that P is the case'. Consider the case P = 'Ouch!' What method do we use to verify what the speaker is talking about? The later Wittgenstein would reply that the speaker is not talking *about* anything that could be the case (that's not the role the sign 'Ouch!' plays here), and so it makes no sense to say that the meaning of 'Ouch!' is the method we would use to verify that 'Ouch!' is the case. For example, if we stick a pin in someone, and he yells 'Ouch!', no one would say that he read or interpreted the prick by crying 'Ouch!' (Wittgenstein and Waismann 2003, 217–18).

4 Cf. Wittgenstein (2005, 64e): 'One has to *begin* with the distinction between sense and nonsense. Nothing is possible before that distinction.'

lawyers and judges can and do 'attach' to legal language. It is not enough, for Dworkin, that the sentence 'Legal norm X means Y' merely consists in a different linguistic sign than the sentence 'Legal norm X means Z'; the two sentences must also *mean* something different. They must, in short, contain or refer to different meaning bodies, $\square_Y$ and $\square_Z$, even though we have absolutely no idea of what these meaning bodies might be, or how to look for them. One cannot sensibly agree *or* disagree with a philosophical statement about legal meaning until one understands what the statement is even *trying* to say.

Thus, what kind of thing is a meaning, such that people could 'attach different [or even the same] meanings to the same sound', as Dworkin puts it? We simply do not know and are not told. In sum, the truth or falsity of the semantic sting argument presupposes that it is intelligible – that it makes sense. Otherwise philosophical talk about law's tvbuxl would sound just as important to us, and just as deep, as philosophical talk about law's meaning (cf. Wittgenstein 1994, 177). As Dworkin frames it, the semantic sting argument is unintelligible and senseless because it does not give us any criterion for meaning that is any different than listening to the mere sounds people make when they talk.[5]

Quite apart from the semantic sting argument, Lon Fuller's famous example (1958, 663) of a fully operational army truck that veterans want to put on a pedestal in the park as a war memorial cleverly shows how Hart's dogma of core meanings can lead to what most people would regard as an absurd interpretation of the legal norm, 'No vehicles in the park'. But Fuller's example is essentially only a political critique of Hart's theory – it shows how the belief that words must always have 'core meanings' can produce baleful practical consequences. In contrast, my concern here is to demonstrate that views like Hart's lead into a bottomless slough of philosophical self-delusion and ethical evasion. Although judges frequently ground their decisions in statements about what legal norms mean, this does not imply that the norms have or refer to meaning-entities ($\square$s) which ground what judges do, or even that judges 'impose' something called a 'meaning' on the law in the course of interpreting and applying it (see Dworkin 1986, 47).

Hart assumes that regularities of behaviour within a historically similar group of people (judges unanimously agreeing in easy cases) must be based on something more important or real (the 'meaning' of legal norm-signs) than the plain fact that these people happen to belong to a group of human beings all of whom simply *act* the same way in deciding the cases in question. This way of thinking is a variation on what logic calls the genetic fallacy, which consists in confusing the origins of a belief with its ground (Honderich 1995, 307). In other words, Hart's *only* criterion for a legal norm's meaning-the-same to many judges is that they behave the same way in response to it. He thus provides no criterion for there being such a thing as the 'core meaning' of a norm which exists independently of its use. And if there is no core, there can be no periphery either.

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5 Cf. Wittgenstein (2005, 430e): 'Where you can ask you can also search, and where you cannot search you cannot ask either. Nor can you answer … Where there is no method of searching, a question cannot have any sense.'

At a minimum, Hart's way of thinking violates Ockham's razor, which wisely stipulates that philosophers should not multiply entities beyond necessity (Lacey 1986, 164). The fact that people have been trained, or have otherwise just picked up, how to use certain normative words in this or that particular context is sufficient to explain (causally) why they do not experience doubt about what the words require of them. Moreover, when a judge simply understands how to use a legal norm without reflecting on it, it is a distortion of language to say, as Hart does, that the judge is then using the rule as his 'guide' (1961, 10).[6] Hart's motive for saying this is to distinguish the internal from the external points of view on law: as we have seen, in the former case judges rely on legal norms as the grounds for their decisions, whereas in the latter case an observer of the judge counts the norm as but one of the causes and conditions of a judicial outcome that the observer would like to predict or explain. But while the distinction between grounds and causes is good as far as it goes, it is totally irrelevant to Hart's thesis that even the automatic application of a legal norm is an instance of 'being guided' by the norm.

People seek guidance from a norm when they are in doubt about how to behave. But assuming they ever began doubting in the first place, when their doubt ceases so too does the guiding function of the norm. To be sure, language and the interpretive process can 'guide' us through the experience of feeling uncertain about a legal norm towards the formulation of a new expression of that norm that we now understand without any more ado. But that final understanding itself does not 'guide' anything – it simply *is* how we apply the norm.

In law-doing, as elsewhere in the real world, actual results come from physical processes, not logical ones – from actions, not words. From words alone nothing follows *in reality*. Thus, for example, the sentence, 'A double negation yields an affirmation' sounds like 'Carbon and oxygen yield carbon dioxide'; but in the real world, as Wittgenstein (2005, 122e) points out, 'a double negation doesn't *yield* anything; it *is* something': namely, a linguistic sign that looks like this: '~~P'. Hart wants there to be two things in easy cases – a guide ('core meanings') and the judicial behaviour that is guided – but he only gives us criteria for the existence of one: the action of a judge applying the norm to a case. If his theory were drawn in the form of a representational painting, it would contain lots of legal norm-signs together with plenty of wrenching representations of legal violence and legalised suffering, but not one single image of a legal 'meaning'.

6 Hart's nemesis, Lon Fuller (1968, 59), makes the same mistake. Criticising Hart's view that a judge is guided simply by the *words* of a legal norm, Fuller claims that he *also* 'must be guided … by some conception … [of the norm's purpose] implicit in the practices and attitudes of the society of which he is a member'. In other words, Fuller thinks that if a legal norm-sign 'X' has social purpose Y, then the *expression* of that purpose ('Y') can and does act as a 'guide' to judicial behaviour. But this merely reproduces the problem of being guided by the 'meaning' of a linguistic sign at a different level, and thus does not come to terms with the important distinction between the being *guided* by a norm (before acting) and acting on the basis of one's *reception* of the norm.

Ronald Dworkin's 'Right Answers'

Dworkin is by far the most sophisticated defender of the magical view of language in legal theory. Like Hart, he maintains that right answers to legal problems are based on legal meanings. However, these meanings are not supposed to be located 'out there' in some transcendent plane (e.g. Hart's 'core'), where they can be seen or inferred by all rational actors. Instead, Dworkin (1991, 364) thinks that judges *constitute* the meanings of legal norms through the labour of interpretation. Unlike Plato's ideas, *these* meaning-bodies could not in principle transfix or determine legal reasoning in advance, inasmuch as they owe their alleged existence *to* legal reasoning as it performs its interpretive work in the context of particular cases (see Dworkin 1986, 71, 83). But while Dworkin criticises Hart's core/penumbra theory (1986, 39–43), and while his own account of meaning is far more subtle than Hart's, Dworkin's way of thinking ultimately falls prey to the same basic confusion as Hart's.

To understand why and how this happens, we will begin with one particularly revealing account that Dworkin (1991, 362) gives of the general relationship between meaning and use in language:

> Language can only take its sense from the social events, expectations, and forms in which it figures, a fact summarized in the rough but familiar slogan that the key to meaning is use. That is true not only of the ordinary, working part of our language, but of all of it, the philosophical as well as the mundane. Of course, we can use part of our language to discuss the rest. We can say, for example, what I just said, that meaning is connected to use. … But we cannot escape from the whole enterprise of speech to a different and transcendent plane where words can have meanings wholly independent from the meaning any practice, ordinary or technical, has given them.

Distilled to its essence, this passage asserts that meaning is not the same as use, but rather is 'connected to' it, and that words are 'given' their meanings by the practice of using them in this or that context. The claim is that *two* things belong to the phenomenon of legal language – use and meaning – and Dworkin attempts to prove this claim by appealing to a consensus of behaviour within legal practice. The consensus is not about *what* meaning the law has in any given hard case (since judges disagree on this, which is why the case is 'hard'). Rather, the consensus is about the proposition *that* a hard case has one and only one right answer (Dworkin 1985, 120–21).

For example, regardless of where they stand on the legal and moral questions raised by the abortion controversy, all rational American judges undoubtedly would agree that the law of the excluded middle is 'true' in the following sense: *either* a woman has a legal right to choose to have an abortion under the United States Constitution *or* she does not – there is no third possibility (cf. 134).[7] For Dworkin, the political task of judges

7 The proposition that law of the excluded middle is 'true' is questionable, to say the least, for what would it look like for that law to be false? What would it look like, for example, for the author of this book to be at once alive and not-alive, in such a way that the word 'alive' is not ambiguous? Wittgenstein (1978a, 29) observes that the law of the excluded middle, as well as the law of non-contradiction, do not represent or 'mean' anything that could be true or false, but are instead grammatical rules that 'determine a meaning and are not answerable to any meaning that they could contradict'.

is to elaborate legally correct answers within a context framed by this sort of binary opposition. He also seems to think that the way judges actually go about performing this task suggests there is in 'fact', so to speak, a single right answer for them to elaborate.

The right answers thesis thus conceives of law's meaning as an ingredient and result of the process of adjudication rather than as the demonstrable *ex ante* ground of right answers: meaning is sought and established, not found. This differentiates Dworkin's theory from Hart's, to be sure, but not fundamentally – not at the level of the magical view of language. A meaning that is created (Dworkin) and a meaning that is found (Hart) are first and foremost supposed to be *meanings*, not behaviours. The one is a plum that grows on the tree of judicial judgement and then drops to the ground when it is ripe (Dworkin); the other is a plum that judges find and then pluck from the tree of the law itself (Hart). If Hart's philosophy of language presupposes a vulgar referential theory of meaning, then Dworkin's right answers thesis presupposes the more sophisticated stimulus-response theory of meaning. But as I mentioned in Chapter 4, theories of the latter sort suffer from a fundamental logical flaw: a thinker cannot rightly infer that the law 'has' or 'acquires' a meaning if (*a*) his only evidence for this is a consensus of judicial behaviour, and (*b*) he has no criterion for the thing he calls 'meaning' that is any different than the behaviour that the meaning is supposed to explain or be produced by.

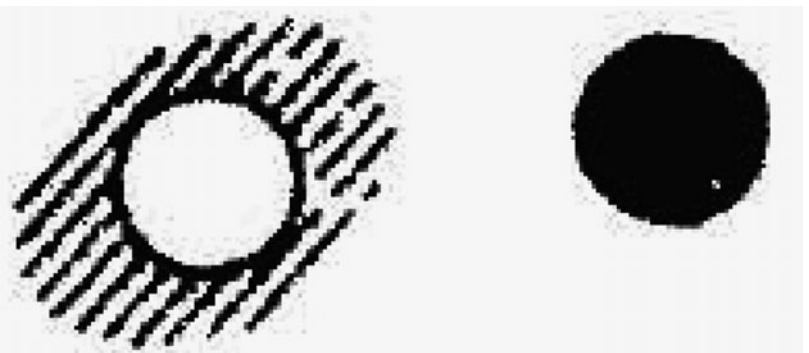

Figure 5.2 Mould and sphere

Source: Ludwig Wittgenstein (1960), *The Blue and Brown Books: Preliminary Studies for the 'Philosophical Investigations'*, 2nd edn. Image reproduced by permission of Blackwell Publcations.

Perhaps a simple visual metaphor will help make the importance of this last point a bit more concrete.[8] Suppose we wanted to know whether a particular solid shape, say a small sphere, fits into a mould. To do this we could pick up the sphere and try to place it into the mould, checking to see if they fit together. But the main reason we *can* do this, or at least try to do it, is because we have two different things before us: the mould *and* the sphere, as in Figure 5.2.

8 This paragraph exploits a metaphor used by Wittgenstein (1960, 170) in *The Brown Book*.

Figure 5.3 Plan view of sphere lying on a surface

Source: Ludwig Wittgenstein (1960), *The Blue and Brown Books: Preliminary Studies for the 'Philosophical Investigations'*, 2nd edn. Image reproduced by permission of Blackwell Publcations.

Now suppose a second case in which we are not allowed to look at anything but the view from far above of a sphere that is lying on a surface, as in Figure 5.3. Someone now asserts that the bottom quarter of the sphere is resting in a mould carved into the surface. What are we to do? Suppose the person making the assertion cannot tell us what kind of thing he means by the word 'mould'. In that event, not only would there be no way to determine whether his assertion is true, *we would not even know what he is trying to say*. We would have only *one* thing available to us – the sphere – and there would be no way to make sense of the speaker's claim that it does, or does not, lie in something else called a 'mould'.

Dworkin's theory of meaning is just like the second example given above. It is one thing for a thousand judges to say, in unison, 'We all agree that there is a single legally right answer to every case [or some cases],[9] even if we do disagree about what that answer ought to be'. It is quite another thing to claim, as Dworkin (see 1991, 365; 1985, 120–21) does, that this partial agreement by judges proves that rights answers really do *exist* in a sense that goes beyond a banal description of the ways in which the word 'exist' is actually used by judges during the pragmatic task of resolving cases.[10] This is because the mere fact (if it is a fact) that all judges would agree with the abstract proposition that there is a single right answer in hard cases (Dworkin's version of the law of bivalence) is not the equivalent of (*a*) their

9 In *Pragmatism, Right Answers, and True Banality*, Dworkin (1991, 365) maintains that his right answers thesis is 'characteristically or generally sound in hard cases', but he limits his defence of the thesis to 'some hard cases' in order to achieve clarity, as he says, about 'the *kind* of claim I am making'.

10 Cf. Wittgenstein and Waismann (2003, 305): 'One can't read off from the rules of chess that the square shape of the chessboard is inessential; rather, if I can declare it to be inessential then it is inessential … Essential and inessential moves are only a distinction within a game.'

giving us (or even themselves) any criterion for what a 'meaning' is in its own right, in relation to (*b*) whatever linguistic sign they may use to express the right answer in any given real case.

Let me say it once again, for emphasis: a legal theorist cannot sensibly claim that the *evidence* shows that a thing like 'meaning' exists (or does not exist)[11] unless he can give a *criterion* for the kind of thing it would be if it did exist.

Dworkin claims to be using the distinction between following and ignoring authoritative legal materials in the 'ordinary' way that legal agents use it, and he asks, rhetorically, 'If the ordinary distinction can't be used in [a] descriptive and critical way, then how can it be used?' (380). But what, exactly, counts as a 'description' of the way lawyers and judges use words? If it consists in the proposition that lawyers and judges actually use linguistic signs such as 'meaning' and 'right answers' in certain ways (e.g. according to such-and-such methods of application), then the description itself should not include anything extraneous, such as the strong ontological claim that right answers really do 'exist'. On the other hand, if a description of the way lawyers and judges use words goes beyond their public behaviour to describe the alleged 'meaning' of that behaviour, then the description becomes a covert attempt to prove that meaning's existence philosophically – i.e. from an 'external' point of view.

For example, a judge's assertion in the context of a real dispute that 'the right answer to this case is A' is *not* the equivalent of his argument after work, in the context of a philosophical debate with a nihilist friend, that 'right answers (for example the meaning of "A") really do exist in law'. The first is a *legal* argument (within legal practice) that takes no position on whether the words used to express the argument stand for their meanings in the way the magical view of language supposes. The second is a *philosophical* argument (outside of legal practice) that asserts an existential claim about the true nature or essence of law and language. The law-doer in his capacity as judge essentially *whips* people, and as he is whipping them he calls what he is doing 'what the law requires'. Whereas the law-doer *qua* part-time philosopher tries to comfort himself after hours by convincing himself that the bullwhip he earlier wielded was actually attached to the law itself – to what the law really *means* – rather than to his own bloodstained hand.

Although the previous example shows that there are times when a judge can doff his robes and become a philosopher, a professional philosopher like Dworkin is not a judge. Dworkin's right answers thesis is part of a philosophical, not a legal, project, even if it is probably true that he would be thrilled if more judges read his books. Dworkin wants a description of judicial behaviour to *mean* something – namely,

11 For a good example of a nonsensical absolute *denial* that meaning exists or could ever exist, see Stanley Fish (1991, 56), who asserts that '[f]ormalist or literalist or "four corners" interpretation is not inadvisable … it is impossible'. Here Fish is *not* saying that there is a kind of four-corners interpretation that he can imagine and represent, but that engaging in this practice is so very, very difficult for human beings to do that it comes down to being impossible in fact. Fish is saying absolutely that there is and can be no such thing as four-corners interpretation and the objective legal meaning on which it is based. But here it can be seen that he commits the same sort of error as Dworkin, only in this case Fish wants to talk about the *non*-existence of something for which he provides no criteria. Compare this with the statement 'Gryphons do not exist'.

'law as integrity' (1986, 225) – in addition to just being itself. The plausibility of Dworkin's project rests on the distinction between the external and internal points of view, and few have expressed that plausibility any better than Wittgenstein (2005, 191e): 'Even if one objects to the words "the contract (or the law) binds me", one can't object to the words "I *feel* bound by the contract [or the law]".' Unlike Wittgenstein, however, Dworkin wants his concept of law as integrity to be based on something more stable and enduring than mere subjective feelings. He wants and needs right answers to really, really *exist*, and it is his craving desire for the existence of legal meaning bodies that gets him into trouble.

Consider Dworkin's anti-empiricist claim (1985, 138) that there are 'facts beside hard facts', including the 'facts of narrative consistency'. He thinks that these facts must exist and be true (and not just be *said* to be 'true' within some language game) in order for his right answers thesis to be true. As was noted earlier, Dworkin's pre-commitment to a coherence theory of truth leads him to imagine that the linguistic signs which express propositions 'about' law have or refer to meaning bodies that are capable of either fitting or not fitting together consistently. But only *things* actually fit together or fail to fit together – everything else relies on a merely metaphorical use of the word 'fit'. And although the material of the linguistic signs expressing propositions about law are indeed things, the fact that *they* might fit or not fit with one another, whether on or off the page, would be trivial.

Where, then, are the fit-worthy meanings that propositions about law refer to, and how do we go about finding them? Instead of just saying what everybody knows and has to admit – namely, that judges happen to behave regularly in certain ways with words such as 'meaning', 'right answer', 'true' and 'false' – Dworkin wants to mythologize these signs.[12] He wants something like $\square_{\text{The Truth}}$ to compel reason to surrender all opposition to the proposition that legal meanings (and hence right answers) really do exist. Dworkin's claim that there are 'facts of narrative consistency' which objectively explain judicial behaviour is a strong ontological assertion outside of legal practice, and as such it is no different in kind from the philosophical claim that the only facts which truly exist are the 'hard' facts of experience, or those facts that we can believe in because they have proved themselves useful to us (see James 1948, 159–76).

Speaking metaphorically, Dworkin wants the solid sphere of a judicial consensus about the abstract proposition that 'the right answers thesis is true' to fit into the mould of its meaning – *the meaning of the right answers thesis itself*. But before we could even begin to determine the truth or falsity of this alleged 'fact', we would have to know what kind of thing a 'meaning' is in its own right, given that it is supposed to be something *different* from the judicial behaviour that produces it. This is something that Dworkin does not (or cannot) tell us. His right answers thesis is analogous to Figure 5.3, not Figure 5.2, because he asserts that there are two things – judicial behaviour and right answers – but only gives us a criterion for identifying one: judicial behaviour. His theory is neither true nor false – it is quite literally unintelligible.

12 Cf. Wittgenstein (2005, 111e): 'In philosophy one is always in danger of creating a mythology of symbolism, or of psychology. Instead of just saying what everybody knows and has to admit.'

Hart and Dworkin: A Reprise and a Segue

Dworkin's invention of 'right answers', just like Hart's invention of 'core meanings', is both unnecessary and circular. It is unnecessary because, as Wittgenstein remarks, 'symbols that are dispensable have no meaning – superfluous symbols signify nothing' (Waismann 1979, 90).[13] And it is circular because if the only evidence for the existence of 'right answers' (like 'core meanings') consists of certain observed regularities in the behaviours of legal actors, then the right answers thesis comes down to saying, rather unhelpfully, that what is to be explained (judicial behaviour) is ultimately explained by what is to be explained (judicial behaviour).[14] If the concept of 'right answers', like that of 'core meanings', has a use in legal practice (as it undoubtedly does) this is not because there is something *else* – some entity, whether mental or otherwise – to which it refers. It just has a use. Period. If legal meanings exist, they exist only in the sense that the *words* 'legal meaning' and 'exist' have a use.

The origin of the temptation to say more than this – to say, for example, that the meaning of legal norm-signs is something that determines legally right answers in easy cases (Hart), or is a goal and product of judicial interpretation in hard cases (Dworkin) – is not difficult to locate. In legal theory, meaning-mongers such as Dworkin and Hart yearn to provide the concept and practice of the rule of law with a metaphysical foundation in accordance with the principle of ground rather than the principle of causation.

As Kant (2000, 10) puts it, causes occupy a mere *domicillium* ('dwelling place') in nature, whereas rational grounds possess a sovereign *ditio* ('realm'). Meaning grounds right and just action; and the activity of grounding is an exercise in human reason. A historically conditioned intuitive reaction to norm-signs, on the other hand, is merely causal in nature, and causation is something that also happens to lesser

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13 This is also the import of Wittgenstein's famous 'beetle in the box' remarks, which refute the so-called 'private object' thesis. The latter thesis holds that whenever someone has a sensation (e.g. pain) the sensation itself is always a private object located inside of him that only he can experience. Wittgenstein's response (1953, 100e) is worth quoting in full:

> Suppose everyone has a box with something in it: we call it a 'beetle'. No one can look into anyone else's box, and everyone says he knows what a beetle is only by looking at *his* beetle – here it would be quite possible for everyone to have something different in his box. One might even imagine such a thing constantly changing. – But suppose the word 'beetle' had a use in these people's language? – If so it would not be used as the name of a thing. The thing in the box has no place in the language-game at all; not even as a *something*: for the box might even be empty. – No, one can 'divide through' by the thing in the box; it cancels out, whatever it is. That is to say: if we construe the grammar of the expression of sensation on the model of 'object and name' the object drops out of consideration as irrelevant.

14 Cf. Mackie (1967, 178): 'Just as a circular argument fails to give support, so a circular explanation fails to explain. There are concealed circularities of explanation; for example, some mental performance is explained by reference to a faculty, but further inquiry shows either that to say that this faculty exists is only to say that such performances occur or that, although more may be meant, there is, apart from such performances, no evidence for the existence of the faculty.'

beings such as planets, icebergs and alligators. To compare language to a mechanism of signs that serves to set off certain reactions in us by virtue of previous conditioning and association (Wittgenstein and Waismann 2003, 341) seems to slander reason. It seems to put human beings on the same level as planets, icebergs and alligators.

Thus does reason attempt to convince the will that it is free in a very particular sense of the word 'free': namely, that the will can choose to act under cover of the *truly* right and just meanings of the linguistic signs and images which merely express what is right and just. This sort of freedom craves its own negation. It wants to stop short of the more radical kind of freedom that Wittgenstein (2005, 208e) described when he answered his own hypothetical question, 'What is the "real position" of the body that I see under water?' He replied, simply: 'What do you *call* "the real position"? *You can decide this yourself.*' Someone who knows that he can always decide for himself what to call 'real freedom' is infinitely freer than someone who thinks that the objective meaning body ($\square_{\text{Real Freedom}}$) of the sign 'real freedom' limits his possibilities in advance.

Freedom of the sort that Wittgenstein describes is an anomic product of history, resting only on a will that realises there is nothing 'behind' the language of legal norms, and therefore that ultimately it has nothing to rely on but itself.[15] Whereas freedom in the traditional Western sense craves *nomos* – it yearns to give itself the law, or rather, what the law means ($\square_{\text{The Law}}$). Dispel the philosophical illusion that the meaning of a legal norm-sign is something *else* (the magical view in a nutshell) and the whole rational edifice seems to collapse, leaving law and justice open to the corrosive charge that they are merely the continuation of war by other means (Foucault 2003, 15).

Keep on doggedly clinging to this illusion, however, and a clear-eyed assessment of what people *call* the 'rule of law' – what actually goes on, phenomenally, when judges in liberal democracies decide cases – is avoided. Also avoided is the ethically grim prospect of conceiving of law in terms of suffering and tragedy rather than in terms of political legitimacy and the principled justification of legal violence. Thus do desire and fear bind philosophical thinking in advance to Nietzsche's law of 'metaphysical need',[16] hobbling it and rendering it incapable of even *understanding* the point of view that I have called ethical distress.

The Absence of Doubt

Traditional legal theory is so busy claiming and trying to prove that legal norms have meanings that it does not ask, let alone consider, the basic phenomenological question of how, concretely, judges make the passage from their perception of a linguistic norm-sign to their enforcement of the law. For example, is it true that something like $\square_{\text{Meaning of Norm-sign 'X'}}$ shows itself in consciousness during this passage,

15 Cf. Wittgenstein (2005, 231e): 'You can't get behind the rule, because there isn't any "behind".'

16 See Nietzsche (1968, 307): 'Metaphysical Need … If one is a philosopher as men have always been philosophers, one cannot see what has been and becomes – one sees only what *is*. But since nothing *is*, all that was left to the philosopher as his "world" was the imaginary.'

such that this meaning, as such, becomes a sort of grounding platform on which a rational judge can stand? Leaving the magical view of language behind, the balance of this chapter takes a step backward from the self-evident in order to ponder how the event of deciding a case according to the law shows itself phenomenally.

I will begin with two exceedingly simple, yet easily misunderstood, observations about the phenomenological situation in which the practice of judging finds itself: (*a*) in most cases (those we call 'easy') judges *do not doubt* how to apply authoritative legal signs, and (*b*) in all other cases – including those in which judges *do* self-consciously plumb and interpret a legal norm for its meaning – the process of finding meaning always eventually ends with an *absence of doubt*. These observations will be buttressed, if not 'proven', in the sections that follow, which build upon Wittgenstein's path-breaking phenomenological descriptions of following orders and rules. But precisely because the concept of 'not doubting' is so easily misunderstood – so easily reified as referring to a thing or event – it is necessary to keep on stating, very clearly, what it is *not*. The phrases 'do not doubt' and 'absence of doubt' are not meant to signify the *presence* of a cognisable feeling of certainty preceding judgement. They do not say that there is a Cartesian *certum aliquid* ('something certain') to be found inside the head whenever one does not doubt how next to proceed in applying a legal norm.

The temptation to say otherwise, despite all phenomenal evidence to the contrary, is nearly overwhelming. Listen, for example, to what Derrida has to say about the judicial experience of working with determinable rules:

> When there is a determinable rule, I know what must be done, and as soon as such knowledge dictates the law, action follows knowledge as a calculable consequence: one *know*s what path to take, one no longer hesitates; the decision no longer decides anything but simply gets deployed with the automatism attributed to machines. There is no longer any place for justice or responsibility (whether juridical, political, or ethical). (Borradori 2003, 134–5)

Putting all questions about its author's specific intent aside (a gesture that undoubtedly would have pleased Derrida), it seems to me that the foregoing text seriously risks misstating the phenomenal facts of the case. The risk comes from the use of the words 'know' and 'knowledge'. This usage suggests that something like an *act of knowing* is or must be present at or just before the moment that a decision according to a determinable rule is deployed.

The vagueness of language is immense, says Wittgenstein (Wittgenstein and Waismann 2003, 277), and 'it plays around our words as breezes do things': an observation with which Derrida, for one, would have heartily agreed. Behind a word like 'knowledge' or 'intention' there is no particular mental state that would constitute its sense; nor do we call the effect of a word on our feelings its 'meaning'. As things stand now, I just *always* know how to add 1 + 1 + 1, whether or not I happen to have this particular sum, or the procedure for adding it, on my mind at any given time. 'Knowing', in the way we use that word, is more like knowing *how* than knowing *what*. The question, 'Do judges know how to use legal norms?' is closer to 'Can they use legal norms?' than it is to 'What processes occur in judges when they judge?' (cf. Wittgenstein and Waismann 2003, 451).

Heidegger (2001b, 200) also risks fostering a similar kind of misunderstanding when he says:

> It belongs to the essence of the motive [for an action] that it is understood as such in order to be followed. It makes no sense to assert that a motive is present and then an ego is added. This is a 'hypostatization' of the motive.

Instead of simply describing the phenomenon of having-a-motive, this brief text appears to do to understandings precisely what it says should not be done to motives: it hypostatises them, as if something like an *act of understanding* were necessary to activate our motives. Phenomenally speaking, neither a motive nor an understanding is a cause 'seen from within' (Wittgenstein 2005, 296e). If, as Heidegger (2005, 23) says, 'in all speaking the critical "as" is … present', this does not imply that a particular event of 'as'-recognition is present whenever speaking occurs. In any case, there is no 'as' which shows itself in the phenomenon of judicial reception – *there is no particular act of meaning-recognition*. It is not necessary to interpret or understand a proposition 'as' being about something in order for it to become a proposition that accompanies the doing of law.[17] In order to be used, rarely do legal propositions need riders, mental or physical, that constitute their 'interpretations' or 'understandings'.

In sum, the idea that behind thinking there always is or must be a mental state or entity which is engaged in a special act of thinking itself thinking – the so-called *cogito me cogitare* of Fichtean idealism (see Heidegger 2003c, 49) – is based on high-flying metaphysical speculation, not on concrete phenomenological observation. 'Only in reflection are willing and acting different; in reality they are one', says Schopenhauer (1969, i. 100–101). He is right. It only *seems*, after the fact, as if 'understanding' were a process that always runs parallel to the sequences of words we hear or speak.

The root of the tendency to believe that such a process *must* have existed inside the mind lies deep in the magical conception of thinking. Since the principle of reason says that nothing is without reason, we naturally think that knowing and understanding must have a reason. But once again we forget that the word 'reason' as it appears in the principle of sufficient reason is ambiguous. Like Angelus Silesius's rose – which is without a 'why' in its blooming but not without a 'because' – a thing can have (*a*) a reason, in the sense of a cause, without also having (*b*) a reason, in the sense of a ground. That knowing and understanding have causes, no one doubts, and this seems sufficient to satisfy the demands placed on being by the principle of sufficient reason. Why then *must* actions which are believed by an observer to reflect the actor's knowledge and understanding also have 'rational grounds' that are somehow present inside the actor while he is acting?

'Not doubting' and 'the absence of doubt', as those concepts are used in describing the phenomenon of reception, can best be characterised, both positively and negatively, in terms of the category of habit. William James (1904, i. 115–16),

17 Cf. Wittgenstein (2005, 234e): 'The whole idea – that when you think one proposition that entails another, you have to think the latter – rests on a false, psychologising conception [of thinking].'

one of the greatest (and today, least appreciated) phenomenological observers who ever lived, was astute enough to notice that the phenomenal structure of habit in general consists in the sensation of *just having done* something that immediately triggers some other action, and not in the presence of some particular mental act preceding habitual action:

> In action grown habitual, what instigates each new muscular contraction [e.g. a judge announcing a result or signing a judgement] to take place in its appointed order is not a thought or a perception, but the *sensation occasioned by the muscular contraction just finished* … In an habitual action, mere sensation is a sufficient guide, and the upper regions of brain and mind are set comparatively free.[18]

James's description allows us to catch sight of habit's (and hence reception's) most important phenomenological feature: it *is* automatic behaviour in which no inner mental state of knowing or understanding appears. It *is not* automatic behaviour conceived of as acting in accordance with some amorphous inner state called 'automatic knowledge' or 'automatic understanding'.

Thus, the concept of an absence of doubt (or of not doubting) does not suggest that a mental event of not-doubting is present inside the judge, such that it (the event itself) becomes the ultimate ground of his action. Rather, it signifies that *no* interpretive event – not even meaning-recognition – transpires in consciousness at the very moment when any doubt that may have been harboured by the judge ceases and the unleashing of legal violence begins. In short, there is nothing mental, and certainly nothing 'rational', about the absence of doubt that I am attempting to describe here.

Nor is there anything mystical or ineffable about it. The phenomenon of not-doubting is a genuine *absence* of doubt unaccompanied by the presence of something else, something 'profound'. This sort of absence is not a Hegelian or Sartrean *nihil negativum*, or absolute nothingness at the heart of being. Instead, to describe it is to describe a *nihil privativum*: the simple negation of the presence of a ground at the very moment of decision.

I have used the term *reception* to refer to this extraordinary passage or movement from the absence of doubt to the initiation of legal violence. Properly understood, the phenomenon of reception is an unmarked penultimate stop on a judicial journey that

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18 I have chosen to omit the following sentence from James's account of habit: 'A strictly voluntary act has to be guided by idea, perception, and volition, throughout its whole course' (i. 115). The reason is obvious: James's description of habitual action actually corresponds to the phenomenal facts of the case, whereas his assertion that voluntary actions are 'guided by idea, perception, and volition' is only a hypothesis, not a phenomenological description of the concrete 'how' of *being guided* by an idea, perception or volition. More generally, this chapter's description of the phenomenon of reception is meant to clarify an omission in James's account of the relation between the will and 'ideas'. His thesis that volition is characterised by an idea that 'comes to prevail stably in the mind' (ii. 561), just like Husserl's notion of intentionality in general (1962, 107–11), fails to address the critical *ambiguousness* of the principle of reason. That is, it does not clarify the precise *manner* in which the mental image of an idea 'affects' behaviour – as cause or as ground – and thus sheds no light on the relationship between ideas and 'reasoned' judgements.

runs from a legal norm-sign to a legal sanction. It means, at once, the utter absence of a reason (from the internal point of view) and the utter irrelevance of any cause (from a phenomenological point of view). Seen in its own proper moment, either reception *takes the place* of reasoning (in easy cases), or else it brings interpretive reasoning to a full stop (in all other cases). It can be viewed as a kind of conditional reflex that is triggered by words, including our very own words of interpretation. In the phenomenon of reception, the linguistic sign that comprises the *final* interpretation of a legal norm (e.g. the sign 'Y' in the expression 'Legal norm X means Y') produces what Hart (1961, 123) calls an 'automatic' recognition and response, unmediated by rational calculation, which launches the force of law into the world.

Once again, it is very important to understand what I am *not* saying. I do not claim that the meaning of a legal norm is the effect it produces on the judge, if only because what we *call* 'the explanation of the meaning of a rule' is not equivalent to a statement of its effect (cf. Wittgenstein and Waismann 2003, 101). The concept of reception does *not* reflect a causal conception of meaning, as if the meaning of a legal norm were the same as the behaviour that it is supposed to explain. Instead, a description of reception simply shows that no meaning body is present at the moment of judgement, whatever the causes of that judgement might have been.

For example, the cause of a driver's reacting to a stop sign in a particular way may be that she was long accustomed to reacting to it that way, or that her nervous system has developed permanent connections or pathways such that the reaction follows the stimulus in the manner of a reflex (Wittgenstein and Waismann 2003, 111). Nevertheless, no one would take a description of such a causal nexus as such to be synonymous with a description of the meaning of the word 'Stop' on a traffic sign. On the other hand, this does not imply that the norm-sign 'Stop' has a meaning body that is present whenever the meaning of the norm is explained to someone. Let me try to say it once again: meaning is what is explained by the explanation of meaning – that is now we use the word 'meaning' in legal practice – *but meaning does not show itself as a thing*.[19]

There is something akin to religion in the way legal theorists are inclined to invent or presuppose legal meaning bodies. The kind of mind that cannot bring itself to concede that legal meanings (i.e. grounds, not causes) are not objectively present in being is analogous to the kind of mind that would be horrified to learn that there is no entity or being corresponding to the word 'God'. James famously defines religious faith as 'belief in something concerning which doubt is still theoretically possible' (see Richardson 2006, 202). Although a judge's enforcement of a legal norm does not ultimately depend on the occurrence of any sort of inner mental 'event', such as a conscious feeling of faith or belief, the phenomenon of judicial reception bears a striking resemblance to James's definition of faith. Doubt is always theoretically possible in any legal matter, no matter how unproblematic it may initially seem; but eventually it will always come to pass that the deciding judge *does not doubt* what to do, and then does it.

19 Cf. Wittgenstein and Waismann (2003, 117–18): 'The word "sense" is definitely misleading. Again and again it induces us to understand it as a physical, spatial object which is correlated with this proposition.'

This circumstance casts a new light on the alleged opposition between law and religion, or reason and faith. To be sure, religion is wont to reproach secular (positive) law for its lack of faith in God-given natural laws, just as secular law likes to reproach religion for its irrational credulity about the existence of an unseen normative order. But faith is not the sole province of religion, and law is no stranger to irrational credulity. In the sense of the present comparison between law and religion, faith in the logical or metaphysical determinacy of legal norms (i.e. 'right answers') is comparable to faith in God, and a judge's profession of fidelity to what a legal norm-sign 'means' is like an act of piety. Although he would undoubtedly reject the use I make of it here, I have always thought that the foregoing comparisons go a long way towards elucidating the most important connotation of one of Heidegger's best known aphorisms (1977, 35): 'For questioning is the piety of thought.' Legal thought, like religious belief, becomes piety when it ceases *to think*, as indeed it eventually always must.

Historical circumstances determine when and why judicial doubt ceases in any given case. Nevertheless, it bears repeating that the intellectual task of paying attention to the phenomenon of reception does not belong to the external point of view on law, for it seeks neither to predict outcomes nor impute them to a cause. On the contrary, reception *constitutes* the passage from interpretation to action, as seen from the internal point of view of the interpreter himself. I must stress that the internal point of view of the interpreter *as he is interpreting* is not the same as his own subsequent interpretation of that point of view. Just as there is an important phenomenal difference in legal practice between the context of discovery and the context of justification,[20] so too there is an important phenomenal difference between the context of inflicting judicial violence and the context of interpreting (and justifying) a previous infliction of that violence.

If the concept of a judge's internal point of view were confined to the latter sort of thing, then legal theory would be indistinguishable from the production of ideology to support the judge's own self-interested interpretations of his actions. Undoubtedly Ronald Dworkin's mythical Judge Hercules would describe his decision-making process in the self-laudatory way that Dworkin himself (1986, 239–58) describes it ('law as integrity'), just as Judge Richard Posner (1988, 863) has described his own reasoning process as the effort to make a 'reasonable' decision based on a given legal norm's 'overall concept', the relevant precedents, and the economic policy of wealth maximisation. Other, less theoretically ambitious, judges like to speak of following their 'hunches' (Hutcheson 1929).

These sorts of judicial self-analyses can be very entertaining and enlightening. But for our purposes they are missing an extremely important element: they lack the 'suspension' (*epochē*) of the natural attitude towards experience that is essential for any rigorous phenomenological investigation (see Husserl 1962, 96–100). To put this point plainly and without equivocation: the *ex post* opinion of judges about what happens phenomenally as they are deciding cases is no more binding

20 Stanley Fish (1989, 376) describes this difference as follows: 'performing an activity – engaging in a practice [e.g. of trying to discover what to do] is one thing and discoursing on that practice [e.g. justifying it] is another'.

on philosophy than the opinion of any other interested actor. To paraphrase Marx (1964, v), any thinking aspiring to be genuinely critical must attempt to pluck the living flower of the law's enforcement, rather than to erect a rhetorical gilt frame around a mere picture of that flower painted by law-doers who, for whatever reason, want to prettify it.

The Importance of the Easy Case

For far too long legal theory has concerned itself with proving (or disproving) that 'hard' cases have legally right answers, thus taking the phenomenon of the easy case for granted. It is all too convenient, as well as theoretically imprecise, to characterise the easy case as one where legal norms have a 'plain and unavoidable meaning' (Dworkin 1977, 111), or where 'the result flows almost inexorably from a relatively straightforward application of plainly identifiable legal rules contained in easily located pre-existing legal materials' (Schauer 1985, 410). Ethically speaking, nothing is unavoidable or inexorable in the law unless and until some particular human being *lets* it be so. To put the matter bluntly: the question *whether* there are easy cases is an evasion of the question *how* certain cases come to be called 'easy'.

An illustration will help clarify the distinction between 'whether' and 'how' in this context. Even if every human being on earth were to say that the linguistic sign '→' points to the right, at its most basic level this would come down to being a mere consensus of *opinion*: an agreement that one linguistic sign (i.e. 'points to the right') can be substituted for another ('→'). We would still not know how people's language-dependent behaviour is related to their reception of either (or both) of these linguistic signs. To be sure, a consensus of opinion is also a kind of behaviour – just as speaking and writing are kinds of behaviours. But the activity of speaking or writing the same words should never be conflated with a consensus of behaviour in response to those words, otherwise the sentence 'I'm going to the bank' would be counted as the same behaviour whether it is spoken by a bank teller going to work or a fly fisherman wading out of a river.

In legal practice, it can be very important to learn that judges A and B both interpret norm X to mean Y. In philosophy, however, to say that two or more judges interpret sign 'X' to mean sign 'Y' actually says very little. Lawyers are paid to intuit (or just 'know') where words are likely to lead in the legal system. Philosophers do not know this, or if they do, they have no right to conflate what probably will happen in response to the sign 'Y' with what actually does or must happen. If judge A and judge B both say in unison, 'Norm X means Y', the most this fact allows us to infer is that both judges adhere to a grammatical rule which allows them to substitute one linguistic sign for another. As Wittgenstein (2005, 111e) puts it, 'in answer to the question "What does it mean?", yet another proposition is forthcoming, and it [alone] doesn't get me any further'. To the extent the two judges then go on to behave the same way in the context of an easy case, their agreement is not merely a consensus of opinion, but a consensus of *action*.

Opinions just deliver us more linguistic signs; actions give us deeds. Here is how Wittgenstein (1976, 183–4) puts the point I am trying to make:

> [I]s one's criterion for meaning a certain thing by [a] rule the using of the rule in a certain way, or is it a picture of another rule or something of the sort? In that case it is still a symbol – which can be reinterpreted in any way whatsoever. This has often been said before. And it has often been put in the form of an assertion that the truths of logic are determined by a consensus of opinions. Is this what I am saying? No. There is no *opinion* at all; it is not a question of *opinion*. They [the truths of logic] are determined by a consensus of action: a consensus of doing the same thing, reacting the same way. There is a consensus but it is not a consensus of opinion. We all act the same way, walk the same way, count the same way.

In short: a consensus of action is determined by how people actually behave-with-language, and a description of this behaviour includes, but is not limited to, what people say in the form of their opinions. The concept of a consensus of use therefore casts a much broader net than the concept of a consensus of opinion. The latter is filled up with the saying of words; but the former encompasses *all* that we do.

This distinction between saying and doing also governs any credible attempt to analyse judicial *disagreements* (i.e. the absence of a consensus amongst judges). Suppose we notice that there is a difference in how two judges interpret a given legal norm-sign: judge C says 'Norm X means Y' and judge D says 'Norm X means Z'. This would amount to a mere difference of opinion, and not (yet) a difference of use, for it is possible for the two judges to concur in the same juridical outcome (e.g. affirming a sentence of death) even though their expressed reasons for doing so are not the same. Moreover, we should not take the mere difference of opinion between judges C and D to imply that legal norm X itself 'has' or 'refers to' two different meaning bodies ($\mathbb{M}_Y$ and $\mathbb{M}_Z$), one for each judge, or that one of these meanings must be true and the other false. We should only take this difference of opinion to imply that the two judges just happen to receive and apply the norm-sign 'X' differently. *Why* they do this can be determined causally, if we are so inclined, but not according to any sign-independent objective criterion of X's 'meaning'.

Consider once again the previous chapter's example of a simple geometric projection (Figure 4.2, page 119). No competent mathematician would ask which of the two projections shown in Figure 4.2 (A_1 or A_2) is the more 'correct' representation of shape A. To establish correctness a mathematician needs a criterion of correctness. Assuming that each projection is the result of applying a different method of projection (M_1 or M_2), the truth is that *both* of them are capable of being 'correct' in comparison with their corresponding methods of projection. The methods themselves *are* the criteria of the correctness of A_1 and A_2 as geometric projections of shape A. In this example, how figure A 'really' should be projected has no significance outside the application of this or that particular method (e.g. M_1 or M_2).

The case of our disagreeing judges is similar, although as noted earlier there is no meaning body to which legal norm-sign 'X' refers that would correspond to shape A in Figure 4.2. Nevertheless, the legal correctness of the judges' differing interpretations of norm X cannot be determined independently of some criterion of correctness that would allow those interpretations to be compared, not with norm-sign 'X' or its (non-existent) meaning body, *but with one another*. For example, if judge C employed an 'ordinary meaning' test and judge D employed an 'underlying purpose of the law' test, this difference in methods would be analogous to the difference between M_1 and M_2 in Figure 4.2. If we knew their different starting points, it would be easy to

see how the judges produced two different 'projections' of norm X's meaning, Y and Z. In that case, sign 'Y' and sign 'Z' would be like projections A_1 and A_2, *both* of which would be regarded as mathematically correct projections of shape A if their respective methods of projection had been applied correctly.

Moreover, there would be no way to decide which judicial interpretation was a 'more correct' legal interpretation of norm-sign 'X' without some legal meta-criterion. Positivism cannot say what the law really is as seen from the internal point of view of a judge without some criterion of law's 'really is'. This is why Hart's concept of 'rules of recognition' (see 1961, 92) represents such an important advance in legal theory: it pays attention to the methods of projection, so to speak, that legal actors actually employ. A positivist legal philosopher cannot attempt to describe the law by means of the objects (❒) to which legal norm-signs refer, because there are no such objects; at best he can attempt to describe the *techniques* of description that legal actors in fact employ within legal practice.[21]

Compare Figure 4.2. Suppose we decided to stipulate in advance that the only projections of A that we will call 'correct' are orthogonal, perhaps because we are trying to train someone in the simplest way to perform a geometric projection. In that case it would make perfect sense to say that the non-orthogonal projection, A_2, is incorrect in comparison to A_1. Similarly, a meta-criterion *within* legal practice might tell us, for example, that the 'ordinary meaning' test trumps the 'underlying purpose of the law' test in cases where the letter of the law is unambiguous, but that the underlying purpose of the law test controls if there is any material ambiguity. Only if this meta-criterion has the status of a universally accepted canon of construction would it make sense for us to say – within legal practice – that one judge's interpretation is *legally* correct and the other's is *legally* incorrect. And even then we would not yet know all of the phenomenal facts of the case. That is, we would not yet have given a phenomenological description of the concrete passage from the sign which expresses the legal meta-criterion to *its* application.

Please observe that this way of thinking about judging does not assert or rely upon some sort of grand claim (or theory) about 'meaning' – it simply draws attention to what the two judges in our example are actually *doing* with language. No mere expression of a legal norm's 'meaning' could ever prove or show what happens *in fact* when judges let legal language pass into legal violence. Given the techniques that most judges actually employ in adjudication, we could say that the inference from the major and minor premises of a legal syllogism to a legal conclusion is an internal property of the propositions which express the syllogism (see Wittgenstein and Waismann 2003, 237). *But that is all we can say*, for no mere syllogism – no mere proposition – 'leads' anywhere in reality on its own. To say that the proposition 'P → Q' establishes an internal relation between P and Q is to express a rule for writing down one sign ('Q') after another sign ('P'); it is not a prediction about what human beings will in fact *do* with the rule.

Nothing 'follows' in reality from a syllogism or proposition unless someone *makes* it follow (cf. Wittgenstein 2005, 235e). To contend otherwise is to avoid

21 Cf. Wittgenstein (1988, 48): 'Don't try to specify the act of description by means of the *object* that is to be described; but by the *technique* of description.'

thinking philosophically about the vital passage *between* words and deeds: it is to hear or read a judge's words and then to *assume* that his behaviour will or must be exactly what the observer unreflectively receives the words to 'imply'. While the latter practice, rooted in custom, is probably indispensable for getting along in daily life, it is not a defensible philosophical method. For whatever reason, it short-circuits, and arbitrarily avoids thinking about, the phenomenal how of what everyday discourse casually calls the reasoned (and/or reasonable) passage between legal words and legal deeds.

All of this suggests that an easy case is actually more difficult for a philosopher to understand than a hard case, because the latter involves an explicit and well-defined act of understanding and the former does not. Descartes' famous axiom, *cogito ergo sum* (1985, ii. 17), gives us no right to infer what happens when the entity called 'I' is *not* thinking.[22] It is much harder in principle to understand a phenomenon that is characterised by an absence of conscious understanding than it is to understand the phenomenon of conscious understanding itself.

Take the case of the reading out loud of a printed script. Normally we do not *go by* a rule for reading out loud that we consult each time we encounter a new word on the page. Of course, this sort of self-conscious rule consultation is an empirical possibility (e.g. in the case of our trying to pronounce words written in an obscure foreign language); but this would not characterise the usual case of reading out loud. After the fact we might say that our previous reading-behaviour correctly 'followed' the rules of English pronunciation. But this proves only that we would answer with a rule if asked (after the fact) whether our pronunciations were correct. In the normal case of reading a script out loud we not go by any rule *while we are reading* – we do not 'inwardly' consult rules as we read.[23]

In law, easy cases are easy in the way that reading a written script out loud is easy. No legal meaning exists 'there' (inside the head of the judge) at the moment of judgement, despite the fact that the judge probably could supply us with plenty of 'good legal reasons' (i.e. mere words) if he is later asked to defend what he has done. This implies that easy cases are easy not because a particular legal norm *is* (logically or ontologically) determinate at the very moment of its application, but only because it is received *as* determinate by many (or even all) similarly situated actors. Since the word 'because' is just as ambiguous as the question 'Why?', a better way to make this claim would be to say that we can impute the violence of legal enforcement in easy cases to causes, if we are so inclined, but that trying to impute it to a rational 'ground' would be senseless. A judge simply *expresses* the ground for his judgement in a linguistic sign (e.g. 'Legal norm X requires result Y'), and *just this* behaviour, and this alone, is what we call 'grounding a legal judgement'. To want more – to yearn for a meaning body corresponding to the sign 'X' – is to pursue a will-o'-the-wisp.

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22 Cf. James (Richardson 2006, 431): 'In a perfectly adapted system, where adjustments are fluid and stereotyped, it [consciousness] exists in minimal degree. Only when there is hesitation, only where past habit will not run, do we find that the situation awakens explicit thought.'

23 The example of reading out loud is Wittgenstein's (see Wittgenstein and Waismann 2003, 217–19).

This is not the same as saying, as the stimulus-response theory of meaning does, that a legal norm's meaning is determined by a consensus of judicial behaviour. It is imprecise and un-rigorous to say, for example, that '[l]anguage can only take its sense from the social events, expectations, and forms in which it figures, a fact summarised in the rough but familiar slogan that the key to meaning is use' (Dworkin 1991, 362). As we have seen already, the latter way of talking elides the distinction between causes and grounds by attributing the 'sense' or 'meaning' of language to social causes, while failing to specify what kind of thing *sense* or *meaning* is in its own right.

In contrast, the claim that in the moment of reception the violence of legal enforcement can be imputed to causes but not grounds merely says that there just *is* a consensus of behaviour when it comes to judges applying legal norms in easy cases. To go further and call this consensus law's *meaning* (or sense) is to miss the most important lesson to be learned from investigating the phenomenon of reception: a description of reception is a description of the concrete 'how' of enforcing the law even though this phenomenon itself is not identical to what most people would call law's 'what'.

The legal philosopher Ken Kress (2003, 280) has argued that '[t]he pervasiveness of easy cases makes it implausible that there is radical indeterminacy', as if legal determinacy or indeterminacy were an empirically provable fact. It is unfortunate that the much-maligned 'indeterminacy thesis' in legal theory has been so widely misunderstood in this way. Taken in its best light, the indeterminacy thesis does not deny that judges exhibit behavioural regularities, especially in easy cases, or that these regularities have causal explanations. It merely denies the sense of (and questions the motivations behind) mainstream philosophical talk about rational *grounds* conceived of metaphysically, that is, as the 'meanings' or 'contents' of legal norms. The indeterminacy thesis resists any effort to elevate the brute facticity of the customary way a given person, group or even era receives a legal norm-sign into the realm of necessity. The logical and ethical reasons for this are plain: the responsibility for adhering to customary ways of being should not be attributed to non-existent meaning bodies – *it should be attributed to those real human beings whose concrete, day-to-day behaviours keep on enacting and reinforcing custom in the name of law*.

If I am right that meaning bodies (taken as grounds) are logically undetermined fantasies produced by the magical view of language, then it follows that the task of emphasising individual responsibility for perpetuating habitual ways of behaving is actually *more* imperative in easy cases than it is in hard cases. In a hard case the paths not taken are visible to everyone, as is the judge's personal responsibility for the decision not to take them. In an easy case, however, a judge's responsibility is obscured by the powerful human tendency to naturalise what seems self-evident as something that is eternally valid and necessary.

Regrettably, the generalised refusal ever to relax this tendency lies at the basis of much that is pernicious and hateful in human relations. Racism – the practice of 'reading' the unique physical characteristics of a group for their 'meaning' and then treating individual members of the group accordingly – is a case in point. If it was once possible for a scientific article in *The Encyclopaedia Britannica* shamelessly to report, barely a hundred years ago, that 'the mental inferiority of the negro to the

white or yellow races is a fact' (Willcox 1910–1911, 344), then should we not be just a *little bit* wary of clinging to the social 'facts' that we receive and perpetuate as self-evident today?

In legal theory, the most one can reasonably hope for (or fear) is that the linguistic signs which express legal norms are *causally* determinate, in much the same way that the sound of a bell determined when Pavlov's dogs salivated. In the phenomenon of purely receptive self-evidence 'catatonic understanding' holds sway (Nancy 2003, 134). Here the future is not grasped by human beings – it *befalls* them. I hasten to say that the verbal equation '*judges deciding cases = dogs salivating at the sound of a bell*' is not intended as an insult. On the contrary, it is only meant to gesture at the outer limits of reason in legal interpretation and the rule of law: a curious place where the distinction between the grounds and the causes of legal outcomes is suspended. Here, in this very place of suspension, rises an altar of justice that has been consecrated to law's illusory meaning bodies. And to that altar, in an endless procession, are led the real human bodies that real human law-doers keep on sacrificing, day after day, to the super-being they call 'the law'.

Wittgenstein's Phenomenology of Following Norms

No thinker has mapped the subtle contours of this place of suspension more carefully than Ludwig Wittgenstein. Nor has any philosopher dealt a stronger blow to the conventional notion that practical reason (as opposed to historically-conditioned habit) can successfully connect a norm to its application by its capacity to 'objectively' determine the will.[24] For Wittgenstein himself, 'phenomenology' means investigating the possibility of sense, not truth or falsity (Waismann 1979, 63). That is, he regarded the accurate description of phenomenological states of affairs not as the ultimate end of philosophical investigation, but only as a means to the end of clarifying grammatical relations. He would not have said that an accurate description of the phenomenon of reception shows that judicial action is essentially 'groundless'; rather, he would have said, as I do here, that a description of reception is *pro tanto* a description of what we *call* 'the judicial enforcement of the law'. Such a description claims nothing – it simply shows. It deflates the traditional pretensions of reason without trying to offer any new pretensions to take their place.

Wittgenstein's research into the practice of following orders is an important case in point. An order passed from one person to another is a kind of ought-statement, or norm, and is analogous to a legal norm. The latter may communicate its 'ought' more impersonally, but it does so no less imperatively. The following passage from *The Blue Book* (Wittgenstein 1960, 3) discusses what can only be called a *negative* fact about the usual way of following simple ought-statements in easy cases.

24 Kant's canonical description of practical reason (1996, 148) indicates the traditional conception of reason's powers in Western thought: '[Practical] reason is concerned with the determining grounds of the will, which is a faculty either of producing objects corresponding to representations or of determining itself to effect such objects (whether the physical power is sufficient or not), that is, of determining its causality. For, in that, reason can at least suffice to determine the will and always has objective reality insofar as volition alone is at issue.'

What it uncovers is the complete *absence* of anything approximating an 'act' of understanding:

> If I give someone the order 'fetch me a red flower from that meadow', how is he to know what sort of flower to bring, as I have only given him a word? Now the answer one might suggest first is that he went to look for a red flower carrying a red image in his mind, and comparing it with the flowers to see which of them had the colour of the image. Now there is such a way of searching, and it is not at all essential that the image we use be a mental one. In fact the process may be this: I carry a chart coordinating names and coloured squares. When I hear the order 'fetch me etc.' I draw my finger across the chart from the word 'red' to a certain square, and I go and look for a flower that has the same colour as the square. But this is not the only way of searching and it isn't the usual way. We go, look about us, walk up to a flower and pick it, without comparing it to anything. To see that the process of obeying the order can be of this kind, consider the order 'imagine a red patch'. You are not tempted in this case to think that before obeying you must have imagined a red patch to serve you as a pattern for the red patch which you were ordered to imagine. Now you might ask: do we interpret the words before we obey the order? And in some cases you will find that you do something which might be called interpreting before obeying, in some cases not.

This passage invites readers to prove to themselves, by means of a simple but sustained act of introspection, that there is such a thing as the habitual or automatic execution of an order, and by implication, of any other ought statement. In such cases, we may notice *that* an order or norm applies to us, but we do not also *take notice* of anything explicit about it, such as what it 'means'. In other words, there is no discernable internal event of meaning-recognition that precedes action: we simply react to the linguistic sign that comprises the order or norm without question or hesitation. As Wittgenstein (2005, 135e) says elsewhere, *this* sort of use of language 'is better compared to what occurs when, upon pressing a button with the word "blue" on it, a blue colour chip automatically pops up, or doesn't pop up if the mechanism fails'.

The imaginative extension of our own experiences of simple order-following to the case of judicial decision making is warranted by the fundamental premise of all phenomenological research: the only phenomena a person will ever be able to observe are those which he himself experiences. Originating from inescapably subjective experiences, a phenomenological description cannot be proven true or false by comparing it to the kind of 'external' facts that a scientist would recognise as being 'objective'. As the great French phenomenologist Maurice Merleau-Ponty (1962, xx–xxi) puts it, 'Phenomenology, as a disclosure of the world, rests on itself, or rather provides its own foundation'. Hence, a phenomenological report such as Wittgenstein's proves itself as true if it is *accepted* as being an accurate depiction of a certain type of experience that the reader, too, has had.[25] Such a report encourages us to notice that '[i]n actual fact in most cases of applying language there is no such thing as a transition from a word to a mental image' (Wittgenstein and Waismann 2003, 9).

25 Cf. Heidegger (2002e, 107): 'What is phenomenologically genuine authenticates itself and does not require a further (theoretical) criterion.'

Of course, just because phenomenological investigation finds that in most cases of language use there is no such thing as a transition from a word to a mental image does not imply that an outside observer would be unable to specify the *causes* of someone's language-related behaviours in such cases. It is obvious, for example, that physiologists or neurologists might find and confirm that certain characteristic physical changes occur in the brains of those who apply norms in an automatic and habitual way. But so what? Our use of language is such that we do not *identify* these chemical and electrical changes in the brain with the 'meaning' of the norm that we happen to be applying while the changes are occurring.

The popular-scientific opinion that we use certain areas of our brain to perform tasks such as 'thinking' or 'identifying colour'[26] is incorrect, or rather, profoundly misleading. The kind of thing that scientists actually *know* is that when people think of or are shown, say, a red object, a certain area of their brains regularly lights up on a special scanner. This fact entitles us to say that thinking, or the perception of a red object, is typically *accompanied* by certain physiological changes in a particular part of the brain. But it does not entitle us to say that the meaning of the linguistic signs 'thinking' and 'identifying colour' (i.e. what we *call* thinking and identifying colour) is the same as these physiological changes. The old saying, 'A penny for your thoughts', does not mean a penny for an image of your brain, for as Heidegger (2003c, 43) says, 'The autopsy of the brain does not reveal any "representations"'.

There is no room 'in' a linguistic sign such as 'fetch me a red flower' for anything other than the sign itself.[27] If a given norm-sign is taken to symbolise something in a manner that seems to be supremely pellucid, this is only because the one who receives it *does not doubt* (in the sense described earlier) what to do next. A linguistic sign which shows itself in this way is ready-to-hand (*zuhanden*), to use Heidegger's terminology (1962, 104), in the way that a hammer shows itself to a carpenter who is unselfconsciously wielding it. It is not present-at-hand (*vorhanden*) as a mere object, like an Egyptian hieroglyph that is shown to someone who has not yet learned how to decipher it.

'Following a rule is analogous to obeying an order', says Wittgenstein (1953, 82e). The force of the analogy between order-following and rule-following derives from the essential *finitude* of human experience. When the list of justifications for how an order or a rule 'should' be followed comes to an end – when it reaches the bedrock of action, as it always must – our philosophical spade is turned, as Wittgenstein (85e) puts it, for there is then no further event of justifying or grounding to consider. A results-oriented parent or bureaucrat might justify a particular use of signs 'by saying that they are supposed to induce someone to perform certain actions' (Wittgenstein 2005, 144e). Thought from such an external point of view, norm-following is a present disposition or ability created by social custom as it continually co-constructs the identities and typical reactions of individual actors through various processes of socialisation (see Berger and Luckmann 1967, 129–83). But custom in this sense is not a *ground* that is consulted by the actor. Once he fully internalises

26 See 'Too well connected', *The Economist*, 26 May 2007, 95.

27 Cf. Wittgenstein (1974, 16): 'No proposition can make a statement about itself, because a propositional sign cannot be contained in itself.'

it through learning, the actor does not fall back on this past event of learning to know how to behave according to custom: his behaviour is 'instinctive later on, whatever its origin' (Wittgenstein 2005, 162e). That is, the concept of 'custom' is but a shorthand way of expressing the idea that the actor and others like him have been *caused* by social conditioning and their own previous behaviours to behave in certain stereotypical ways.

A norm 'can only seem to me to produce all its consequences in advance if I draw them as a *matter of course*', says Wittgenstein (1953, 87e). But if we are able to bracket and set aside all of the historical causes and conditions of 'acting as a matter of course', it becomes apparent that the internal moment of norm-following, considered as a concrete phenomenon, most definitely is *not* a matter of rationally discovering the meaning body of rule-sign 'X', at t_1, and then binding ourselves by an act of will to a particular expression of that meaning body ('Y') at t_2. Even if a judge were to order himself in advance to interpret a given norm as 'requiring result Y' in all cases such as the one before him, 'how does [he] know what to do with this earlier knowledge when the step actually has to be taken?' (Wittgenstein 1983, 36). The judge may indeed succeed in writing down the words 'result Y' in the official record of the case, and he may even be applauded for doing so by everyone else on account of the excellence of his judgement. Nevertheless, 'It is superfluous to suppose that this [result Y] was determined earlier on. My having no doubt in face of the question [what to do in this case] does *not* mean that it has been answered in advance' (37).

The foregoing conclusions are not meant to be theoretically dogmatic. They are based on the kind of simple observation that even a little child can perform: all of the future applications of a norm are not in fact present while it is being applied to a particular case in the present. And if this is so, how can *any* future application of the norm *ever* be answered in advance? It would seem that this is one of those times – like Sherlock Holmes's 'curious incident of the dog in the night-time' (Doyle 1930, 347) – when noticing what is not present is more important than noticing what is.

The forgoing observations should not be mistaken for rule scepticism, for they do not assert the thesis that legal norms 'have no meaning'. As I noted earlier, rule scepticism attempts to exclude something (meaning) without providing any criterion to identify *what* it is excluding. We are entitled to ask the rule sceptic the following question: what, exactly, does not exist, if the correct meaning of a legal norm does not exist – *no correct meaning as opposed to what?* An undetermined meaning body that is negated ('not-❒', or '⊟') is no more comprehensible than an undetermined meaning body that is affirmed ('❒').[28] Instead of being symptoms of rule scepticism, the foregoing observations are better characterised as rule *realism*, inasmuch as they merely describe what the process of following orders and norms actually looks and feels like from the inside (see Kripke 1982, 7–54).[29] S.G. Shanker's remark (1987, 17) about the determinacy of the 'meanings' that

28 Cf. Wittgenstein (2005, 89e): 'In the negative proposition [not-p] I need the complete, accurate picture of the positive proposition [p]' in order to know what is being negated.

29 Cf. Merleau-Ponty (1962, viii): '[Phenomenology] is a matter of describing, not of explaining or analysing.'

seem to be expressed by mathematical rule-signs distils Wittgenstein's argument to its essence: 'The impression of necessity [in a rule] is an illusion; the apparent inexorability of a rule reflects our inexorability in applying it.'

On the other hand, it must also be stressed that nowhere does Wittgenstein mythologize the transition from a norm to its application. Unlike Jacques Derrida (2002, 257), Emmanuel Levinas (1999, 103), and Jean-Luc Nancy (2003, 13), Wittgenstein does not use the occasion of noticing the phenomenal facts of rule-following to transform the norm-regarding moment of justice into some sort of mysterious and ineffable ethical challenge or duty. Nor does he claim that there is no difference between the external and internal points of view. Quite the contrary: he merely describes *how* the moment of following an order or norm shows itself internally, and hence what process, concretely, we *call* 'following a rule'.[30] In doing all of this, Wittgenstein simply lets the chips fall where they may, just as any good phenomenologist should (see Bachelard 1969, xxi).[31] Indeed, one could argue that it is Wittgenstein's very indifference to the project of constructing elaborate philosophical theories of norm-following which makes his work so effective in subverting the traditional conception of how the rule of law works.[32]

Wittgenstein's Phenomenology of Interpreting Norms

The magical view's belief in the undetermined actuality of a legal norm-sign's 'meaning' – its status as 'something else' – fares no better when Wittgenstein turns his attention from cases in which we react to ought-statements in an automatic way to cases in which we actually *do* try to interpret the language of a norm. In general, the interpretation of a norm begins with a feeling of irresolution: the interpreter does not immediately grasp what he interprets, and thus finds himself in a state of doubt.

Imagine, for example, a situation in which we are trying to get someone to walk in a certain direction by showing him a symbol that looks like this: →. Wittgenstein makes the obvious point, in *The Blue Book*, that the meaning of such an order could in fact be doubted, and moreover, that it could be interpreted by someone to mean that he is to walk in a direction opposite to the one that most people would go (1960, 33). Indeed, merely to utter the words, '*The sign "→" means go to the left*',

30 Cf. Wittgenstein and Waismann (2003, 107): 'Reason and cause correspond to the two meanings of the expression "to follow a rule". The cause of an action is established by observation, namely *hypothetically*, i.e. such that further experience can confirm or contradict it. The reason is what has been *specified* as such.'

31 Cf. Wittgenstein (1953, 49e): 'Philosophy may in no way interfere with the actual use of language; it can in the end only describe it. For it cannot give it any foundation either. It leaves everything as it is.'

32 Cf. Wittgenstein (1988, 142): 'We are not looking for a theory … [For example], Freud's theory of dreams as wish fulfilment is explained with reference to primitive dreams. But it is a theory, and we can justly object by saying: "Oh, but there are other dreams." This is not the case with us. We are not giving a theory. I am only giving a type: only describing a field of varying examples by means of centres of variation. Any other example is not a contradiction; it is only a contribution.'

proves that → *can* be so interpreted. Moreover, it can be proven that such a thing as a non-standard (i.e. not customary) interpretation of a norm actually exists[33] – and no amount of argument can prove that its factual existence is logically impossible.[34] After all, 'an arrow that indicates a direction [is not in fact] a surrogate for going through all the stages to a particular goal' (Wittgenstein 2005, 379e).

Truth be told, → is not even an arrow: just like René Magritte's famous painting of a pipe, which correctly declares on its face *Cesi n'est pas une pipe* ('This is not a pipe'), → is not a real arrow. It is only a picture of an arrow. What is more, although a real arrow is not a pipe, there is nothing about the linguistic sign '→' as such – or indeed, about the linguistic signs that express any possible interpretation of it – that prevents us from deciding to use '→' as the equivalent of the sign 'pipe'. Although the stipulation, '→' = '*pipe*', would be unusual, it is not unimaginable. Nor is there any law against it, as the saying goes, that would itself be immune to a further event of creative interpretation. Regrettably, conventional legal theory has yet to come to terms with this kind of indeterminacy, which by rights should be called *logical* rather than 'radical' (*pace* Kress (2003, 262)).

Consider the overused and much maligned concept of deconstruction, which for present purposes can be defined (albeit simplistically) as the quasi-literary practice of attempting to make non-standard interpretations of a text seem plausible (see D'Amato 1989). When Frederick Schauer (1985, 420) reproaches deconstruction for its tendency to make up 'weird and fanciful instances in which even the clearest language breaks down', he actually begs the most important question that deconstruction puts to legal theory. Kenney Hegland (1985, 1207–8) also begs this question when he asserts, 'Resources and imagination can always create arguments; [but] they cannot always create *good* arguments and therefore cannot always produce doctrinal uncertainty'. These authors do not seem to recognise that the most salient philosophical question raised by deconstruction is not *whether* some arguments will (or will not) be received as wildly counterfactual and implausible (see Schauer 1985, 420) by similarly situated actors. Of course they will. The really important question is not whether, but *why* this will happen: is it because historical causes have conditioned these actors to respond the way they do (cf. Pavlov's dogs), or is it because the expression of legal norms stand for 'meanings' that constitute their rational and supra-historical grounds (the magical view)? At stake in answering this question is nothing less than thinking the outer limits of practical reason.

Properly understood, therefore, Wittgenstein's extended discussion in *The Blue Book* of the example of the arrow-sign is not a pugnacious poke in the eye of anyone who believes that the sign '→' clearly means go to the right, and that every sane person who encounters it will actually interpret it that way. Rather, the arrow-sign example is merely intended to shed light, once again, on the exceedingly important

33 Cf. Mitchell v. Henry, 15 Ch. D. 181, 190 (1880) ('white' can mean relatively dark in a contract for the delivery of fleece). The decision reversed Sir George Jessel, who stated that 'nobody could convince *him* that black was white' (Corbin 1960, iii. 156 n. 96).

34 I am reminded here of the old joke about the doctrinaire economist who, when shown a surprising empirical result, replies, 'That's all very well and good in fact, but will it work in theory?'

distinction between *causes* and *grounds* – a distinction that is rooted, as we have seen, in the essential ambiguity of the principle of sufficient reason. To this end, Wittgenstein (1960, 33) correctly observes that '[w]henever we interpret a symbol in one way or another, the interpretation is a new symbol added to the old one'. Any given interpretation of sign 'X' always in fact takes the form of yet another sign, 'X means Y'. Hence, if someone wanted to interpret our hypothetical arrow-sign, whether or not in a standard way, he could add a new symbol to the original one in the form of an interpretation. For example, he could place the sign '←' underneath the sign '→' to indicate that the bottom arrow-sign shows what the norm really 'means'.

So far we have merely described, in a non-controversial and commonsensical sort of way, what the process of interpretation might actually look like in this particular case. But the supposed rational integrity of the process of interpretation in general is what is at stake here, and traditional Western thought has invested a considerable amount of pathos in its adoration of reason over instinct and grounds over causes, especially when it comes to thinking about the rule of law.[35] Although conventional legal theory may grudgingly concede that every linguistic sign is capable of interpretation, it still wants to say that the *meaning* itself must not be capable of interpretation. It wants to say that *meaning* itself (i.e. the rational ground of legal violence) is the last, best interpretation.

Wittgenstein's final observation about interpretation and meaning must therefore administer a particularly cruel blow to the conventional belief that reason actively finds (or constructs) the 'contents'of legal norm-signs, and that these contents can and do serve as the objectively secure grounds of right action:

> [I]f this scheme [of interpretation] is to serve our purpose at all, it must show us which of the … levels [of arrows] is the level of meaning. I can, e.g. make a scheme with three levels, the bottom level always being the level of meaning. But adopt whatever model or scheme you may, it will have a bottom level, and there will be no such thing as an interpretation of that. To say in this case that every arrow can still be interpreted would only mean that I could always make a different model of saying and meaning which had one more level than the one I am using. (1960, 34)

For present purposes, the general significance of Wittgenstein's example is almost too obvious to miss: no matter how much interpretive work one puts into a particular norm-governed case or situation, at the very end of the process of interpretation there will be no experience of doubt concerning the very statements that make up one's own interpretation of the norm.

This does not imply that the signs one uses to express one's final interpretation *could not* be further interpreted. It's just that they *are not* further interpreted. And while it is true that we often *call* the bottom level of signs 'the meaning of the norm', this does not imply that the bottom level of signs 'has' or 'refers to' a meaning. Phenomenally speaking, no meaning or meaning body shows itself, inside or outside, at the *final* stage of interpretation. Linguistic signs and images plus our actions in

35 Cf. Wittgenstein and Waismann (2003, 121–2); 'Philosophy receives its pathos from the pathos of the propositions which it destroys. It overcomes idols, and it is the importance of these idols which give it its importance.'

using them: this is what actually appears, phenomenally, when we use the word 'meaning'. To quote Shanker (1987, 17) again, 'it is not the rule which compels me, but rather, I who compel myself to use the rule in a certain way'. This is not meaning – it is doing. Of course, there is obviously such a thing as doubting whether one's interpretation of a norm is correct; but in the end, no one who thinks he is following a norm doubts the import of the very interpretive signs that he himself has produced.

Wittgenstein's statement, '*But adopt whatever model or scheme you may, it will have a bottom level, and there will be no such thing as an interpretation of that*', suggests that it is possible to extend and generalise reception as a phenomenological category. Although the phenomenon of reception is easiest to see in those cases where we 'automatically' follow orders and rules, it also shows itself even when we are explicitly aware that a concept or idea of a norm is 'guiding' us in the performance of a task. This is because a concept or idea is not a 'thing' on which we are physically constrained to move, like railroad tracks beneath a train. As phenomena, concepts and ideas show themselves as mental representations: they appear to us in the form of words or images. And as Wittgenstein says, there is an important sense in which 'we use images no differently than words' (Wittgenstein and Waismann 2003, 461). Strictly speaking, we are not used *by* words and images as such. Nor are we used by some phantasm ('meaning') that stands behind them. At the end of the day, we just *use* them.

The main point of drawing attention to the fundamental phenomenological fact of reception is to contradict the magical view of language where it tends to have the strongest hold on our imagination: namely, in the much-lauded spheres of 'thinking' and 'reasoning'. Listen once more to Wittgenstein (2005, 139e):

> We would like to give reason after reason after reason. But we feel: so long as there is a reason, everything is all right. We don't want to stop explaining – and simply describe. How can *what is happening right now* be interesting? All that we're ever interested in is the justification, the why! It isn't mathematics [or law], after all, to say what people *do* … [At the end of reason-giving, I am speechless.] That's simply the way I act (and one can cite a cause for this, but not a reason).

In brief, concepts and ideas show themselves as signs, whether they appear on paper or in the mind. In this one critical respect, at least, the phenomenal situation of someone who receives a norm in writing is no different than that of a person who later remembers the written norm in the form of a mental image.[36] The phenomenon of being guided by an *idea* of what the norm means is thus analogous to being guided, in a completely automatic way, by a written or spoken linguistic sign such as 'bring me a red flower from the meadow'. In both cases what shows itself to consciousness is comprised of two elements, one positive and one privative: (*a*) the *presence* of a mere sign (words and/or images) and (*b*) an *absence* of doubt about what to do next.

Wittgenstein's earlier-quoted remark (1960, 3) about the order to *imagine* a red patch shows this most vividly: 'You are not tempted in this case to think that before obeying you must have imagined a red patch to serve you as a pattern for

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36 Cf. Wittgenstein (1953, 139e): 'But if you say: "How am I to know what he means, when I see nothing but the signs he gives?" then I say: "How is *he* to know what he means, when he has nothing but the signs either?"'

the red patch which you were ordered to imagine.' It is almost impossible to think of a case in which the phenomenon of imagining a red patch would be preceded in consciousness by the image of a red patch that serves as a pattern for the meaning of the order, 'Imagine a red patch'. And even if such a case could be found, how would the imaginer know what the pattern itself means? This shows why Wittgenstein stipulated that, for methodological purposes at least, 'Every so-called inner process is replaceable for us by an outer one, a memory image for a painted picture, conviction by a gesture of conviction, etc.' (Wittgenstein and Waismann 2003, 27).

In law-doing, what shows itself in the final analysis – at the point when words and images give way to deeds – is the phenomenon of pure reception. We look at the words or images and then simply react. *There is nothing else there*. I hasten to say, once again, that noticing the phenomenon of reception is the product of phenomenological introspection rather than a deduction from some undisclosed theory of mind. It does not imply, as philosophical monism would have it, that mind is merely a manifestation of matter; it merely characterises experience, without purporting to explain it the way theories do. As such, the description of reception in all of its various contexts has a tendency to show that the 'automatic' case and the case of 'being guided explicitly by an idea' are closely related – that they are, in fact, variations on the same basic theme.

The world into which I have been 'thrown', to use Heidegger's term (1962, 321) (i.e. my history in the largest sense of the word), has put me in a position simply to react in certain ways to what I do not doubt. For present purposes, this is the most important sense of the phenomenological categories of 'fore-having' (*Vorhabe*), 'fore-sight' (*Vorsicht*) and 'fore-conception' (*Vorgriff*) (Heidegger 1962, 191). Taken together in their unity, these categories describe a state of affairs in which '[t]he intelligibility of something has always been articulated, even before there is any appropriative interpretation of it' (203). But here it is exceedingly important not to think of intelligibility as if it were a thing located inside our heads – a meaning body or archetype of X, located somewhere in consciousness, that pre-authorises us to think of something else 'as' X. For what, in that event, would be the as-structure of the archetype itself? What would the 'fore-conception' itself mean, and how would we know how to use it? In sum, the category of the 'before' to which Heidegger refers also includes our phenomenal situation *vis-à-vis* the linguistic signs and images which comprise our very 'appropriative interpretations' themselves, *after* we have produced them.

The phenomenon of reception ultimately holds sway whether a linguistic sign is undoubted right away and automatically (e.g. 'Stop thief!'), or undergoes an interpretation that ends with the production of an interpretation-sign that is *then* not doubted (e.g. 'The German words *Halt Dieb!* mean "Stop thief!"'). This is a phenomenological observation, not a causal claim. It asserts nothing about *what* a judge will actually do in response to the norm-sign, as causal and logical determinism do. Causes, like excuses, are 'strangers to the event', as Jankélévitch (2005, 61) puts it. However an observer might choose to explain or predict the judicial application of legal violence in any given situation, that phenomenon *as such* (i.e. as considered from the internal point of view of the judge himself) reveals nothing that could fairly be characterised as a rational 'meaning' or 'ground' of that violence.

According to the poet Wallace Stevens (1990, 345), 'It is a world of words to the end of it/In which nothing solid is its solid self'. This is good poetry, but bad philosophy. Despite appearances to the contrary, there is no genuine problem of an infinite regress in interpreting norms. It is a misunderstanding born of the illusion that humans have infinite time at their disposal to believe that 'no course of action can be determined by a rule, because every course of action can be made out to accord with the rule' (Wittgenstein 1953, 81e). To be sure, the question 'If norm X means Y, then what does "Y" mean?' *can* be asked by a judge, and he *can* keep on giving one interpretation after another if he is so inclined. But explanations of signs, after all, always have to come to an end somewhere (Wittgenstein 2005, 46e). Eventually there will always come a moment when the very last interpretive sign the judge gives before acting is not itself interpreted. *It is simply received and acted upon without any reflection or justification*.

This is not a small insight, either philosophically or ethically. Behind the last moment before action there is no prior moment in which the metaphysical meaning body of a legal norm magically showed itself to the judge. It is not as if reason first grasped the meaning of norm-sign 'X' in the form of meaning body (not sign) $\mathbf{❒}_Y$, and then the presence of this meaning body in a glorious instant of epiphany authorised the judge to relax and thereafter to go on autopilot, so to speak, letting himself become a mere instrument of the meaning body's will. Phenomenally speaking, there is no meaning body which appears – there is only the *sign* or *image* 'Y', or even '$\mathbf{❒}_Y$'. With each new sign or image arising in the mind the will turns, as Schopenhauer (1999, 37) puts it, 'like a weathervane on a well-oiled pivot in a changeable wind, to every motive that is presented to it by the imagination'. Seen rigorously from the inside, the judicial interpretation of a legal norm exhibits nothing more tangible and real than signs and images, all the way to the bottom, until the very moment when legal violence commences. To be sure, there is nothing that the judge *cannot* say or think before this moment. But in the moment itself there is only what he *does not* say or think.

Wittgenstein gives excellent advice (1953, 81e) on how to make peace with the basic phenomenological fact of reception:

> What this shews is that there is a way of grasping a rule which is *not* an *interpretation*, but which is exhibited in what we call 'obeying the rule' and 'going against it' in actual cases. … [T]here is an inclination to say: every action according to a rule is an interpretation. But we ought to restrict the term 'interpretation' to the substitution of one expression of the rule for another … '[O]beying a rule' is a practice … [For] to *think* one is obeying a rule is not to obey a rule.

A practice 'exhibits' itself only to observers, with their external point of view, and not to the immediate participants themselves, who are too busy practicing to observe themselves. For observers, 'The object of observation is something *else*' (Wittgenstein 1953, 187e); for participants, there is no experience of separation between doer and doing. Thus, the concept of following a norm 'correctly' belongs to the external point of view of an observer, whereas the more primordial concept of 'following a norm' as such belongs to the internal point of view of the one who is actually following it. Considered from the internal point of view of a participant,

the judicial practice of moving from the final expression of a legal norm-sign's 'meaning' to legal violence is not the ground of itself in addition to being itself. Instead, it just *is* itself.

Please understand that none of this is meant to deny that people think as they produce legal language, or that they believe things about the legal language they have produced, or that a wide variety of mental phenomena accompany the production, understanding, and learning of normative texts. The question is not *whether* the 'inner' world of judges exists (it plainly does), but rather *how* the relationship between this inner world and the public categories of 'meaning' and 'ground' shows itself in practice. Wittgenstein's phenomenological research demonstrates that whatever role is played by these psychological phenomena in our lives, that role does *not* consist in the psychological phenomena being the same as what legal norms 'mean' (see Wittgenstein and Waismann 2003, 437). His rich descriptions of following orders and rules show that in every case of hearing and reading norm-signs there *eventually* comes a time when no fact 'in' the world (including mental facts 'inside' the subject) constitutes the 'meaning' of the signs. We just *react,* like Pavlov's dogs.

The Easy Case as Aspect Blindness

Our everyday unawareness of (and indifference to) the underlying nature of our *final* responses to the linguistic expressions of norms can be compared to the phenomenon of seeing only one aspect of an ambiguous figure. Consider for example the gestalt drawing known as the duck-rabbit (Figure 5.4). It is possible to see what Figure 5.4 represents in at least two different aspects. If you look at it one way, it appears to be a rabbit; but if you look at it another way, it appears to be a duck.

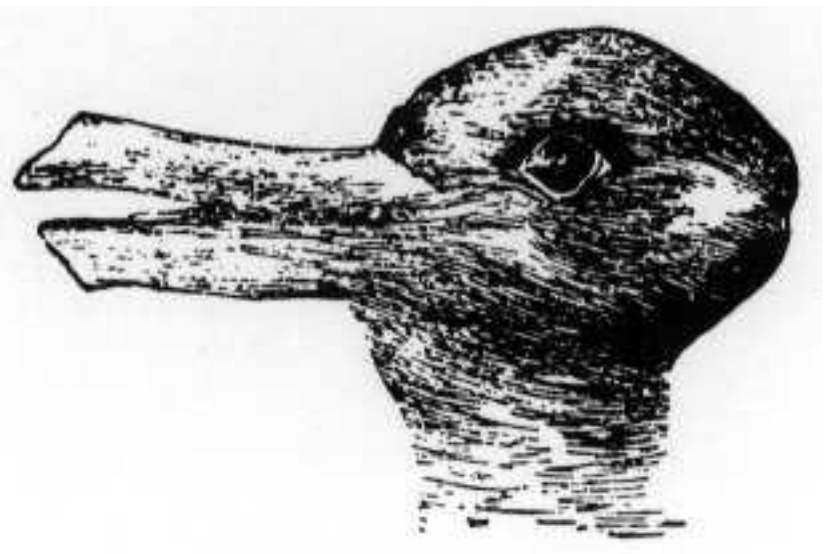

Figure 5.4 Duck-rabbit

In the *Philosophical Investigations*, Wittgenstein (1953, 194e) notes that there may be certain people who have always seen this figure as, say, a rabbit, and have never seen it in any other way. For them the figure would 'clearly' represent a rabbit and only a rabbit. Indeed, Wittgenstein (213e–14e) also observes that there might even be people who are 'blind' to the possibility of seeing a figure such as the duck-rabbit in *any* of its different aspects, even if the figure's possibilities are pointed out to them in no uncertain terms. He notes that the condition of 'aspect blindness' would be comparable to colour-blindness, or lacking a 'musical ear', and that the aspect blind person 'will have an altogether different relationship to pictures than [those who *can* see multiple aspects of the same figure]' (214e). This example was important to Wittgenstein because of the analogy it suggests between the concept of seeing an aspect and the concept of experiencing the meaning of a word (214e). For him, saying a word mechanically or unthinkingly corresponds to being aspect blind, whereas saying a word 'with feeling' – to 'experience its meaning' – corresponds to seeing at least one aspect of the duck-rabbit figure.[37]

In the context of the present investigations, however, the analogy's significance flows from the fact that the phenomenon of actively experiencing something called the 'meaning' of words is actually quite rare. 'If a sensitive ear shews me … that I have now *this* now *that* experience of [a] word – doesn't it also shew me that I often do not have *any* experience of it in the course of talking?' (Wittgenstein 1953, 215e–16e). Indeed, a sensitive ear ought to show us that the phenomenon of reception (i.e. not doubting) is what happens *most* of the time when we use language.

If this leads to the reasonable conclusion that most of the time human beings tend to walk through their lives in a state of aspect blindness to any other possibilities of being, then so be it. One might say that the metaphor of aspect blindness is Wittgenstein's way of expressing (or at least gesturing at) what Heidegger (1962, 275–6) calls 'inauthenticity' (*Uneigentlichkeit*). The latter is Heidegger's term for a state of affairs in which human beings fall into their world so completely that they forget they are autonomous beings who are full of possibilities and interpret themselves solely in terms of their current preoccupations and social roles. Aspect blindness is also a good metaphor for the effects of 'disciplinary power', which Foucault (2006, 71) defines as the process by which 'the singular body is taken charge of by a power that trains it and constitutes it as an individual, that is to say, as a subjected body'. Metaphorically speaking, the fully disciplined body is trained to look at itself in only one way. It is trained both to *see* that it is a boring old duck and *not to see* that it also has the possibility of becoming a rabbit.

The twin phenomena of 'seeing-as' and 'aspect blindness' are thus perfect metaphors for the distinctly political dimension of the phenomenon of reception. The most doctrinaire proponents of the magical view of language think literally in a very precise sense of the word 'literally': they take the linguistic signs that express legal norms to 'literally mean' what they unquestioningly receive them to mean.

37 Cf. Wittgenstein (1953, 214e): 'What would you be missing, for instance, if you did not understand the request to pronounce the word "till" and to mean it as a verb? – or if you did not feel that a word lost its meaning and became a mere sound if it was repeated ten times over?'

Consider, for example, Stanley Fish's entertaining description (1998, 167) of legal formalism:

> Formalism is the thesis that it is possible to put down marks so self-sufficiently perspicuous that they repel interpretation; it is the thesis that one can write sentences of such precision and simplicity that their meanings leap off the page in a way no one – no matter what his or her situation or point of view – can ignore.

Fish's description of the legal formalist's attitude towards language reveals how the phrase 'literal (or plain) meaning' is often used in law. This phrase is used as a put-down that elevates a particular historical reception of a norm-sign – one that the receiver and others who are like-minded do not doubt – to the status of unquestioned and unquestionable Truth.

A dogmatist of this type is like someone who is capable of seeing the figure of the duck-rabbit in only *one* of its aspects, and who goes on to insist that it 'clearly means' just this one thing. Such a person would suffer from a failure of imagination that is analogous to partial aspect blindness. He would tend to judge non-standard interpretations of what he calls 'clear' legal norm-signs as being perverse, metaphysically wrong and 'irrational' rather than as being the expression of an alternative point of view that *could* be imputed (by an observer) to differences in the makeup and inclinations of those who hold them. To borrow Catherine MacKinnon's artful phraseology (1983, 635), the most extreme kind of formalist is inclined to think of his own point of view as the standard for point-of-viewlessness – as the very measure of objectivity itself.

Is this not how God's voice comes to be 'heard' in most theocracies? Is this not how the criteria of law and justice come to be 'known' in most secular courtrooms?

On the other hand, the importance of these practices to the parties involved in or affected by them lies in the fact that the participants are playing the 'plain meaning' game. That *importance* as such is not lost just because another, more sophisticated, way of doing law might have taken place.[38] Thus, suffering that is inflicted or ignored by an anonymous and formalistic police court judge or welfare bureaucrat is every bit as real and important as suffering that is inflicted or ignored by a Justice Cardozo or a Judge Posner. When it comes to law and justice, there is no necessary relationship between intellectual subtlety and pain: brilliantly justified suffering can hurt just as much as (or even more than) crudely justified suffering. Considered from the standpoint of legal theory, the analogy between aspect blindness and the concepts of inauthenticity (Heidegger) and disciplinary power (Foucault) has a surprising, if not disquieting, implication. It suggests that *everyone* who interprets legal norm-signs – regardless of their politics or degree of philosophical sophistication – eventually becomes a kind of 'strict constructionist', indifferent to the infinite ambiguities and interpretive possibilities that could, in principle, always destabilise even the most ordinary legal situation.

But whatever political consequences might be enabled (or disabled) by this or that particular judicial reception of a legal norm, it is clear that the words 'correct legal interpretation' and 'rightly following legal norms' do *not* refer to the event of

38 Cf. Wittgenstein (2005, 187e): 'The importance of a game lies in the fact that we play this game. It doesn't lose its importance by not being an action in another (superior) game.'

locating some mysterious meaning body in a norm-sign, on the basis of which lawful and just action can thereafter be constructed. On the contrary: when it is viewed phenomenally during the concrete activity of judging, the expression of a reason or ground for a legal judgement always marks the end of reason*ing* and the beginning of action. It is reception – a kind of aspect blindness to other interpretive possibilities – that triggers action, and not some entity called the law's 'meaning' or 'ground'. In the beginning is always the deed, not the word.

None of this should be interpreted as bad news, for the application of legal norms according to our historically conditioned receptions of them is no small thing. Not only does the phenomenon of reception characterise the form of life that every law-doer actually leads, without it we would all be lost in a perpetual haze of doubt. Indeed, the entire situation tends to become pathological when the kind of automatic responses triggered by reception are absent to any significant degree. As Hannah Arendt (1994, 259) has said, being unable to fall back on habitual responses is 'the chief element in the anxiety of maladjustment', inasmuch as the human person is always 'a specific mixture of spontaneity and being conditioned' (240). Rather than being a nihilistic jeremiad, a description of how judges actually receive and apply legal norm-signs is nothing less than a dispassionate description of the rule of law itself. Such a description tries to tell us what *really happens* when we allow ourselves to be governed by legal norms.

The point of this kind of description is not to advance the sceptical thesis that all language is radically indeterminate and therefore that there can be no such thing as the rule of law. After all, there is an important phenomenological (and not just political and ethical) difference between the situation of an independent judge trying in good faith to apply a legal norm and the situation of an absolute dictator telling people what he wants them to do. No, the point is to show and try to understand, by means of the description, just exactly what people *call* the 'rule of law'. If we do not take too distant a view of it, the latter consists in the violent instantiation of results that always *could* have been otherwise, given more doubt and more interpretation (or a different decision maker), but that are not *in fact* anything other than themselves.

The Relationship Between the Easy Case and Political Totalitarianism

Seen rigorously from the inside, the phenomenon of reception shows itself as action without any supporting ground or cause. Seen from the outside, however, it has a predictable and repeatable causal structure. Pavlov could explain why (and manipulate when) his dogs salivated even if their behaviour was 'without why' from the point of view of the dogs themselves. The absence of a ground and the irrelevance of a cause within the phenomenon of reception as such thus lay bare a troubling kinship between the conventional Western conception of the easy case decided under the rule of law and totalitarian conditioning.

Life would be intolerably stressful if we could not frequently 'relax into the automatic reactions we all use to cope with many daily situations' (Arendt 1994, 259). On the other hand, one likes to think (or hope) that human beings also are capable of retaining a relatively high degree of spontaneity – a kind of moral

autonomy from convention that lets them escape their conditioning in certain situations, especially those involving the infliction of suffering on others. Knowing that spontaneity is always a possibility, totalitarian forms of government typically seek to rob individuals of everything that makes them unique and identifiable, thereby transforming human beings into what Arendt (304–305) calls 'collections of identical reactions' to a wide range of socio-political situations. This was how so-called 'ordinary Germans', for example, were made to participate in the crimes of the Nazi regime. In a nightmare world where everyone else increasingly responds automatically in the same way to the same political and economic stimuli, those who seek to retain their individuality and moral spontaneity experience the 'anxiety of maladjustment', as Arendt (259) puts it. And of course, this kind of anxiety can put pressure on even the most independent of minds to conform to how everyone else is behaving, no matter how badly or horribly.

That totalitarian conditioning attempts to turn human beings into a herd of sheep, and sometimes into a pack of wolves, is well known. Less well known, but nonetheless striking, is the similarity between the totalitarian situation and the phenomenon of the easy case decided under the rule of law.

Duncan Kennedy (1986, 521) traces the anxiety of maladjustment experienced by the independent-minded judge to what he calls the phenomenon of 'double objectivity': the inner sense of the judge that '[t]he reaction of other people [to what the judge might do in the case before him] is an anticipated fact like [his] anticipation that the sun will rise tomorrow or that this glass will break if [he] drops it on the floor'. When combined with the judge's own sense of what is objectively possible given the legal norm-signs with which he must work, the idea of double objectivity frames a psychologically perilous space. Through this space the judicial mind must sail, as it were, between the Scylla of its own unreflective reception of legal materials and the Charybdis of other people's anticipated unreflective reception of the same materials:

> It is important not to mush there two forms of objectivity together. It is possible for me to see the case as 'not clearly governed by the rule' when I do my interior rule application, but to anticipate that the relevant others will see it as 'open and shut'. And it is possible for me to see it as clear but to anticipate that others will see it as complex and confusing. (Kennedy 1986, 521)

Thus, even if a particular judge manages to retain a high level of creativity and spontaneity with respect to the easy case, at some level of consciousness he feels a compulsion to decide it as other, less imaginative, judges would. That is, the marginally more creative judge feels psychological pressure – perhaps born of the fact that humans are social animals who generally yearn to 'fit in' with their peers – to decide the case in accordance with other people's pre-rational reception of the linguistic signs expressing what they take to be the 'relevant' legal norms. And this pressure persists regardless of the judge's own personal conviction that these particular norm-signs are not relevant, or that they do not determine what he should do in the situation before him.

The phenomenon of reception shows that totalitarianism and the rule of law have a common root – that the 'easy case' in law and totalitarian conditioning constitute variations on the same theme. The point is not, as Frederick Schauer (1985, 420) puts it, that the situations which make 'even the clearest language break down' are 'weird and fanciful', and therefore inconsequential threats to the rule of law. Rather, the point is that when it comes to the judicial reception and enforcement of 'clear' legal language in easy cases, 'the habit once acquired is nothing more than mechanization and stuttering', as Vladimir Jankélévitch (2005, 29) puts it. Both totalitarianism and the rule of law ultimately depend on the same mechanism for keeping spontaneity and all thought of contingency at bay. They both cultivate and maintain social reactions that are typically unreflective and automatic. Instead of the one being rational and the other irrational, each exhibits a different mode of being *pre*-rational.

Justifications, interpretations of justifications, and even interpretations of interpretations, all show themselves concretely as but slender threads of language woven into the historically conditioned human activity of legitimating behaviour by appealing to norms. Mr A can call Ms B's automatic reception of norm-sign 'X' naïve and historically contingent only because *he* is capable of seeing (and hence interpreting) the same sign *as* 'Y'. But then again, who is to say that A's reception of 'Y' is not itself naïve and historically contingent, inasmuch as Ms C, who finds herself able to interpret 'Y' as 'Z', now puts the necessity of A's reception into doubt?

Language, like memory, is a fan whose segments *can* be unfolded without end,[39] but that always *is* in fact unfolded only so far and no farther. At the moment of reception, the law is not 'that which one cannot get around' (*incontournable*), as Levinas (2001b, 31) puts it. Strictly speaking, the law is that which one *does not* get around. Or better still, in the moment of reception, 'the laws fall silent' (*les lois se taisant*), as the French Revolution phrased it (Arendt 2006, 9), so as to make way for legal deeds. This is what it means to say that human beings are finite creatures: just as death is the absolute end of life, so too doing is the absolute end of talking and thinking. Likewise, the concept of *in*finitude in this context does not signify some endlessly long number or large quantity. Instead, infinitude signifies that in every single case of law-doing the law-doer *could* in fact choose to open up and make problematic what he, if not everyone else, has previously received as being closed and settled.

Thus, an external point of view can always rise up to cast doubt on a given internal point of view on law, but only temporarily. At the very moment of casting doubt, the external point of view becomes, in turn, yet another internal point of view that is itself vulnerable to the external gaze of someone else. While a judge is applying legal norm-sign 'X' he does not doubt that just this norm is his standard of judgement. And although under different circumstances the judge could (empirically) also call *this* into question, in such a case he would only be postponing the inevitable.

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39 Cf. Benjamin (1978, 6): 'He who has once begun to open the fan of memory never comes to the end of its segments; no image satisfies him, for he has seen that it can be unfolded, and only in its folds does the truth reside.'

In the feeling of disappointment that comes from knowing that this always-finite game of leapfrog, *and only this finite game of leapfrog*, is what we call 'rationally grounding legal violence' can be glimpsed, once again, the discomfiting appearance of the phenomenon of ethical distress.

The 'Mystical Foundation' of Law's Authority

This chapter began by quoting Pindar's poem, *The Power of Custom*. It will end by quoting a strikingly similar text written more than twenty centuries later. In his 294th *pensée*, Pascal (1941, 101) wrote a remark that will serve to distil this chapter's findings to their essence:

> *Rien, suivant la seule raison, n'est juste de soi; tout branle avec le temps. La coutume fait toute l'équité, par cette seule raison qu'elle est reçue; c'est le fondement mystique de son autorité. Qui la ramène à son principe, l'anéantit.* (Nothing, according to reason alone, is just in itself; all changes with time. Custom creates the whole of equity, for the simple reason that it is accepted. It is the mystical foundation of its authority; whoever carries it back to first principles destroys it.)

Custom, in both Pindar's and Pascal's sense of the term, is analogous to a law of nature. To say that people 'follow' custom is like saying the earth is continually making a decision to follow the curvature in space-time created by the mass of the sun. To be sure, the earth's orbit around the sun can be calculated (by an observer) according to the laws of space-time and gravity. But considered from the 'internal' point of view of the earth itself, the earth does not revolve because of the 'reasons' for revolving that are posited by those laws.[40]

Likewise, human beings do not, strictly speaking, follow the rules of custom, because customary behaviour as such proceeds *according* to custom but not *because* of it. To express custom in language is to state what an observer has concluded about certain regularities in people's behaviours. The observer (but not the observed) adopts what Kant calls the 'principle of purposiveness': just as the earth behaves *as if* it were a conscious agent obeying the laws of nature, people often behave *as if* they were following this or that customary 'rule'.[41]

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40 Cf. Nietzsche (1968, 336): 'We discover a formula by which to express an ever-recurring kind of result: we have therewith discovered no "law", even less a force that is the cause of the recurrence of a succession of results'; Heidegger (1962, 269): 'Newton's laws, the principle of contradiction, any truth whatever – these are true only so long as Dasein [the being we call "human"] *is* … To say that before Newton his laws were neither true nor false, cannot signify that before him there were no such entities as have been uncovered and pointed out by those laws. Through Newton the laws became true and with them, entities became accessible in themselves to Dasein. Once entities have been uncovered, they show themselves precisely as entities which beforehand already were. Such uncovering is the kind of Being which belongs to "truth".'

41 See Kant (2000, 23): 'This transcendental concept of the purposiveness of nature is neither a natural concept nor a concept of freedom, because it ascribes nothing to the Object (of nature), but only represents the peculiar way in which we must proceed in reflection upon

But Pascal's *pensée* reminds us that to go any further than this – to attempt to express custom as a binding norm – is to destroy the very essence of custom as a phenomenological category. This is because a norm presupposes the possibility of disobedience, whereas true custom remains custom only so long as it is unreflectively *accepted*. One does not 'disobey' customary ways of being, one *deviates* from them. Another way to put this is to say, as Pascal does, that noticing custom *as* 'custom' annihilates it, or rather, merely pushes it downward into another level of obscurity, where customary ways of understanding the linguistic signs which merely *express* custom hold sway.[42]

So far, these investigations have tried to demonstrate that law-doers do not think their way into right action – rather, at the end of the day they act their way into what an observer might subsequently call 'right thinking' (cf. Max 2007, 36). Inasmuch as the phenomenon of reception shows what does *not* happen when judges move from final legal norm-signs to legal violence, it might strike some readers as a small and inconsequential kind of thing. But when one recalls that law manifests itself as violence, and that suffering is at once law's cause *and* consequence, this phenomenon begins to assume a new level of importance.

The category of reception suggests that there is one important sense, at least, in which the distinction that the Greeks first drew between the sovereign (*basileus*) and the magistrate (*arkhōn*) does not hold. In the ancient Pythagorean theory of sovereignty announced by Diotogenes, for example, 'the king, having become the cause of the just, is a living law (*nomos empsukhos*)'; whereas the magistrate is merely someone who applies the law that is laid down by the sovereign (see Agamben 2005, 69–70). On this view, law's *authority* resides in the very person of the sovereign, reflecting what Agamben (84) calls 'law's immanence to life'; while the embodied person of the magistrate is a juridical irrelevancy – he merely possesses temporary political *power*.

Agamben (69) himself draws an eminently reasonable conclusion from the ancient theoretical distinction between authority and power: 'That the sovereign is a living law can only mean that he is not bound by it, that in him the life of the law coincides with total anomie.' But if the magistrate, then or now, always eventually acts according to how he receives the law, how is he any different from the ancient sovereign in this respect? If, in the moment of reception, law coincides with life for *anyone* who announces or applies it, then it would seem that the distinction between sovereign authority (*auctoritas*) and judicial power (*potestas*) is always suspended

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the objects of nature in reference to a thoroughly connected experience, and is consequently a subjective principle (maxim) of the Judgement. Hence, as if it were a lucky chance favouring our design, we are rejoiced (properly speaking, relieved of want), if we meet with such systematic unity under merely empirical laws.'

42 For example, Article 2 of the Uniform Commercial Code corrects some of the rigidities of previous contract law by inscribing certain of the customs of business as explicit legal rules (see Twining 1985, 270–340). But the Code's language does not capture business custom *as such*. Instead, it expresses custom's *interpretation* – it reduces customary behaviour to linguistic signs. To read the Code as attempting to make custom itself into custom's own rational ground is like trying to promulgate a legal decree that would enjoin the earth to revolve around the sun: both activities are at once useless and unnecessary.

for as long as that moment lasts. In the moment of reception there would be no such thing as 'law and life … tightly implicated in a reciprocal grounding' (Agamben 2005, 85). There would only be life itself: not biopolitics, but sheer *bios*.

Catching sight of the phenomenon of reception in legal practice allows one to recognise, at long last, that historically contingent irrational violence and rationally grounded legal violence are not strangers to one another – that they are, in fact, opposite sides of the same coin. Goethe calls this coin 'the Deed'. I call it reception. But whatever one calls it, this phenomenon is the irreducible 'how' of all judicially imposed legal violence. Reception kills possibilities so that actualities can be born, and as such it remains as natural to human life as breathing. Just as holding one's breath postpones breathing, a judge can always postpone the moment of reception by means of critical doubt and interpretive labour. But in the end everyone who lives must breathe – and every living judge must act. Legal violence is no more based on reason and reasons than breathing is based on a ceaseless act of will.

Human reason attempts to master historical becoming by creating conceptions of what ought to be. But history has the last laugh: it winds up mastering reason by conditioning how the expression of reason's concepts are received and acted upon. To pretend otherwise is not only bad philosophy – it also amounts to a rank apology for whatever forms of state violence legal actors and philosophers happen to receive as unproblematic at their particular stage of historical becoming.

If a historically-conditioned consensus of behaviour is the ultimate expression of legal violence, then it seems to me that legal theory ought to acknowledge this forthrightly. It ought to admit, for example, that viewed from a philosophical perspective easy cases are easy and predictable because of causes, not reasons. The point is not that there is a better way for judges to apply the law: just and responsible action clearly requires that justifications be given and accepted *as* 'just and responsible'. But history proves that the category of justification in general is not wholly benign. Those who idealise reason's capacity to cut between the lawful and the unlawful, the just and the unjust, on the basis of correct legal 'reasons' see only the truth of the imperative to justify violence. The intimate relationship between justification and suffering remains invisible to them. Only in awareness of the phenomenon of reception can universal suffering, and with it the ethically tragic dimension of human relations, begin to show itself.

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Chapter 6

The Times of Law and Religion

> It can always be quite easily shown that political action is going to be valuable; it is difficult to ever prove that political action has been valuable.
>
> George Oppen, *Daybooks* (2007, 89)

Time, Meaning and Freedom

In the previous chapter we noticed a certain affinity between law and religion with respect to *what* their practitioners believe in: religion's 'irrational' faith in the existence of an ineffable entity corresponding to the word *God* is analogous to law's 'rational' faith in the existence of indeterminate meaning bodies corresponding to legal norm-signs. The strong affinity between religious faith (in God) and legal faith (in meanings) is not accidental. Traditionally, the self-certain Cartesian subject has always been just as certain of its reasons (and its reason) as it has been of its faith. The supreme hubris of this posture of self-certainty guarantees, in Heidegger's words (2003b, 181), that '[m]odern [Western] culture is Christian even when it loses its faith'. Yet faith and reason, being finite human things, do not hover in eternity – they always show themselves in time. The concept of 'ought', in the sense of the true meaning of a religious or legal norm taken as the ground of right action, cannot be thought properly without taking account of the problem of temporality. This chapter traces the twin self-certainties of reason and faith to certain fundamental conceptions and presuppositions about the nature of time, including especially the temporal situation (and predicament) of human beings seeking to justify the infliction of suffering on other people as a necessary means to the ends of law and justice.

In Greek, *phainomenon* means, 'something that shows itself' (Heidegger 1997c, 87): hence the central orientation of phenomenology as a philosophical method. How, then, does time show itself to those who perform law's task, and is the manner of time's self-showing to law-doers related to how time shows itself to those who aspire, for whatever reason, to follow the so-called 'word of God'?

We see only what we look at. Most people interested in religion and law look only at the what they take to be the contents of these institutions: the meaning bodies which seem to be 'contained' in God's commands, for instance, or in the Universal Declaration of Human Rights. They do not think to inquire into the temporal milieu, so to speak, that allows religious and legal norms to be cloaked with ostensible meanings in the first place, by providing them with the time (or time-space) they need to come into being.

The point is simple, but far from obvious: time gives being. Of course, to say that time gives being is really only half the story. It is also possible to say that being

gives time, in the sense of granting to the latter a manifold ('the world') that is first capable of sustaining and enduring temporal existence. As Heidegger (1972, 16–19) remarks, the word *es* ('it') in the ordinary German phrase *es gibt* ('it gives') – the grammatical equivalent of 'there is' in English – can be used to indicate *time* in the saying *Es gibt Sein* ('it gives [there is] being') and *being* in the saying *Es gibt Zeit* ('it gives [there is] time'). But when read together, these two seemingly 'profound' metaphysical assertions actually leave the relationship between time and being completely undetermined and un-thought. To say that time gives being and being gives time is analogous to solving the riddle of the chicken and the egg by asserting, rather mysteriously, that the chicken came first *and* the egg came first.[1]

Regardless of how one answers the metaphysical question of time's logical priority *vis-à-vis* being, however, it must be conceded that the idea of a moral action or gesture of piety that occurs outside of history is just as incomprehensible as the idea of a legal right that can only be exercised in heaven. Yet despite time's status as a fundamental condition of the possibility of all religious and legal practices, conventional thinking on these themes rarely reflects upon the problem of temporality as such. In brief, common opinion takes time for granted.

The magical view of language is intimately connected to, if not caused by, attachment to a particular conception of time. As we have seen, people reveal themselves as beholden to the magical view whenever they interpret a legal or religious norm in such a way as to believe or imagine that the sign comprising the interpretation itself (e.g. the sign 'Y' in the proposition 'X means Y') refers to or contains its own extra-linguistic 'meaning' (at t_1), and that this meaning is capable of determining right action (at t_2).

When it comes to the relationship between religion and law, an analyst caught in the spell of the magical view typically begins his or her research by selecting a given domain of social interaction (family life or public morals, for example) in which the language of a religious text seems to permit or require behaviours that the language of a legal norm seems to condemn (or *vice versa*). After identifying a significant tension, or conflict, between the canons of religion and those of law in this domain ($\square_R$ *versus* $\square_L$), this analyst endeavours to reconcile the two practices, or perhaps to decide between them, on the basis of some religious or secular meta-criterion that is itself conceived of as being full of present 'meaning' ($\square_M$). The resulting political conflicts are almost inevitable: for every secular thinker of this sort who claims that religious values should give way to the (mostly) liberal values encoded in universal human rights declarations (see Dawkins 2006, 309–74), it would seem that there exists a religious thinker who rejects the ultimate authority of anything but God's word, and who just as vehemently opposes any legal norms which contradict what he takes to be the content of God's commands (see Ezzati 2001, 57–60). Either way, the question whether various

1 Hence Heidegger himself, after undergoing his famous 'turn' (see Inwood 1999, 231–2), repudiated the language of traditional metaphysics in favour of the term *Ereignis* (often translated as 'the event of appropriation'), hoping thereby to think the unity of being and time in terms of something like an 'enabling power' which keeps on 'coming to the fore' (Heidegger 1999, xx–xxii). See also Heidegger (2006, 268): 'time-space [is] … the ground of the onefold of "time" and "space" that lets time and space emerge in their mutual belongingness'.

presuppositions about temporality might differentially affect how people determine a norm's meaning and application is not even asked, let alone considered.

The thinking attempted in this chapter follows a different path: we will try to look, as clearly and unblinkingly as possible, at the distinctly *temporal* dimension of law and religion. In doing this, we will be 'reanimating dissimulated questions' (Levinas 2001b, 80) about time, meaning and freedom that most people ignore or take for granted. In order to accomplish this task we must rigorously forbear from staking a position on any particular meaning or value that appears to be 'present' in religious texts, legal norms and/or the minds of those who apply them. To the extent possible, the magical view of language will not inform or underlie *these* investigations.

Any other course would bypass a fundamental question that logically precedes whatever conflict or harmony is said to subsist between the canons of religion and those of law. This question asks how the meaning or value of a religious proscription or legal norm arises in the first place, and how the human activity called 'finding meaning in secular or religious norms' shows itself in its own right, considered as a concrete phenomenon. I should say that none of this is intended as a reproach to the plethora of books and articles that do approach religion and law from the standpoint of their specific contents, for some of these efforts are works of great subtlety and provable practical importance. I only wish to observe that prior to determining the meanings of authoritative texts, and prior to assessing the semantic relationships among them, lies the problem of the distinctly *temporal structure* of 'meaning' itself, and that *this* problem is the one that concerns us here.

In order to do justice to this problem, it will be necessary to sharpen our understanding of two competing conceptions of time that, in one way or another, have dominated Western thought since antiquity. I will call these conceptions *linear time* and *existential time*. However, it will not be enough merely to elucidate their structures; we must also be ready to uncover the 'aporias' to which these structures lead.

Given the casualness with which the word aporia is thrown around these days, I ought to make it clear why it is being invoked here. The Greek word *aporos* means literally 'without passage', and from this original usage philosophy has come to think of an aporia as a consideration of the world – a particular point of view – that does not get through, that does not find a way (Heidegger 1997c, 87). As used here, the term will connote all of its various senses simultaneously: hence, 'aporia' signifies at once an impasse, a lack of resources, puzzlement and embarrassment. Although the temporal aporias that we will encounter in these pages have a tendency to confound serious thinking on the subject of religion and law, they do not normally intrude on the actual practices of these institutions, which generally proceed in ways and directions that are impervious to philosophical questions. At one level, therefore, the distinction between theory and practice suggests that the fly of philosophical thought has simply allowed itself to be caught in one or another of the temporal fly-bottles that it has made for itself.[2] The task at this level of thinking is self-emancipation: it is to free oneself from the illusions that are created by morbid attachment to one's own cherished grammatical conventions.

2 Cf. Wittgenstein (1953, 103e): 'What is your aim in philosophy? – To shew the fly the way out of the fly-bottle.'

But there is another level – the level of ethics – at which the aporias of linear and existential time *should* begin to confound religion and law a great deal more than they do now. This is because there is a constitutive relationship among three terms, or aspects of existence, that co-define our relationships with our fellow human beings: *time*, *meaning* and *freedom*. In other words, each of the conceptions of time that we will investigate is associated with a fundamentally different conception of meaning and freedom.

As we shall see, the idea of linear time construes religious and secular norms in terms of meaning-full 'contents' from the past that show themselves in the present; it then construes freedom as self-legislation – willing obedience to meanings from the *past* in a *present* action aimed towards a pre-authorised *future* state of justice or righteousness. Contrariwise, the idea of existential time finds unbounded freedom and responsibility – and radically indeterminate meanings – within the horizon of a now-time that never ceases to renew itself; the inhabitants of existential time keep on freely creating and renewing norms by their deeds, thereby collapsing the (linear) distinction between the 'past' founding of a norm and its 'present' conservation. The task at this level of thinking is to follow the aporias of linear and existential time all the way to the bottom of the well, so to speak, and to bear witness to the broken bodies and lives of quiet desperation that one can find there, lying far beneath the level of ordinary philosophical discourse, if only one has the will to look.

Considered from an ethical perspective which takes the concrete historical reality of inter-human violence and universal human suffering as its primary concern, the only thing that ever really counts is what people actually *do* and *keep on doing* to one another under the banners of religion and law. Such an ethical perspective, born of ethical distress, is made possible (if not necessitated) by the supremely awful experiences of a suffering humanity during the past hundred years. Although it is probably nonsense to say that we are all responsible for Auschwitz and Rwanda, we *are* all responsible for preserving the memory of those who fell, irretrievably, during the course of these horrors (cf. Marcuse 2007, 212). From the standpoint of ethical distress, our legal and moral duties are never discharged so long as *all* the effects of someone's having previously taken steps to discharge them continue, or at least continue to be remembered. The hypertrophied faculty of memory and witness that characterises the phenomenon of ethical distress quickly uncovers a disturbing fact about inter-human relations: most of humanity's worst crimes have been (and continue to be) committed in good faith, that is, in the name of what the actors believed to be necessary according to the meaning of this or that doctrine or norm (see Arendt 1994, 71). 'The greater the mission, the greater the man' (79): from this saying comes the pretension of omni-competence and hyper-confidence that lies at the root of most terrifying claims of necessity in the moral and legal spheres.

A brief literary example will serve to make this last point a bit more concrete. In Kafka's unfinished novel *Amerika* (1947, 180), there is a scene in which the head porter – an authority figure *par excellence* – mistakes the protagonist for someone else. But in hotels, as in law and politics, some mistakes cannot be allowed to exist *as* 'mistakes'. The loftiness of the head porter's position and the importance of his mission prevent him from acknowledging his error: 'So I've mistaken you for someone else, have I? How could I go on being Head Porter here if I mistook one

person for another? … In all my thirty years' service I've never mistaken anyone yet.' From the structural imperative of displaying this sort of omni-competence flows the lie – the necessary lie, uttered as a quasi-truth in the service of higher ends – and hence too the necessity of submission to what the lie seems to demand. Here, as is usually the case, abject submission to necessity, especially to the necessity of a just order, is neither pure nor purely heroic – it always brings with it a tinge of shame.

Consider the ending of that most jurisprudential of Kafka's novels, *The Trial* (1937, 286). Throughout most of the book the protagonist, K, has been hounded and discombobulated by legal bureaucrats relentlessly pressing unspecified charges against him. On the last page of the novel, though, he finally realises that the ridiculous legal jig is up: now he is about to be executed for having (somehow) fallen afoul of the law. Ignobly submitting to his death, K's last thought, just before his lights go out forever, is not that of a martyr or innocent victim trusting in or hoping for future vindication. His last thought involves shame – eternal shame: '*it was as if the shame of it must outlive him*'.

Thus it comes to pass that even victims can become complicit in their own fates, with law and justice playing the role of a dominatrix rather than that of a high executioner. Seen from the point of view of someone like K – or of those who pity him – time is always inseparable from *all* of its content, and no future can ever repair what happens to the human beings who submit to suffering and death so that a 'better' world can be made. On the other hand, it should also be acknowledged that the effort of reflection that permits the healthy subject to break the power of immediacy in this way somehow never produces an image that is as compelling as the illusion it dispels (cf. Horkheimer and Adorno 2002, 161). The legal justification of suffering and the feeling of shame are inseparable because even the clearest and best intellectual insight cannot bring redemption to the human heart.

Seen from the standpoint I have been calling ethical distress, it is not what people *have planned to do* (present perfect tense) that matters most, as in Kant's concept of the good will (1993, 155). Nor is it the future consequences that they *will have produced* (future perfect tense), as in Bentham's concept of utility (1939, 852). Although Kant and Bentham are usually thought of as bitter competitors in the struggle to achieve the rational high ground of universal moral probity, Kant's deontological ethics and Bentham's teleological ethics actually find common ground at the level of their methods. That is, both thinkers acknowledge and support the need to use violent means to achieve the victory of just ends.

Neither thinker appears capable of understanding the always tragic relationship subsisting between victor and vanquished that is so finely expressed in the following lines about civil war from the Roman poet Lucan (1928, i. 126–8): 'Who more justly took up arms/Cannot be known; each party claims strong authority/The conquering cause pleased the Gods, but the conquered one pleased Cato.'[3] These simple words imply that glorious victory and ignominious defeat, like justice and suffering, are

3 '*Quis iustius induit arma,/Scire nefas; mango se iudice quisque tuetur:/Victrix causa deis placuit, sed victa Catoni*'. Lucan's reference is to the implacable political opposition offered by Cato the Younger to Julius Caesar's successful effort to seize power from the Roman Senate during the Civil War of 49–46 BCE. Hannah Arendt (1994, 56) quoted the line

inextricably knotted together inside reality as a whole. For Kant and Bentham, however, it is as if finding out which cause pleases the gods is the only thing that matters. Each thinker conceives of his task as breaking eggs in order to make omelettes: either the omelette of a personal duty that ought to be discharged (Kant's duty principle)[4] or the omelette of a net social welfare that ought to be maximised (Bentham's utility principle). Justice, not merely law, is their goal, for they know that law is capable of forgetting justice. But justice *always* forgets universal human suffering, which is why the following proportion can never be anything other than completely invalid: *law: justice::suffering: compassion.*

Justice, says Badiou (2003, 70), is simply the name by which a philosophy designates the possible 'truth' of a political orientation. But when it comes to political action, truth can be a highly overrated value. The Western political subject's self-certain belief in the truth of this or that political orientation leads to approval rather than affirmation. Such a subject avoids affirming the ethical distress of naked deciding in order merely to approve what The True requires (cf. Heidegger 2006, 99). It as if The True (or The Truly Just) were an incredibly distant star towards which the mighty intergalactic spaceship of law and politics is headed. The inhabitants of the spaceship realise that humankind may never finally reach the star, at least during their lifetimes. But since they all believe in 'progress', they continue to take all of their bearings from the star. They point the nose of their spaceship at the star and then proceed to run past (or over) anything that stands in their way. They merely *approve* of the direction that the star sets for them. They do not *affirm* each and every step in their journey as a new direction based on a new decision made in the upsurge of a fresh present.

The star-seekers are able to call themselves principled only because they have hypostatised what the verb 'to journey' signifies. As Levinas (2001a, 83) defines it, hypostasis 'designates the event by which the act expressed by a verb becomes a being designated by a substantive'. To journey becomes 'the journey', as if the goal were already reached before the task of journeying is completed, or even begun.[5] Hypostasis confuses time with space – juxtaposition (side-by-sideness) with

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in an essay on Friedrich von Genz, and later indicated to Karl Jaspers and others that for her Lucan's words express the 'very essence of political judgment' (xxiii).

4 It was Benjamin who was astute enough, yet again, to notice the import of the little word 'merely' in the version of the categorical imperative which reads 'Act so as to treat man, in your own person and that of anyone else, always as an end, and never *merely* as a means' (Kant 1993, 195) (emphasis added). Despite the imperative's lofty rhetoric, the word 'merely' actually presupposes the rightness of using people as means (i.e. breaking eggs to make omelettes) just so long as the egg-breaker *also* treats them as ends. Perhaps the apotheosis of this way of thinking is Hegel's notion (1967, 70) that it is always just to punish a criminal because his punishment is 'self-chosen'. Troubled by the categorical imperative's approbation of violence, Benjamin (1978, 285, n.*) gives the following startling retort to Kant's (in)famous moral principle: 'One might, rather, doubt whether this famous demand does not contain too little, that is, whether it is permissible to use, or allow to be used, oneself or another in any respect as a means. Very good grounds for such doubt could be adduced.'

5 Cf. Wittgenstein (2005, 287e): 'When I walk, an individual step does not contain the goal that walking will get me to. [Only] when I get to the goal … [was] each step … a step towards that goal.'

succession – and it can be very dangerous, ethically speaking. Journeying towards the star of True Justice under the illusion that it is 'the journey' of justice itself makes it difficult to notice the fact that legalised justice always seems to 'disadvantage the unjustified advantages of some and provide advantages to the unjust disadvantage of others' (Jankélévitch 2005, 51).

Moreover, experience confirms that no form of principled dogmatism, however righteous and just, is ever more than a hair's breadth away from turning people into ethical monsters: horrible deeds such as Agamemnon's sacrifice of Iphigenia, the bloody sack of Jerusalem during the First Crusade, the burning of heretics and apostates by the Catholic Inquisition, the cataclysmic murder-suicides committed on 9/11 – the list of ethical outrages committed in the service of dogmatic beliefs is well-nigh endless. To know that religious piety and deep spiritual convictions motivated people to participate in these abominations is almost enough to make one agree with Lucretius's savage condemnation (1946, 7) of religion in general. Compared to the number of humans it has restrained from taking the 'road to sin', Lucretius writes, 'Religion's self, I ween, hath oftener proved/The mother of foul crime and impious deeds'. But of course, religion has no monopoly on fanaticism. Hitler, Stalin, Mao, Pol Pot, Idi Amin, Slobodan Milosevic – not to mention all of their willing minions: the list of people who have committed ethical atrocities in the service of hypostatised secular meaning bodies is just as long as any list of religious misdeeds could be.

Why do these sorts of ethical tragedies keep on repeating themselves? Is it because people are not principled enough? Or is it perhaps because they are *too* principled? Once again Kafka (2006, 8) has it right: from the point of view of the singular egg that every human being's presently existing life always is, 'The decisive moment of human development is continually at hand'. The reason that the critique of history is always only a critique of the present (Heidegger 2002b, 114) is because the only thing that ever really *touches* us concretely is what other people keep on doing (present progressive tense) in our midst, whether or not they are conscious of it and whether or not they take it to be justified.

What if we were to re-think temporality not as an ongoing event of containment – not as a dimension or 'field of presence' (Merleau-Ponty 1962, 415–16) – but rather as a chaotic maelstrom of colliding forces? What if we were to conceive of the present as arriving *later* than the future, because the 'now' springs from a struggle between forces which push on us from the past and forces that keep on coming at us from the future (cf. Heidegger 1994, 40)? What if the words 'past', 'present', and 'future' did not name abstract parts of time, but rather certain concrete vectors of coercion and repression that we are constantly bringing to bear on ourselves and others *right now*, simply by virtue of being the kind of beings who must always be presently acting or reacting in some direction or other? And finally, what if the task of finding and applying the meaning of religious and legal norms were conceived of in terms of violence and suffering instead of faith or reason? In that event, everything that happens would probably have to atone for the fact of having happened, as in myths (see Horkheimer and Adorno 2002, 161), and a reflection on the temporality of religion and law would ultimately be the same as a reflection on the ethically tragic dimension of these institutions.

However enigmatic the foregoing questions and suggestions may seem to be at this stage of our thinking, they will have to suffice as preliminary indications of the direction we will be taking from this point forward.

Linear Time and Existential Time: Is it the Future Yet?

We will begin to think the relationship between the irrational faith of religion and the rational faith of law by juxtaposing the idea of linear time with the idea of existential time. That there are many subtle and important philosophical variations on these two concepts – especially the latter one – is not denied. Begson's *durée* ('duration'), which constitutes time as the subjective perception of a pure succession that is wholly lacking in distinctions (1997, 128); Husserl's 'retention' and 'protention', which construe the present moment as always already containing more or less vivid elements of the immediate past and the immediate future (1991, 29–75); Heidegger's *Ekstase* (from the Greek *ekstasis*, meaning 'standing outside'), which unifies the three parts of linear time on the basis of Dasein's present movement towards the future on the basis of its past (1962, 379–80); Derrida's *l'indécidable* ('the undecidable') (2002, 252–5), which makes the 'moment' of decision as such into a kind of impossibility; Benjamin's thesis (1968, 255) that the past can only be seized in an image that 'flits by' in the present and is never seen again: every one of

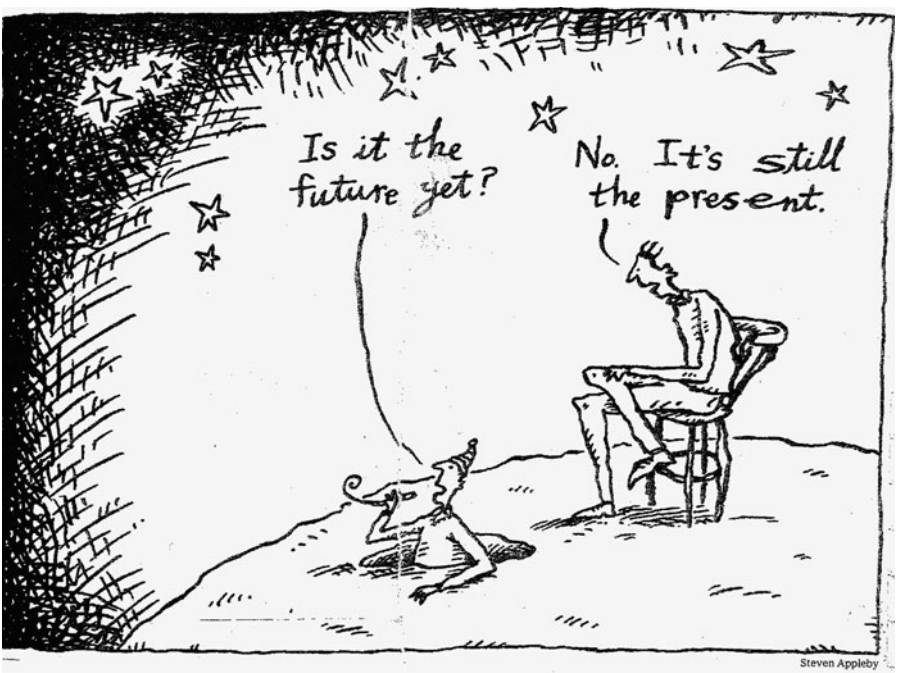

Figure 6.1 ***Is it the Future Yet?***

Source: Steven Appleby, cartoon © 1999 Steven Appleby. Reprinted by permission of the artist.

these conceptual *tours de force* would be worthy of attention if the purpose of these meditations were merely to give an intellectual history of the philosophy of time in Western thought. But that is not our purpose. We are not looking to recount and/or pick and choose amongst various theories of time – we only seek to understand how it is that a precritical attachment to certain temporal metaphors exerts, and continues to exert, a preternaturally disabling grip on both our intelligence and our ethical sensibilities.

The conceptions of linear time and existential time should therefore be viewed as Weberian ideal types (1978, i. 20), rather than as the discrete brain children of particular historical thinkers. The emphasis will be on the maximum degree of logical integration of these conceptions, so that each one can emerge with as much clarity as possible and, hopefully, succeed in striking a deeply familiar chord with the reader beyond any possible exegetical controversy. But while the method is quasi-sociological, it must always be remembered that the most important motivation for our being interested in the first place in the relation between time and meaning derives from the phenomenon of ethical distress.

Figure 6.1, a cartoon by Steven Appleby,[6] felicitously displays an initial indication of the contrast between our two ideal-typical conceptions of time. The character who asks 'Is it the future yet?' is thinking in terms of linear time. He imagines the future as a stream or set of thing-like 'moments' that will eventually arrive in the present, by which time the thing-like moment that he is experiencing now will have slipped into the past. For the man of linear time, time is always transitive: *this* time is related to *that* time as a plan is to its fulfilment (the present moment 'leads to' a future moment) or as an effect is to its historical cause (the present moment 'comes from' a past moment). In linear time, the given is always *following on* from something else. According to anti-linear thinkers such as Heidegger (2006, 95), 'The "moment" is the origin of "time" itself [and] … does not need "eternity"'. But according to the line-loving man who asks 'Is it the future yet?', time and eternity co-determine one another. For him, time is truly the 'moving image of eternity' that Plotinus (1991, 213) says it is: time, a succession of moment-boxes, mimes an eternity-box that is full of absolute purity and stasis. Linear time is like a conveyor belt on which moment-boxes containing objectively iterable linguistic meaning bodies are constantly moving forward, and it corresponds to an eternity that is conceived of as the everlastingly stable site of objective meaning as such. The schoolmen called this sort of eternity the *nunc stans* (literally 'standing now'): an odd sort of conceptual 'place' where space and time are somehow unified in the form of an eternally abiding temporal present and spatial presence.

Contrariwise, the man who answers 'No, it's still the present' is thinking in terms of existential time. For him, the concept of linear time unjustifiably suppresses the question concerning the 'space' that belongs to the time locations that it hypostatises (cf. Heidegger 2006, 96). From the second man's point of view, the only thing that ever really 'arrives' is what is going on right here and right now. Here is the image

6 The cartoon first appeared in the *New York Times* (30 December 1999, sec. 1, p. A25) just before the turn of the millennium. I am grateful to Steven Appleby for his permission to reproduce it here.

of a slate that is constantly being wiped clean the moment the man acts, leaving him with the inescapable task of always creating or recreating something new within a moment that never ceases to renew itself (see Jankélévitch 2005, xviii). Thus, the 'now' of existential time is essentially intransitive: it is not now *in relation* to anything else. Conceived of as the concentrated site of life as it *is being lived* (present progressive tense), this *hic et nunc* ('here-and-now') describes a circumference or horizon of present time-space within which all of our thoughts, impressions, memories and expectations are experienced and must be experienced, if ever they are to be experienced at all.

The idea that time is linear can be traced to Aristotle's determination ($219^{b}1$–$220^{a}9$) of time as number and enumerated movement with respect to bodies that retain their unity even though the 'now' in which they move is always different. Linear time portrays its subject matter as an endless series of arithmetically distinct 'moments' – represented as t_1, t_2, t_3, and so on – in which each particular moment, though undeniably unique in its individual being, is never content merely to lie down inertly between the moment before and the moment after. Instead, each moment vitally *connects* (somehow) with its predecessor and successor in such a way as to create the causal nexus.[7] From the secular side of things, Kant (1998, 163) famously, if dryly, describes our intuition of this sort of time in terms of a sequence of metaphorical points that exist successively on 'a line progressing to infinity, in which the manifold constitutes a series that is only of one dimension'. And from the side of religion, Augustine similarly maintains (1961, 263–7) that God created time in such a way that past, present and future really 'do exist', despite the embarrassing fact that only the present moment is ever really given to us in experience.[8]

Considered from the point of view of linear time, human beings live their lives from moment to moment within a span of time lying on a universal timeline, where all 'events' have both a determinate temporal beginning and a determinate temporal end. Somewhere in this conception of time can be glimpsed the origin of calendars and clocks, as well as the plethora of human technologies for reckoning dates, eras, successions of events, and causal relations. The radical humanisation of linear time, first clearly articulated by Kant, coincided historically with the emergence of Western capitalism and the widespread availability of clocks and watches designed to measure 'it' (i.e. time). In the modern era the idea that time is linear is thus ultimately technological: it serves to facilitate 'the reign of process and the linking

7 Hegel (1975, 217–20), for example, provides a particularly interesting (as well as historically important) account of the causal connection that subsists between moments of time. Although he concedes that cause and effect have separate identities in one sense, these identities are nonetheless 'suspended' in the unity of reciprocal action, by means of which the abstract and endless succession of causes and effects (bad infinity) are remade into a self-contained relationship (the causal nexus) that is perspicuous and meaningful to human beings. The latter, in turn, are supposed to find 'freedom' in the awareness that they are determined by the absolute idea throughout all the stages of Spirit's historical becoming. Hence Hegel's seemingly paradoxical conclusion that the truth of necessity is freedom (220).

8 On the other hand, Augustine (1961, 276) also foreshadows Kant's theory of time by arguing that '[i]t is in my own mind [*in te, animus meus*] that I measure time', and therefore 'I must not allow my mind to insist that time is something objective'.

of time to the logic of process and procedure' (Nancy 2003, 21). In sum, belief in the unquestionable truth of linear time is intimately connected to the will to control and manage the earth, and with it, human life itself.

Belief in the truth of existential time – linear time's 'other', so to speak – also has ancient roots. Its idea ultimately goes back to a premise that unites the otherwise competing philosophies of two of the West's most important pre-Socratic thinkers, Parmenides and Heraclitus: namely, the idea that time and being are unified in the form of an eternal now. Parmenides conceived of existential time in terms of eternally stable being;[9] whereas Heraclitus described it in terms of a ceaseless event of becoming in the now.[10] Despite their many differences, however, neither philosopher interpreted true time in terms of duration. Instead, a quintessentially existential conception of time underlies both theories: a unified and abiding time-space determines its object *either* as the non-durational present existence of beings (Parmenides) *or* as the non-durational present autogenesis of beings (Heraclitus).

In the figures of Parmenides's 'ungenerated and imperishable' being and Heraclitus's 'everliving fire' can be glimpsed the idea of the eternal 'being of beings' that the Greeks called *physis* (see Heidegger 1998, 183–230). According to Heidegger (1959, 14), *physis* originally denoted the 'self-blossoming emergence (e.g. the blossoming of a rose), opening up, unfolding, [of] that which manifests itself in such unfolding and perseveres and endures in it'. Hence, *physis* can be (and has been) interpreted as a kind of ceaseless 'revealing' that lets beings come forth into visibility – a revealing that all the while manages to conceal itself from view (Heidegger 2006, 326). In existential time, the now has only one dimension, not the three of linear time; it is 'a rising up from nothing and a disappearance into nothing' (Heidegger 1985, 123). One could say that for the man in the cartoon who answers, 'No it's still the present', the modifying temporal predicates ('past', 'present' and 'future') are fundamentally irreal, and 'only the determination of the now is real' (Husserl 1991, 15). Considered from his point of view, there is a sense in which rivers stand still (*à la* Parmenides) and mountains flow (*à la* Heraclitus).

The idea of existential time shows itself in the intuition that all of our works and days, without exception, do and must transpire in a tangible, palpable 'now' that nonetheless somehow manages continually to empty itself of reality. From birth to death, it is as if each person's concrete now keeps on bending back on itself. 'Remember', said Marcus Aurelius (1900, 28),

> that no man properly can be said to live more than that which is now present, which is but a moment in time. Whatsoever is besides either is already past, or uncertain. The time therefore that any man doth live, is but a little, and the place where he liveth, is but a very little corner of the earth.

9 'That-which-is is ungenerated and imperishable;/Whole, single limbed, steadfast and complete;/Nor was it once, nor will it be, since it is, now, all together' (Parmenides 1984, 65).

10 'The ordered world [*Κόσμον*], the same for all, no god or man made, but it always was, is, and will be, an everliving fire, being kindled in measures and being put out in measures' (Heraclitus 1987, 25).

The awesome force of Aurelius's intuition of existential time – which explicitly strikes us as a theme only very infrequently – underlies Nietzsche's argument (1969, 65) that 'the thought is one thing, the deed is another, and another yet is the image of the deed: the wheel of causality does not roll between them'. Benjamin (1968, 261) describes existential time from a modern secular perspective when he says, 'History is the subject of a structure whose site is not homogeneous, empty time, but time filled by the presence of the now [*Jetztzeit*]'. While Meister Eckhart (1994, 80–81) represents the concept of existential time from a religious point of view when he claims that God 'did' not create the world in the past, but rather keeps on ceaselessly creating it in the eternal present.[11]

The idea of existential time delimits 'the space-time of the here and now: concrete finitude', as Nancy (2003, 21) puts it. The time that belongs to human *experience* as such is phenomenological (existential) time, not cosmic time. In this thesis can be glimpsed the origin of our intuitions of immediate experience, which sometimes slow down and other times speed up in ways that are largely indifferent to clock time.[12] Herein too can be found the origin of the many artistic, psychoanalytic and phenomenological practices that take immediate experience as their primary theme.

If, in the concept of existential time, the ultimate point of the present is to be *experienced*, then in the concept of linear time the ultimate point of the present is to be *known* (cf. Nancy 2002, 14). The idea that time is linear allows thought to imagine, and attempt to achieve, the identity of thinking and being: a dream (or nightmare) that is as old as philosophy itself, rooted as it is in Parmenides's iconic statement (1984, 56) that 'thinking and being are the same' (τὸ γὰρε αὐτὸ νοῖν ἔστιν τε καὶ εἶναι). Linear time attempts to secure this possibility in advance by permitting time (and human effort) to 'pass' between a state of ignorance and a state of knowledge – a passage that it believes is vouchsafed by the existence of a pre-established harmony (*harmonia praestabilita*) between matter and mind, being and spirit, and the real and the true (see Leibniz 1934, 17–18; Schopenhauer 1974, 130). In short, linear time gives reason the wherewithal to think not only that knowledge is the result of a process-in-time, but also that human thought is a glorious super-medium in which the real – *all* of the real – can and eventually will be caught like a fly in amber at the end of history (see Hegel 1977, 11).

In contrast, the idea of existential time maintains an essential separation between the real and the true: it gives us the resources to detect within our own experience the sheer, brute fact of a 'that' which is irreducible to any 'what', and thereby to refute what Arendt (1994, 147) calls 'the age-old Occidental prejudice which confuses reality with the true'. The shocking feeling that just *this* is – this particular experience, *right now* – tends to dispel the smug certainty that comes from believing that a thing is always fully described by a proposition containing all of the universals that apply to it. Existential time makes us think and relish the moment as such, without which

11 So strongly is Eckhart (1994, 81) attached to an existential view of time that he asserts, 'All that belongs to the past and future is alien and remote from God'.

12 E.P. Thompson's magisterial essay of the history of time-concepts in relation to the rise of industrial capitalism points out that Chaucer had already noticed and written about the difference between 'nature's time' and 'clock time' as early as the 14th century (1967, 56).

there would be no reality, and invites us to find (or construct) an unbridgeable gap between existence and essence, or the sphere of lived experience and the sphere of propositions about that experience.

The Problem of Metaphor

Kant (1998, 163) correctly observes that time in general 'yields no shape' to our intuition. This implies that all of our descriptions of time are necessarily metaphorical, or, as Kafka says, 'oblique'.[13] But a metaphor is essentially a reference to absence (Levinas 2003b, 11). Like a simile, a metaphor seeks *to compare* just this non-metaphorical being or event with something else, something that the non-metaphorical being or event itself is not. Since the point of metaphorical language is to compare this with that – presence with absence – this raises a formidable problem of language that must be forthrightly confronted before we can make any further progress towards understanding the two conceptions of time symbolised in Appleby's cartoon. For if, as Kant says, time yields no shape to our intuition – and if, more generally, time is not 'present' in such a way that it can be compared to its metaphorical other – then the idea of a metaphor *of* or *for* time would be an oxymoron. Instead, the word 'time' would come down to being a mere linguistic sign that happens to appear *in* a metaphorical image.

'Every verbal signification lies at the confluence of countless semantic rivers', says Levinas (2003b, 11), *metaphorically*. A compelling image, this: a sparkling aquatic metaphor of metaphors. It suggests the thesis that all linguistic performances are metaphorical, as if the equation *language = metaphor* revealed some deep and abiding truth about the essential ineffability of the world. But if the world as such is absolutely ineffable, how could we even *try* to describe it? Lest we are tempted to cling to the thesis that all language must be metaphorical, it would be well to remember the basic logical point, discussed in Chapter 4, that if everything is X, then nothing is X. In other words, sense presupposes contrast. This indicates that if there is such a thing as a 'metaphorical' way of describing, there must also be such a thing as a 'non-metaphorical' way of describing. In sum, if we care to notice how human beings actually use words, we should probably not confuse the language game of using metaphorical speech with the language game of speaking 'directly' about something.

The problem of language in relation to time is therefore a consequence of the important distinction between objects that can be described *either* metaphorically *or* non-metaphorically, and objects (or rather *non*-objects) that can *only* be described by means of a metaphor. The colour of Homer's 'wine-dark sea' (ἐπί οἶνοπα πόντν) (1990, *Iliad* 23.143) is an object of the first type, since it can be described metaphorically, as Homer does, or non-metaphorically, say, in the scientific language of a chemical or spectrometric analysis. However, time is a non-object of the second type: *in describing time we have only metaphorical means of description at our*

13 'Language can be used only very obliquely of things outside the physical world, not even metaphorically, since all it knows to do – according to the nature of the physical world – is to treat of ownership and its relations' (Kafka 2006, 58).

disposal. As Bergson (1997, 99) puts it, 'time, conceived under the form of an unbounded and homogeneous medium, is nothing but the ghost of space haunting the reflective consciousness'.

Crotchety, nonsense-hating thinkers such as Wittgenstein would therefore undoubtedly say that it is a 'misuse of language' to describe time metaphorically as a line – or indeed, *as* anything whatsoever – inasmuch as there exists no non-metaphorical way to describe 'it'.[14] Not even Bergson's valiant effort to describe pure duration as 'succession without distinction' (1997, 100), can rescue the idea of time from the taint of metaphor. This is because the notion of an indistinguishable succession of qualitatively heterogeneous moments in time simply projects a picture of *spatial* side-by-sideness in which the objects depicted blur or melt into one another without any clear boundaries: a thesis that Bergson himself confirms when he says that states of consciousness '*permeate* one another' (98), and when he describes duration in terms of 'the *melting* of states of consciousness into one another' (107) (emphasis added). After all, the well-defined parts of a carefully moulded bar of chocolate before it melts in the sun and the messy gob of goo that the bar becomes after it melts have at least one thing one common: they are both extended *in space*.

Nevertheless, a misuse of language is still *some* kind of use. Indeed, if enough people begin to think and speak *in* a metaphor (as opposed to thinking about the metaphor as such), then what used to be a misuse of language now becomes something else. The potent image projected by the metaphor gets mistaken for the non-object itself, and can begin to determine an entire orientation to life. If everyone thinks that the Emperor of Time wears the 'new suit' that the swindlers made for him, then triumphal parades get organised and the people heap torrents of praise on the Emperor for his sartorial splendour. As in Hans Christian Andersen's fairy tale, *The Emperor's New Clothes* (1942, 79–83), none of the adults are capable of noticing on their own that the Emperor is actually walking around buck-naked.

Let us call the latter kind of misuse of language a *lived* metaphor. If the lived metaphor of linear time is what Hegel (1977, 27) disparagingly calls the 'paralysed form' of an enumerated line, then what is the most apt lived metaphor for the concept of existential time? Without a doubt, the most commonly used (and best) metaphor for existential time is that of a 'horizon'. For example: '[Time is] not a series of now-moments, but instead the horizon for the understanding of being' (Heidegger 2003c, 43). Those who peddle the idea of existential time tend to say that beings are constantly arising and passing away within the space encircled by this horizon, as they partake in a 'Bacchanalian revel' of becoming (Hegel 1977, 27) that is ceaseless but without extension. Thus: 'What does not pass in time is the passing of time itself; time restarts itself' (Merleau-Ponty 1962, 423). By definition, therefore, the revel of becoming lacks extension because the horizon of existential time surrounds *only* the now-time as

14 Cf. the following passage from Wittgenstein's *Lecture on Ethics* (1993, 42–3): '[I]n ethical and religious language we seem constantly to be using similes. But a simile must be a simile for *something*. And if I can describe a fact by means of a simile I must also be able to drop the simile and to describe the facts without it. Now in our case as soon as we try to drop the simile and simply state the facts which stand behind it, we find that there are no such facts. And so, what at first appeared to be a simile now seems to be mere nonsense.'

beings flit through it, leaving the black void that lies over the horizon (i.e. what linear time would call the 'past' and the 'future') unnamed, unnoticed and un-mourned.

Longstanding attachment in the West to the lived metaphors of linear time and horizonal (existential) time has created an extremely interesting tension or contradiction in Christian theology – and derivatively, in legal theory – on the question whether meaningful (i.e. meaning-full) language as such possesses generative 'power'. On the one hand, Christianity tells us (and law agrees): 'In the beginning was the word [*logos*]' (John 1:1). In the beginning was the word of God that, once spoken, must have determined the world; in the beginning, too, was the word of the law, which, once written, must have determined correct (if not just) legal outcomes. On the other hand, the Western theological and philosophical tradition is also sophisticated enough to know that 'the distinction between preservation and creation is only a conceptual one' (Descartes 1984, ii. 33). That is, since the first beginning is no longer with us in the present, there must be something homologous to a first beginning that operates each and every instant to keep things going.

This implies the need to posit the existence of something like a continuous act or event of creation, either along the 'line' of linear time or within the 'horizon' of existential time. The following assertions and arguments on the theme of 'continuous creation' are typical: (*a*) 'God created the world in such a way that he still creates it without ceasing' (Eckhart 1994, 80–81); (*b*) 'God alone is the primary Unity … from which all monads, created and derived, are produced, and are born, so to speak, by continual fulgurations of the Divinity from moment to moment' (Leibniz 1934, 11); (*c*) 'God is not only the cause of the commencement of the existence of things, but also of their continuation in existence' (Spinoza (1955, 62); and (*d*) 'It is strange that one says God created the world and not: God is creating, continually, the world. For why should it be a greater miracle that it began to be, rather than that it continued to be?' (Wittgenstein 2003, 215).[15]

The metaphor of a line induces us to look for a first cause at the 'beginning' of time, and then to look for continuous acts of mini-creation, so to speak, which enable beings to proceed along the timeline from moment to moment. And while it is true that the horizon metaphor of existential time jettisons the idea of a historically distant first cause, it, too, makes us want to look for a continuous act or event of creation (and recreation) in the eternal now-time. On the one hand, as Kafka (2006, 41) remarks, 'It's only our notion of [linear] time that allows us to speak of the Last Judgment' (Kafka 2006, 41), because this notion presupposes that the actions we take during our lives will be judged only when the world arrives at a particular, but distant, point on the timeline. But on the other hand, the horizon metaphor of existential time seems to make *every* moment into a last judgement, or, as Kafka puts it, a court marshal convened on the spot.

15 Heidegger (1977, 105), of course, deeply disparaged the traditional Western idea that the world was and is created by a creator-being. Nevertheless, his concept of the 'ontological difference' between beings and Being posits a similar kind of continuous *self*-showing in the now: creation without a creator, so to speak, by means of the ongoing happening of the un-concealment (*Unverborgenheit*) of beings according to the truth of Being as such (see Wolcher 2005, 70).

It is obvious that the different relations between metaphor and thought that are created by these two images – line and horizon – can lead to different deeds, and even to different forms of life. To verify this one need only compare the timeline-denying, live-in-the-now attitude of a Zen master (see Foster and Shoemaker 1996, 189) with today's heated disagreements between scientists and Christian fundamentalists about how 'long' (a spatial metaphor drawn from the geometry of a line) the world has existed on the timeline.[16] All of this suggests that the difference between the line and horizon metaphors is not only conceptual, but also cultural – not only about time, but also about how people live.

Nevertheless, both metaphors, if thought rigorously at the level of their sense, ignore the most important question raised by the concept of creation in religion and law: Why should anyone have to keep on sweating to create the world (or the legal order) if the meaning of the word (*logos*) is as powerful and as determinate as scripture says it is and legal theory thinks it is? The very fact that Western thought believes the concept of continuous creation to be necessary gives the proponents of linear and existential time reason to agree with Wittgenstein's remark (2003, 159) that the Bible (or a law book) is just a book, after all, and from the ink stains in a book no belief – indeed, no action of any kind – ever 'follows'.

Kojéve (1980, 111), in his justly famous interpretation of Hegel's thought, asserts that 'only a *speaking* being can be free'. But he also says that 'there would be no truth for Man' unless something gives 'meaning' to words (107) – unless 'the Concept or the Word … has a meaning' (111). This strong commitment to the image of a meaning-in-time establishes what is by far the most important bond between law and religion, and not, as Carl Schmitt (1985, 36) would have it, the analogy between the exception in jurisprudence and the miracle in theology. Traditional religion, as the Latin origin of the word implies, first and foremost attempts to 'tie itself back' (*religare*) to the meaning of God's word, just as law (from the Old Norse word *lagu*, meaning 'something laid down or fixed') attempts to fix or lay itself down in the meanings of legal norms. The concepts of the juridical exception and the theological miracle are both parasitic on this primordial idea of meaning: their role is to take the place, so to speak, of pre-established meaning bodies whenever truly extraordinary situations require things to happen in a way that the meaning bodies do not authorise or explain.

It is obvious that Kojéve's remarks about the 'meaning' of words and concepts reflect yet another, albeit more sophisticated, form of the magical view of language. He argues, as does Heidegger,[17] that free creation creates on the basis of its projection of grounds (i.e. 'meanings'). But if a ground or meaning can be projected once, why

16 See Dean (2007), reporting on the controversy surrounding the case of an earth scientist who believes that the world is only 10,000 years old (as calculated according to scripture), but who nonetheless submitted a PhD thesis which asserts that certain marine reptiles vanished at the end of the Cretaceous era, about 65 million years ago.

17 See, for example, Heidegger (2001b, 217): 'Freedom is to be free and open for being claimed by something. This claim is then the ground of action, the motive'; and (1985, 154): 'Freedom is capable only when it positions its decision beforehand as decidedness in order for all enactment to become necessary in terms of it.'

is it necessary to keep on projecting it? The duelling temporal metaphors of a line and a horizon both suppose that freedom consists in rising above the given to take up a relation to it on the basis of freely created meanings. But if a free act is one that is taken to be unexplainable on the basis of what has gone before[18] – if being free means that I *am* not now what I have been or will be – then how could this projection of precisely *meaning* itself (i.e. ❒) ever occur in (or as) me, whether I conceive of time as a line, a horizon, or anything else? The answer seems to be that this projection of meaning – no, let's say it plainly: this projection of meaning bodies – can only occur within the faux imagistic 'spaces' that have been conjured up *by the metaphors themselves*.

Noticing but Not Deciding

The foregoing remarks are meant to serve as a warning to anyone who might be tempted to get carried away with either (or both) of the metaphors of linear time and existential time. Whatever else it may be, *time itself* 'is' neither a line nor a horizon. Any thinking that loses itself in the rich texture of either metaphor ceases to be thinking. Metaphorically speaking (irony intended), in such cases the metaphor becomes the master and the mind its slave. If only for this reason, I will not try to prove here that one of these conceptions of time is true, and the other false. What would such a 'proof' look like, anyway, and who could it possibly convince who is not already intellectually or emotionally inclined towards the ways of life that its metaphor recommends?

In his undeservedly neglected book *The Gospel in Brief*, for example, Tolstoy (1997, 17) asserts (but does not 'demonstrate') that the past and the future are mere 'illusions of life' that must be destroyed. He also announces (but does not 'prove') that the true message of the gospels is purely existential: 'He who lives by love now, in the present, becomes, through the common life of all men, at one with the Father'. To be sure, the thesis that Jesus' teachings ignore linear time in favour of existential time has managed to influence one or two like-minded intellectuals: Wittgenstein, for one, nurtured the mystical side of his being by reading and rereading Tolstoy's book (see Glock 1996, 251). But it is also the case that Tolstoy's vociferous repudiation of traditional Christian dogma – including his denial that God has prepared some kind of spatio-temporal 'hereafter' for human beings – eventually got him excommunicated from the Russian Orthodox Church (Tolstoy 1997, 9).

Tolstoy's arguments for the superior religious benefits provided by the idea of existential time, not to mention his disciple Wittgenstein's more strident critique of the soul's alleged 'temporal immortality' after death,[19] are not likely to convince

18 Cf. Nietzsche (1968, 297): 'But from the fact that I do a certain thing, it by no means follows that I am compelled to do it.'

19 In the *Tractatus*, Wittgenstein (1974, 72) argues that '[i]f we take eternity to mean not infinite temporal duration but timelessness, then eternal life belongs to those who live in the present'; he then throws down the following gauntlet before conventional religion: 'Not only is there no guarantee of the temporal immortality of the human soul, that is to say of its eternal survival after death; but, in any case, this assumption completely fails to accomplish

ordinary, died-in-the-wool Christians and Muslims to relinquish their notably fervent belief in the proposition that the souls of the dead survive 'forever' along the same timeline that the living inhabit, albeit somewhere else (i.e. in heaven or hell). For every famous dead secular philosopher who denies that the human soul is immortal, in the sense of enjoying a personal life of endless duration after death (e.g. Spinoza 1930, 89–93), there is an equally famous dead religious philosopher who asserts that man's ultimate happiness does not lie in this life, but rather in the endless *post mortem* heavenly reward that God has promised to the faithful (e.g. Aquinas, *Summa contra Gentiles* lib. 3 d. 48).

One's first instinct is to wonder who is right on the question of the soul's temporal immortality – Spinoza or Aquinas. But instead of trying to decide *this* question, we would do better here to analyse the contradictory conceptions of time that underlie their diverging positions. Doing this can put us in a position to notice that Spinoza's disagreement with Aquinas is less about the nature of the human soul than it is about the nature of time, or rather, about time's most appropriate metaphor. Thus, if the image of a horizon surrounding the eternal now allows Spinoza (1955, 41–2) to claim that substance enjoys eternal existence without temporal duration, then we should say that this image is simply *different* from the image of a timeline that allows Aquinas (*Summa Theologica*, I, q. 46 a. 2) to claim that beings in the world necessarily have a temporal duration that began with a first cause. As a result of this fundamental difference in metaphorical images, what counts as a 'soul' for Spinoza is not the same kind of thing as what counts as a 'soul' for Aquinas. Spinoza's soul-thing must be able to merge with matter and abide in the form of a world-as-a-whole inside the horizon of an eternal now-time; whereas Aquinas's soul-thing must be capable of popping out of the mortal body in order to endlessly travel along the universal timeline in the hereafter. Their metaphysical disagreement about the nature of the soul is analogous to two people arguing about the correct meaning of the word 'sole': one says a sole is an edible marine flatfish, and the other maintains that it is the underside of a person's foot.

Nor is it likely that a committed stoic or phenomenologist will lose his confidence in the ultimate truth of existential time by being confronted with the obvious fact that science and technology have produced many important discoveries and spectacular practical successes by assuming that time is linear (see Bell and Bell 1963, 141–57).[20] Such a person will simply reply that the only thing that is ever really concretely given to human beings (including scientists) is the experience of sensations, perceptions, memories and expectations that show themselves to consciousness in the 'actual now' of lived, phenomenological time (see Husserl 1962, 215–18). Anything more is but

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the purpose for which it has always been intended. Or is some riddle solved by my surviving forever? Is not this eternal life itself as much as a riddle as our present life? The solution of the riddle of life in space and time lies outside space and time.'

20 A note to the scientifically-minded: the modern assumption that time is relative to the state of motion of the observer's coordinate system does not abolish the concept of linear time but rather presupposes it. Einstein's Special Theory of Relativity (see 1954, 227–32) disproves Newton's claim that there is only *one* true time, which runs at a uniform rate, by showing that there are in fact a *plethora of linear times*, each one generated by the state of motion of its particular coordinate system relative to the states of motion of other such systems.

an abstraction or regulative idea that is doubtlessly useful for certain purposes, but that, strictly speaking, goes beyond any facts actually available to us in experience. As Seneca puts it, no matter how far you go, and how many different things you see, 'you sail on a point, you wage war on a point, and you dispose of tiny kingdoms on a point',[21] and never on more than a point (see Foucault 2005, 277). Linear time cannot prove its validity to someone who, like Seneca, espouses what Wittgenstein (1979c, 25) calls 'solipsism of the present moment', and who will not stop insisting that only his (or our) present experiences are real.[22]

From the standpoint of ethics, it is of special relevance to both religion and law that the proponents of existential time can also support their claims by mentioning what Levinas (1996, 23) calls 'cruelties which are terrible because they proceed from the necessity of a reasonable order'. These cruelties show themselves in the tears that law-doers cannot see, primarily because their official world depends so completely on the calculations made possible by the concept of linear time that they are rendered insensible or indifferent to the brutal phenomenal reality of other people's *present* suffering. In the idea of existential time may be glimpsed the appearance of an ethical sensibility that is 'troubled at the prospect of committing violence … [even if it is] necessary for the logical unfolding of history' (Levinas 1996, 164). At a minimum, the possibility of such an ethics suggests that it remains an open question which conception of time – linear or existential – is more congenial to thinking about our ethical responsibilities to others, even if it is also true that science needs to presuppose linear time in order to perform its calculations. To believe that the idea of existential time has nothing to contribute to serious thought about ethics is to fall prey to one of humanity's most pernicious illusions, namely, 'the illusion that scientific, industrial and technical progress [are] incompatible with social and political barbarism' (Löwy 2005, 58).

Once again, for every famous dead philosopher who claims that science, morality and law would be impossible without the assumption that linear time is objectively true, or at least that it is a universal feature of the human mind (e.g. Kant 1998, 162–7), there is an equally famous dead philosopher who claims that it is bad faith, if not ethically moribund, to live in denial of the radical freedom and responsibility that exist, and can only exist, within the temporal horizon of existential time (e.g. Sartre 1956, 47–70). Among other things, these arguments ought to be sufficient to demonstrate that the ancient conceptual competition between linear time and existential time occurs beneath the level at which the magical view of language believes the so-called 'contents' of religious and legal norms come into contact. For example, Augustine (1961, 267) refutes the concept of existential time without regard for any given thought-content when he argues that people would not be able to remember or predict anything if time were not linear, and the present were not

21 The sentence quoted in text is my own translation of the original Latin, which reads: '*Punctum est istud in quo navigatis, in quo bellatis, in quo regna disponitis minima*' (Seneca 1971, 8).

22 Cf. Wittgenstein (1979c, 25): 'A person who says the present experience alone is real is not stating an empirical fact, comparable to the fact that Mr. S. always wears a brown suit. And the person who objects to the assertion that the present alone is real with "Surely the past and future are just as real" somehow does not meet the point. Both statements mean nothing.'

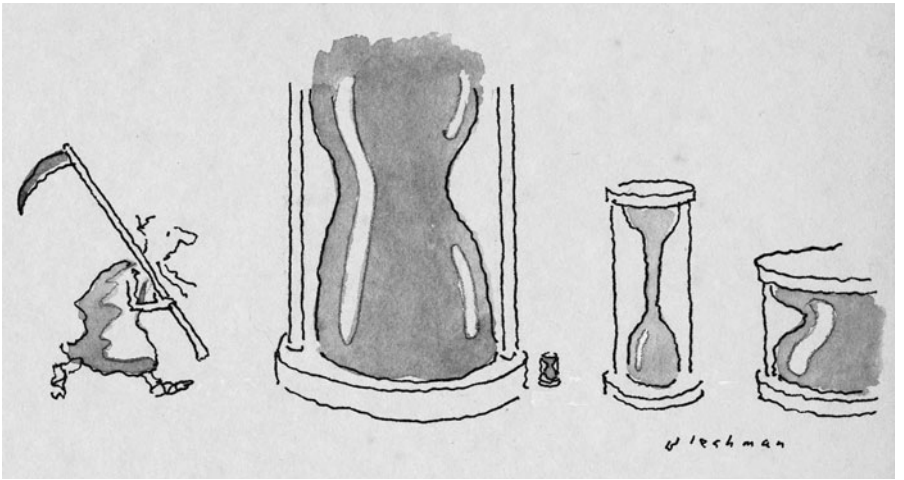

Figure 6.2 ***Hourglasses***

Source: R.O. Blechman, cartoon © 2007 R.O. Blechman. Reprinted by permission of the artist.

in fact 'preceded' by the past and 'followed' by the future. Likewise, when Levinas (1996, 145) employs the resources of existential time against the claims of linear time by arguing that speech is a present event of 'saying' (*le dire*) rather than a mere vehicle for what has been 'said' (*le dit*), he does so without regard for any particular sense or meaning in words: 'Saying as testimony precedes all the said', he writes, and 'does not testify to a prior experience.'[23]

It is not necessary to decide, in the context of these investigations, which theory of time is true and which is false. Unlike the befuddled character of Father Time shown in R.O. Blechman's cartoon *Hourglasses* (Figure 6.2),[24] there is no imperative that *we* select a 'correct' theory of time from a menu of possibilities. Instead of trying to choose sides in the conceptual war between linear time and existential time, a better course of action would be to keep on thinking and re-thinking the contrast between them.

It is obvious that linear time is the more 'popular' of the two conceptions, at least in the polls-show-that-people-believe-in-the-reality-of-the-timeline sense of the word popular. But why do human beings not *always* believe this? At one level, conventional faith in the correctness of the idea of linear time reveals a deep and abiding similarity between traditional religious and legal practices when it comes to the project of grounding action in authoritative norms. But at a different level, thinking the contrast between linear time and existential time allows us to notice a peculiar inconsistency or paradox in Western thought: (*a*) the belief that authoritative

23 Levinas's argument (1996, 145) implicitly invokes Occam's razor: 'Language understood in this way [as a 'saying' in existential time] loses its superfluous and strange function of doubling up thought and being.'

24 The cartoon first appeared in the *New York Times* (23 January 2007, sec. D, p. 3, cols. 2–4). I am grateful to R.O. Bechman for his permission to reproduce it here.

religious and legal norms can produce meaning and provide support for the rightness of right action is best grounded in the idea of linear time; and yet (*b*) the belief that it is possible for human beings to escape fate and freely choose their own destinies is best grounded in the idea of existential time. It would seem that both images of time have important roles to play in constructing the various narratives that human beings employ to keep the suffering of ethical distress at bay.

Language works at a distance in linear time: religious and juridical norms are seen as having earlier acquired (past perfect tense) an authoritative meaning that somehow continues to operate in the present. Thus, for example, Lucretius (1946, 12–14) accounts for the growth and alterations of 'mortal substance' by appealing to the category of linear time, thereby assuring substance a definite sequence of moments within which it can be born, grow old and die. The concept of linear time does the same thing for the human practice of following norms: it transposes Lucretius's axiom (28) that 'naught from naught can be begot' from mortal to moral substance. In this image, the past of linear time is seen as having mysteriously deposited a 'moral law within', as Kant (1996, 269) puts it, on the basis of which subsequent right action can and should be freely launched. This sort of freedom does not consist in being prevented from trampling on someone else's freedom, because at that point it would cease to be free; instead, its first criterion seems to be the ability to deprive others of their freedom according to the time-spanning 'meaning' of the law that it has posited for itself (cf. Foucault 2003, 157).

In linear time, freedom of action is not really freedom as such, but rather its negation. The idea of existential freedom as mere possibility – *dynamis* or *potentia* – is utterly useless in linear time, whereas the un-freedom of raw actuality – *energheia* or *actus* – becomes the source of all concrete use-value. In linear time, the very moment when freedom chooses and acts it ceases to be free (cf. Heidegger 2005, 115). Once tolled, the bell that freedom rings can never be un-rung. In linear time, as in the Newspeak of Orwell's novel *1984*, contingency is always necessity, and freedom is always slavery. The freely positing human being of linear time must somehow immediately *submit* to the meanings it keeps on positing for itself, thereby rendering itself un-free. If, as Levinas (1998, 33) says, 'violence means ascendancy over a freedom', then the freedom embedded in the metaphor of linear time is always first and foremost doing violence unto itself.

In contrast, the past never works at a distance in existential time: the phrase 'past authority' names only what Heidegger (2006, 146) calls a (present) 'trace left in the clearing of being'. According to the idea of existential time, the word 'past' refers to what humans keep on choosing, right now, to create and accept *as* authoritative in a constellation that is comprised of two basic elements: (*a*) a present situation and (*b*) the present trace or memory of a past event. But if, as Bergson (1997, 221) says, 'The free act takes place in time that is flowing and not in time already flown', then how is this freedom supposed to know which way to go and how to act? Locked forever within the horizon that surrounds existential time, freedom becomes the absence of *all* prior grounds, *all* prior meanings – a pure indeterminacy that always finds its hopes and dreams being buffeted about by the winds of fate. Such a freedom cannot help but become anxious on account of the lost emotional comforts offered by linear time. In linear time, at least those who believe that they are not already free can long for an emancipation that will

arrive at some 'point' in the future. But the denizens of existential time realise that they are always already free no matter what happens, and therefore that they have nothing – no freedom, no meaning, no ground, no ❒ of any kind – left to long *for*.

The best way to approach the foregoing antinomies of linear time and existential time is not to try to solve them, for how does one 'solve' the metaphorical difference between a straight line and a horizon? Nor should we succumb to the temptation to paper them over, as Kant (1998, 533–7) does, with the question-begging philosophical distinction between metaphysical freedom and practical freedom. Instead, we would do better to investigate what these antinomies reveal about the human tendency to evade or flee from responsibility for the universal suffering that always seems to attend any good faith effort to engineer what law-doers and religious folk are wont to call a 'better' or 'more just' world.

Uneasiness and its Solution: The Temporality of Grounding Actions in Norms

The common nucleus of all religions, however much they may differ in other respects, consists of two basic elements: the feeling that something is wrong and a solution to this wrongness that relies on a 'higher power' (James 1994, 551–2). The common nucleus of most theories of law and justice is identical, albeit with one slight difference: obedience to the textual authority of a humanly created norm replaces the humanly inscribed word of God as the solution. In short, when religious and legal practices are considered as concrete human phenomena, they both exhibit the kind of two-fold structure, or movement, that William James describes so succinctly in *The Varieties of Religious Experience* (552) as: '1. An uneasiness; and 2. Its solution'.

Expressed in logical terms, the 'solution' is the ground or reason that is supposed to lead to *salvation* in the religious sphere and *justice* in the juridical sphere. Just like the related idea of cause and effect, the conventional idea of a 'ground' or 'reason' for acting presupposes linear time as a condition of its possibility. Although the conventional concepts of cause and ground are both dependent on the idea that time is linear, the proponents of linear time take pains to distinguish them, as we saw in Chapter 4's discussion of the distinction between the internal and external points of view on law. In Western thought, at least, the quality of necessity that pertains to the relation between cause and effect in nature has traditionally been conceived of as categorically distinct from the free and rational grounding of human action in a norm or reason. Aristotle ($1015^{a}31$–3), for instance, revealingly describes necessity as 'something that cannot be persuaded [*ametapeistos anagkē*] … for it is contrary to the movement which accords with choice and with reasoning'. This thesis corresponds to the belief, rooted in Aristotelian thought and subsequent Christian theology, that human beings are 'special' – that they are created superior to nature. Seen from this point of view, a mere natural cause occupies an ontological and moral status inferior to that of a ground. Even if causes and grounds both require a timeline on which to bring their consequences into being, a ground is reasonable (i.e. amenable to the persuasive power of *logos*), whereas a cause is but a brute and inarticulate force.

In conventional discourse, the concept of grounding is usually expressed in terms of will-governed obedience to a norm, and as such it presupposes a span

of linear time during which the norm's commands can *first* be ascertained or legislated, and *then* acted upon. Kant's secular account (1993, 187) of morality as self-legislation according to the categorical imperative is one variation on this theme, as is Aquinas's religious argument (*Summa Theologica*, II, q. 93 a. 3) that 'there is nothing just and lawful but what man has drawn from the eternal law'. By common consensus, grounds and reasons must *precede* action on the universal timeline, for otherwise they could not determine what a 'principled' person chooses to do, or allow us to hold an 'unprincipled' person accountable for having transgressed them. In short, common sense, like the Western metaphysical tradition that is its reflection, 'takes beings as the explainable out of "what has preceded"' (Heidegger 2006, 348). Here thinking as representing imagines not only that its representations ('X') stand for meaning bodies (❒x), but also that only the meaning bodies it believes it sees in a clear and distinct perception (*clara et distincta perceptio* – Descartes) exist and are real (see Heidegger 2005, 232). So powerful is this conception of grounding that common opinion tends to measure the worth of a person's ideas solely by the shadowy things-to-come that the ideas seem to project and assure in advance.

The image of a well-grounded beneficial change in the conditions of existence portrays human beings and their ideas as responsible co-creators of a world that is 'moving' in linear time. Thus, people's dissatisfaction with existing arrangements (at t_1) leads them to imagine a better world to come (at t_2). According to Hegel, sometimes this idea takes the form of a 'pictorial conception', and other times it shows itself as a compelling 'notion … free from all sensuous admixture' (1975, 130). Either way, eventually it comes to pass (at t_3) that the expressions of our ideas start to take on a life of their own: their 'meanings' seem to blossom into the motive for, and ground of, purposive action aimed at producing change. As *motive* the meanings induce people to perform actions aimed at realising them. As *ground* they become what actors offer as the ultimate meaning of their efforts, and what they come back to by way of justification once their ideas become reality. According to this way of thinking, 'willing is striving and desiring, not a blind impulse and urge, but guided and determined by the idea of what is willed' (Heidegger 1985, 95). The theory is that dreamed-of *image* $❒_X$ can become *reality* X on the basis of the linguistic *ground* 'X'. Our actions move in linear time towards a pre-imagined state of righteousness or respect for law and justice in the way that the work of builders moves towards the completion of a building on the basis of a blueprint.

Simple observation will confirm that the words and images which express any given goal or end do not 'contain rules for their use like an object which is packed in a box' (Wittgenstein and Waismann 2003, 361–3). Nevertheless, in linear time ends come to be seen as enjoying a sort of magical present existence long before they arrive; means, in turn, seem to perform their work in the shadow cast by the meaning body of the end they aspire to achieve. Means are directed at ends whose representation in language and images lets them enjoy a sort of virtual existence in the now. This interpretation of grounding is deeply rooted in a linear conception of time. It construes freedom as the decision to construct or accept, and then follow or reject, an imagistic or textual ground of right action; and it construes logical necessity as the relation between a ground and the projects of those who 'correctly' follow

it.[25] In this picture of freedom's relation to grounding, human beings freely decide to subordinate themselves to an object – whether a sacred text such as the Torah or the Qur'an, or a secular text such as the US Constitution or the Universal Declaration of Human Rights – and this strange inversion of freedom into submission becomes the very definition of being righteous, principled and just.

Mathematicians sometimes describe the continuum of rational numbers geometrically by saying that rational points lay 'dense on [the number] line', by which they mean 'that within each interval, no matter how small, there are rational points' (Courant and Robbins 1996, 58). One might say that those who are attached to the foregoing picture of grounding right action in legal and religious norms uncritically transpose this geometric metaphor from the number line to the timeline. This move authorises them to deny that there are any 'gaps' in existence that would render the *passage* between interpretation and action in any way problematical. For those who worship the timeline, the sequence *freedom* → *ground* → *freedom* → *action* appears utterly gapless: freedom posits its ground at moment t_1, freely understands what the ground requires of it at moment t_2, and then freely acts on its ground at moment t_3.

It is a fundamental postulate of geometry that an infinite number of points can be constructed between any two rational numbers, no matter how closely they may seem to lie together on the number line. In the process of grounding religious or legal action on a norm, however, the phenomenon of reception (discussed in Chapter 5) insures that between any given *final* interpretation of the norm and the beginning of action to enforce it *nothing rationally constructible or ground-like can be found*. The only things that can be found, if we choose to look for them, are causes, including hidden psychological and ideological influences over which the decision maker has no immediate control.

When the very sense of the governing metaphor of rational grounding is thought critically, therefore, the analogy between the number line and the timeline breaks down. From the scientific premise that the world is fully determined, causally speaking, perhaps it does follow that there are no 'gaps' in time, and therefore that the number line and the timeline are completely homologous. But science takes an external point of view on nature, including human nature, and hence its premise of causal determinism can contribute nothing to the understanding of the phenomenology of legal and moral decision making. Seen rigorously from an internal point of view, the self-showing intrusion of the phenomenon of reception implies that the timeline (unlike the number line) is *discontinuous* when thought in terms of the 'meaning' of rational grounds. Wittgenstein (2005, 228e) draws essentially the same conclusion when he says that 'no image, not even a hallucination, can bridge the gap between image and reality, and no one image is better at this than any other'.

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25 Any differences between mental images and texts are inconsequential in the present context: to the extent that a mental image or belief is offered as the allegedly stable ground of an action, it is both possible and necessary for us to replace it with an external picture or verbal description that would allow the ground to be compared with the deed that purports to implement it (see Wittgenstein and Waismann 2003, 47). If this is not possible in any particular case, then the image or belief in question simply would not be what is generally called a 'ground' in the first place.

While it is true that no freely constructed grounding image as such can span the gap between norm-sign 'X' and its implementation, a cause (e.g. a psychological or ideological influence on the decision maker) surely can. If, for the sake of argument, it is not illicit to metaphysically 'straddle' the external and internal points of view, one might say that to follow a ground means *to let* this or that causally determined mode of reception of the sign that expresses the ground hold sway – to let oneself become a puppet of the way that history has constructed one's habitual reactions to language.[26]

In linear time, freedom always turns into surrender and un-freedom because those who embrace the metaphor of the timeline cannot locate or construct any particular moment on the line when we are simultaneously free (to posit grounds) and bound (to implement those grounds). In sum, the conventional belief in the possibility of *freely* deriving right action from the *compulsory* meaning of a legal or religious norm is the Achilles heel of linear time. In his monumental essay, *Force of Law* (2002, 251–2), Derrida shows how vulnerable to attack this conceptual weak link truly is:

> Our most common axiom is that to be just or unjust, to exercise justice or to transgress it, I must be free and responsible for my action, my behaviour, my thought, my decision. One will not say of a being without freedom, or at least of one who is not free in a given act, that its decision is just or unjust. But this freedom or this decision of the just, if it is … to be recognized as such, must follow a law [*loi*] or a prescription, a rule. … [Thus, t]o be just, the decision of a judge, for example, must not only follow a rule of law or a general law [*loi*] but must also assume it, approve it, confirm its value, by a reinstituting act of interpretation, as if, at the limit, the law [*loi*] did not exist previously – as if the judge himself invented it in each case. … In short, for a decision to be just and responsible, it must [*il faut*], in its proper moment, if there is one, be both regulated and without regulation, it must preserve the law [*loi*] and also destroy or suspend it enough to have [*pour devoir*] to reinvent it in each case, rejustify it, reinvent it at least as the reaffirmation and the new and free confirmation of its principle. … [O]ne will not say of [a] judge who [acts like a 'calculating machine'] that he is purely just, free, and responsible. But one will also not say this if he does not refer to any law, to any rule … or [if he] improvises outside of all rules, all principles. It follows from this paradox that at no time can one *presently* say that a decision is just (that is to say, free *and* responsible), or that someone *is* just, and even less, 'I *am* just'.

For present purposes, Derrida's analysis of the paradox of legal judgement comes down to this: the idea of a singular moment 'on' the timeline that simultaneously contains *both* freedom and un-freedom is as self-contradictory as the equation 1.1 = 1.2. It is as if a mathematician were to say that between 1.1 (= the free positing of legal ground 'X') and 1.2 (= legal violence V) no rational numbers could be constructed because the points represented by 1.1 and 1.2 lie so closely together on the number line that they touch one another. In that case, to say that norm-sign 'X' *requires* V (the concept of the rule of law in a nutshell) would be like saying that the numbers 1.11, 1.12, and so forth, not only do not exist, but also cannot be constructed.

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26 Cf. Marx (1975, 140): 'Ideas in general can never implement anything; the implementation of ideas requires people, who have to apply practical force.'

Instead of proposing that human beings somehow try to become radically free of *all* prior positive conceptions of themselves – as in Sartre's existentialistic notion (1956, 629) of 'Being-for-itself' (*être-pour-soi*) – the traditional concept of grounding action in a norm encourages them to identify possibility with actuality, and freedom to posit X with servitude to the historically received meaning body of sign 'X'. On this view, any and all righteousness and justice in the world must accrue from on high, by grace of the meaning bodies of norms the necessity of which freedom is supposed to experience as more real and more compelling than reality itself. Little wonder, then, that the linear way of describing the practice of grounding right action in norms always seems to make the state of affairs called 'being principled' into the very antithesis of the feeling of freedom whereby we define and assert ourselves (cf. Nancy 2003, 134).

Positive and Natural Religion: Thales's Sacrifice

The Enlightenment's distinction between positive and natural religion provides another helpful frame of reference for understanding the linkage between religion and law that has been forged by the metaphor of the timeline. According to eighteenth-century rationalism, natural religion consists in the simplest form of those beliefs that reason can admit to without contradiction, such as the existence of God and the immortality of the soul; whereas positive religions are merely the multitude of diverse institutions, dogmas, ceremonies and beliefs that human beings have created for themselves during the course of history (see Voltaire 1949, 53–228). For thinkers such as Voltaire and Kant, this distinction corresponds to the difference between reason and superstition, spirituality and religiosity, piety and pietism, and, more generally, necessity and contingency.

In natural religion, consciousness finds divinity within itself, and thus becomes co-responsible for the laws that it constructs and obeys; in positive religion, God imposes his commands from without (see Kant 1993, 403–54). For positive religion, the structure of linear time supports the existence of a well-formed past-time during which sacred instructions for how to behave were first revealed to a privileged founder. The record of this past-time – in the form of a *verbum dei* that has been translated, once and for all, into holy writ – then becomes a stable meaning body (❐$_{\text{The Word of God}}$) that is thought to ground (and require) any subsequent action that aspires to be righteous.[27] And while natural religion, for its part, attempts to avoid dogmatism by permitting practical reason to deduce right action from the God-given moral law within,[28] it is obvious that the notions of rational deduction and judgement in general depend on the same temporal structure. That is, rational people can lay down the

27 To give but one of many possible illustrations: in his comprehensive analysis of the Islamic jurisprudence of Sayf al-Din al-Amidi, Bernard Weiss (1992, 16) states that 'Islamic law is based upon texts which are considered to be sacred and therefore absolutely final and not subject to change'.

28 Kant's way of putting it is typical: in attempting to perform right action, man must 'proceed as though everything depended on him; only on this condition dare he hope that higher wisdom will grant the completion of his well-intentioned endeavours' (1993, 452).

law for themselves only in a past-time which, even if it is very recent, must always *precede* (and hence pre-authorise) the rightness of all *subsequent* right action.

According to positive religion, God gives people moral laws in the form of holy books. According to natural religion, God gives them a faculty (reason) that allows them to produce valid moral laws for themselves (see Kant 1993, 434 n. 14). Either way, God approves of our conduct only if we follow the 'meanings' that he has previously deposited into the linguistic signs which express the moral law, or into the minds which discover them.

The aforementioned differences and similarities *within* religion mirror an identical set of differences and similarities *between* religion and law. Consider the category of universal human rights. In the West, where a predominantly secular conception of human rights prevails, traditional legal theory interprets them as concrete products of historical struggle and cooperation amongst human beings in a variety of contexts: war, civil disobedience, law-making, treaty negotiation, and so forth. Contrariwise, most religious conceptions of human rights see the latter as deriving, in one way or another, from the Godhead. In Islam, for example, it is said that one should respect other people's human rights because 'Allah Almighty has endowed man with dignity' (Al-Aayed 2002, 14). Although it is undeniable that there are numerous theoretical and practical differences between (and among) the world's many different secular and religious conceptions of human rights, it is more important for present purposes to notice that they all seem to share the same temporal premise.[29] That is: (*a*) there must *first* be norm-signs endowed with meaning at t_1 on the timeline, and (*b*) only *then*, at t_2, t_3, t_4, and thereafter, can actions which comply with or violate that 'meaning' come to pass. And if, in religion, there is talk of redemption and a final judgement to come at some distant point on the timeline, then in human rights there is such a thing as the demand for a general amnesty and the threat to prosecute (someday) powerful political leaders for their war crimes.

As in Marx's theory of commodity fetishism, a religious or legal norm, thought from the standpoint of linear time, seems to be possessed of a kind of productive power on its own. Like a commodity, which at first sight appears 'a very trivial thing, easily understood', a religious or legal norm-sign changes into 'something transcendent' and 'mystical' at the point of its application, that is, at the point at which it assumes a 'social form' (Marx 1906, 81–96). The norm takes on the guise of an autonomous 'thing' from the *past* on the basis of which a *future* action can be launched according to a *present* act of derivation that passes automatically between the authority given by the norm's meaning body and the action that aspires to conform to it. By the same token, the moment of normatively evaluating an action that has already occurred interprets a *past* action as having been (past perfect tense)

29 Of course, the close proximity of religious belief to secular thinking on this important point is not enough, even today, to prevent outbursts of hostility and intolerance from flaring up between them. Consider the recent religiously inspired defeat, in the Arkansas legislature, of a bill designating 29 January as 'Thomas Paine Day'. According to newspaper reports, the opponents of the bill objected to Paine's preference for reason over religion, and interpreted his philosophical work *The Age of Reason*, written in the eighteenth century, as unacceptably 'anti-Christian and anti-Jewish'. See 'Honoring of patriot thwarted on issue of religion', *Seattle Times*, 11 February 2007, sec. A, p. 4, col. 1.

in compliance or non-compliance with the norm's meaning body in a *present* act of judgement that will produce *future* consequences (e.g. praise or punishment).

Despite the common tendency of law and religion to endow normative language with mystical productive powers, our actual practices of 'following the law' (of man or God) exhibit a fundamental category difference between a norm-sign as such and its present application. That is, most sane people, however righteous or law-abiding they may be, are capable of distinguishing between words and deeds, or, as the saying goes, between talking the talk and walking the walk.

Perhaps the first Western philosopher to understand and fully appreciate the implications of this distinction was Thales. According to a brief account given by Diogenes Laertius (1942, 25–7), Thales, 'having learnt geometry from the Egyptians … was the first [Greek] to inscribe a right-angled triangle, whereupon he sacrificed an ox'. Given the striking, if not scandalous, connection that this brief story draws between reason (in the form of pure geometry) and religion (in the form of animal sacrifice), one feels compelled to ask why Thales, who by tradition is counted as the West's first philosopher and scientist, performed a sacrifice to the gods on account of having successfully constructed a simple geometric figure? Although nothing is known about Thales's actual motivations, it is more than a little noteworthy that Laertius's account states that Thales sacrificed the ox *after* having successfully constructed his first triangle. It is as if this great ur-philosopher was surprised that a mere mathematical idea could actually be made to *do* something tangible in the world.

According to Sallust (1951, 207), there are three reasons why the ancients sacrificed animals to the gods: first, to show the gods gratitude for what they had already given or allowed, by returning to them a tithe of their gifts; second, to 'animate' the words of prayers for the future with the life of the sacrificed animal, so as make the prayers more effective than 'mere words'; and third, to offer the sacrificed animal's life as a 'mean term' that would bridge the vast chasm between human life and divine life, thereby permitting mortals to seek happiness and perfection through communion with the gods. It is possible to interpret Thales's sacrifice as manifesting all three purposes: (*a*) he was thanking the gods for having allowed him to make a past construction; (*b*) he was asking them to guarantee the success of future constructions; and (*c*) he was seeking to commune with the gods on account of his miraculous discovery that pure geometry actually works in practice. Be that as it may, however, it is clear that the mere unrealised existence of the words and idea-images that Thales acquired from the Egyptians constituted an insufficient trigger for his expression of piety. It would seem Thales was the first Western thinker to realise the fundamental truth that any thinking which 'remains distanced from the truth of passage', as Nancy (2002, 59) puts it, is almost never worth the cost of the paper it is written on.

Probably without realising it, Kant (2000, 38–9) lends respectability to the idea of Thales's gesture to the gods when he admits that reason alone is unable to 'comprehend' what he calls the 'inexplicable' transition, by means of the faculty of judgement, from the moment of legislation according to our super-sensible practical freedom (at t_1) to the moment in which we apply the law within sensible nature (at t_2). Kant's concession that there is a fundamental category difference between a

norm and its application highlights yet another important point of contact between religion and law: like Thales, each displays a kind of pre-rational 'faith', so to speak, in what can and should happen *after* the moral law comes into being.

Perhaps the 'hair-line which separates science from faith', as Max Weber (1949, 110) puts it, is neither a line nor a separation. For it would seem that reason and religion both 'have faith' in the proposition that the past in general – and appropriately sanctioned religious and legal norms, in particular – can provide a secure foundation for right action in the now. In other words, the age-old squabble between reason and religion about the *origin* and *contents* of the law is like a fight between siblings; what unites them is their common parentage in the notion that the word *law* refers to or has something called 'contents' ($\square_{\text{The Law}}$) in the first place.

What if it could be shown that the passage from norm to action is always insecure because the concept of linear time lacks the resources to account for the *unity* of meanings (and hence grounds) in law and religion? Where would such a demonstration leave people's faith in the absolute holiness of religious prescriptions and the possible justness of legal arrangements? To restate this question even more precisely in terms of the central concern of this book, how would a fundamental critique of the unity of normative 'meanings' affect our religious and legal faith in the possibility of inflicting just suffering on others without having to experience the phenomenon of ethical distress?

Kant's Fundamental Evasion of the Problem of Unity in Linear Time

'None can e'er perceive time by itself', remarks Lucretius (1946, 24), and he is right. Look as we might, nowhere do we find what the word 'time' names in the form of an object, or, still less, the thing-like container or medium that the concept of linear says it is. This absence creates a serious problem for the magical view of language in law and religion: How can religious and legal norms 'contain' objective meanings (or meaning bodies) if time itself does not contain *them*?

Without any doubt, the most influential and elaborate attempt to solve this problem in Western philosophy was Kant's. Moreover, his undeniably brilliant failure to solve it was a far greater accomplishment than any apparent success could have been. This is because there is no such thing as progress in philosophy when it comes to thinking about time and temporality – only important failures. Building on the sympathetic critique of Kant's thought that Heidegger enacts in the *Kantbuch* (1997a) and elsewhere (1997b), this section attempts to show why and how Kant failed. The point of this demonstration is not to score intellectual points against Kant, for this is not a mere game we are playing. Instead, the point is to venture as deeply as possible into the idea of linear time in order to see what makes it so problematical as a temporal foundation for the concept of meaning in law and religion.

Kant was notoriously eager to provide a secure foundation for the objectivity of both knowledge and moral action. To do this, he famously demoted time and space from the status of things-in-themselves *that contain* everything else to the status of things that *are contained* (1998, 155–71). That is, he installed time and space in the mental architecture of the subject as conditions of the possibility of all

its experiences. But while the intellectual audacity and importance of Kant's well-known 'Copernican revolution' (1998, 110) in philosophy must be conceded, it is difficult to understand how time located *inside* subjects who intuit and conceive objects is any less thing-like than time conceived of as a container *for* subjects and objects. To express this puzzlement in the form of a question: if time is not an 'it' that contains objects, how can it be an 'it' that conditions them?

Heidegger (1997b, 212) correctly observes that Kant attempts to assure the purity and universality of the transcendental subject by conceiving of its categories,[30] which are conditions of the possibility of all knowledge whatsoever, as being cut off from any relation to time. However, inasmuch as Kant wants to establish the unity of objects of experience (including the 'meanings' of norms) on the basis of categories that lie *outside* of time and experience, it is unclear how the time-forming subjective 'act' of synthesis could ever take place unless it is always already preformed *by* time and experience. The key to understanding this problem of linear time's relation to the unity of the categories of understanding lies in the concept of the 'imagination', which Kant (1998, 256) defines as the faculty of representing an object without its immediate presence in intuition.

The faculty of sensibility is supposed to be receptive rather than creative: it merely receives intuitions, or what Husserl calls 'hyletic data' offered to consciousness by the senses as the embodied subject undergoes its experiences in time (see Derrida 2003, 63). Since these intuitions are perpetually running off into the past of linear time (where they are no longer 'present' to us), it becomes necessary for the faculty of imagination, or something like it, to *unify* and *preserve* intuitions in the form of 'objects' (phenomena) that can be presented to cognition. The name Kant gives to this act of unification on the part of the imagination is 'synthesis'. Expressing the same point privatively, were it not for the synthesising power of the imagination, the manifold of impressions, intuitions and images that are continually bombarding the mind could never achieve the unity they require to become objects of thought. Thus, the imagination appears to be a *third* source of the mind in addition to the faculties of sensibility and understanding: on the one hand, the imagination complements sensibility by forming unities out of the stream of intuitions that are constantly being received by the latter; and on the other hand, the imagination delivers to the understanding objects that are capable of being understood (see Heidegger 1997a, 94–6).[31]

Consistent with the foregoing interpretation of the relations that subsist among the faculties of sensibility, understanding and imagination, Kant (1998, 211) states, plainly and unequivocally, '*Synthesis in general is … the mere effect of the*

30 According to Kant (1998, 212), the categories, or 'pure concepts of the understanding', are *a priori* features of the mind that permit us to apprehend and make sense of the objects of consciousness. They include (*a*) *quantity* (unity, plurality, totality), (*b*) *quality* (reality, negation, limitation), (*c*) *relation* (inherence and subsistence, causality and dependence, community), and (*d*) *modality* (possibility or impossibility, existence or non-existence, necessity or contingency).

31 Cf. the *Third Critique*, where Kant (2000, 31) identifies the imagination 'as the faculty of *a priori* intuitions' and the understanding 'as the faculty of concepts', and speaks of the possibility of a pleasing 'agreement' between them.

imagination, of a blind though indispensable function of the soul, without which we would have no cognition at all'. Yet elsewhere in the *First Critique* he alleges (152) that there are only 'two stems of human cognition', sensibility and understanding, and furthermore, that the imagination's synthesis of intuitions necessarily proceeds '*in accordance with the categories*' (257). What do these apparently inconsistent remarks imply for the status of the faculty of imagination, without which, as Kant says, 'we would have no cognition at all'?

On his own copy of the first edition of *Critique of Pure Reason*, Kant (1998, 211 n. *b*) attempted to clarify the ambiguous position of the imagination in his philosophy by crossing out the clause which describes the faculty of imagination as '*a blind thought indispensable function of the soul*' and replacing it with the words '*a function of the understanding*'.[32] This move appears to demote the imagination to the status of a mere lieutenant in the service of the understanding and its timeless categories, thereby 'saving' the purity of pure reason. But Kant apparently failed to notice that this sort of salvation comes at a huge cost, for his solution begs what now becomes the most important and pressing question of all, one on which his entire system depends. The question is quite simple: how and from what source do the meanings of the pure concepts of understanding acquire *their* unity?

For Kant, as for the Western metaphysical tradition in general, 'the essence of the objectness of the object lies in [its] unity' (Heidegger 1997b, 241). A thing must first be itself before it can be rightly counted as an object or a ground, or indeed as anything whatsoever. But the concept of linear time threatens to disperse unity, by definition: the object we call 'X' at t_1 is not *necessarily* the same as the object we call 'X' at t_2. Time changes things – hence the plausibility of Edmund Spenser's lines: 'The ever-whirling wheel/Of Change; the which all mortal things doth sway' (Bartlett 1980, 174). In legal theory, time's threat to unity sometimes comes out in the form of the proposition that *when* a litigation takes place can vitally affect a court's judgement about the materiality of the 'facts' of a prior precedent, inasmuch as 'the human and physical factors surrounding the question have undergone continual change in the interim' (Stone 1968, 268–74). Using the metaphor of an edifice and its foundation to characterise the entire Kantian system, the *Third Critique* thus forthrightly concedes that if there is no faculty of *a priori* principles independent of experience-in-time, then 'this would inevitably bring about the downfall of the whole' (2000, 3).[33]

Thus, Kant knew full well that the manifold would be 'nothing but chaos and vertiginous danger', as Nancy (2003, 218) puts it, if the pure concepts of understanding were not themselves unified *prior* to experience.[34] He insists (and

32 According to Heidegger (1997b, 191), this change shows 'how fundamentally uncertain Kant was, not only with regard to the power of imagination but also with respect to the basic relationship between intuition and thinking'.

33 Cf. Derrida (2003, 10–11): 'The foundations of objectivity are ruined if they are psychogenetic.'

34 It would be worse still for Kant's system if the categories were conceived, *à la* Wittgenstein, as being mere linguistic signs that acquire their meanings only through convention-governed uses. For example, what *a priori* 'content' corresponds to, say, the category of negation? Cf. these mildly mocking remarks of Wittgenstein (1953, 146e–7e):

must insist) on maintaining a firewall between *intelligible action*, which is 'known by pure reason alone, apart from every temporal condition', and *sensible action*, which is 'empirical, given in time' (Kant 1993, 417). Only by arbitrarily legislating an absolute separation between the faculty of intuition and the concepts of pure reason is Kant able to paper over a fundamental inconsistency in his philosophy.[35] The inconsistency becomes painfully obvious when one focuses on the logical consequences of Kant's stipulation that the unity of *any* object or representation in consciousness – whether it is an *a priori* concept or an *a posteriori* intuition – can only be acquired by means of the faculty of imagination, without which (it bears repeating) 'we would have no cognition at all' (1998, 211).

The contradiction is easy enough to demonstrate. Although the imagination is supposed to synthesise intuitions in accordance with the categories, at the same time the manifolds which allegedly constitute the 'meanings' of the categories themselves cannot be unified except by means of a faculty of imagination that 'precedes' them in the only medium in which it *could* precede them – namely, linear time. For it is Kant's dogmatic commitment to a linear conception of time that forces the problem of synthesis to the fore: only the ceaseless passage of moments on the timeline creates the need for a faculty (imagination) that is capable of standing squarely *within* the flux of time to capture and preserve what would otherwise be continuously flowing away from us.

To express this same point in a slightly different way, if the categories have 'contents' (❒$_{\text{The Categories}}$), as Kant claims they do, then these contents would always be escaping us, like water draining through a sieve, unless the imagination first held them together as unities-in-time. It would appear that Kant is speaking out of both sides of his mouth: on the one hand, the categories must precede time by enabling the imagination to form unities; but on the other hand, the categories as such can come into existence only after a time-bound act of imagination first unifies and enables *them*. The existence of this barely concealed contradiction in Kant's system implies either that time is a thing-in-itself that 'infects' pure reason from its very birth by providing it with *a posteriori* concepts that are always contingent on messy historical forces, or that pure reason cannot exist in the form Kant needs it to in order to secure the possibility of objective knowledge.[36]

Strictly speaking, the foregoing antinomy in the Kantian system pertains to the faculty of understanding (*Verstand*), which Kant (2000, 11–12) says 'legislates' by means of concepts (natural laws) that represent their objects in intuition as phenomena. The concept of freedom, on the other hand, belongs to the faculty of practical reason (*Vernunft*), which legislates in the moral sphere according to the moral law. As Kant

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'Negation: a "mental activity". Negate something and observe what you are doing. – Do you perhaps inwardly shake your head? And if you do – is this process more deserving of our interest than, say, that of writing a sign of negation in a sentence? Do you now know the *essence* of negation?'

35 Cf. Horkheimer and Adorno (2002, 98): '[In Kant's philosophy] a secret mechanism within the psyche preformed immediate data to fit them into the system of pure reason.'

36 Kafka (2006, 71) cleverly alludes to this latter possibility when he says, 'The same person has perceptions that, for all their differences, have the same object, which leads one to infer that there are different subjects contained within one and the same person'.

(12–13) describes it, 'The concept of freedom is meant to actualise in the world of sense the purpose proposed by its laws'. However, it is precisely at this point in the argument that one feels entitled to ask a question that Kant himself evades: *how* does or can the law's 'purpose' achieve its unity prior to freedom's entry into the world of sensibility (i.e. the world of reception)?

Since the concept of freedom represents its object (i.e. causality through freedom) as a thing-in-itself, Kant (12–13) believes that his primary difficulty is to demonstrate how freedom, which 'contains' the super-sensible in reason, could ever make its purposes felt in sensible nature. But in truth his real philosophical difficulty begins much earlier than this, at the level of accounting for the *unity* of the 'laws' and 'purposes' that reason discovers or lays down for itself in the form of objectively right grounds of action. These grounds of action are supposed to be 'deduced' from the categorical imperative, the *a priori* principle of all moral behaviour.[37] But in order for this deduction to take place on the terms that Kant has set for it – namely, ground 'G' deduced from categorical imperative 'CI' – the latter must be just as much a meaning-full 'cognition' as the categories of understanding are.[38]

Now Kant (1993, 186) rigorously distinguishes the categorical imperative, which he calls an 'objective principle valid for every rational being and … the principle on which the being ought to act', from our subjective principles of action ('maxims'), which ought to 'conform to' the imperative. His schema of practical reason thus poses *two* interrelated problems of unity: (*a*) the unity of the meaning of the sentence which expresses the *categorical imperative* itself; and (*b*) the unity of the meaning of the sentence which expresses the *maxim* that is supposed to be derived from the categorical imperative. In short, reason's laws, just like the understanding's categories, need the faculty of imagination to unify them in such a way that they can show what they 'mean' to the subject who wills what they 'contain' into the sensible world. Kant (2000, 7) underscores how important the problem of unity is when he claims that the will, as the faculty of desire, is a '*cause which acts in accordance with concepts*'. For how could the Kantian will act 'in accordance' with concepts, objectively speaking, unless they are first of all themselves (i.e. unities persisting through time)?

If we transpose the basic terms of the antinomy of the understanding in Kant's system (i.e. the allegedly 'pure' categories of understanding are actually unified by the 'impure' faculty of imagination) to his general theory of grounds and grounding according to practical reason, then it becomes obvious that his system leaves the idea that human beings can give themselves rational grounds for acting hanging in the air, without any 'rational' support. This is because: (*a*) a ground without *a priori*

37 'It is *a priori*, a synthetic, practical proposition. … [W]hen I conceive of [it] I know at once what it contains. … [T]here is only one categorical imperative, namely this: *Act only on a maxim by which you can will that it, at the same time, should become a general law*' (Kant 1993, 185–7).

38 Kant (1993, 187–9) implicitly acknowledges this conclusion when he lists certain concrete moral 'duties ... which derive clearly from' the categorical imperative, such as the duty not to commit suicide, the duty not to make promises that one knows cannot be performed, the duty to make the most of one's talents, and the duty of altruism.

unity is no ground at all, but rather just another kind of cause; and (*b*) the categorical imperative is no less vulnerable than the categories are to the corrosive historical effects of the only unifying power we have – that is, the time-bound faculty of imagination. Once again, what is supposed to be *a priori* is actually the *a posteriori* product of the imagination working in time. Once again, what is supposed to be objectively valid *before* time and experience can only exist *as a consequence of* time and experience. Given its distinctly historical origins, any such 'ground' of action would be constantly subject to fracture and disunity: at any given point in time it would show itself as a mere epiphenomenon spun off by a multiplicity of contingent forces working on the synapses of the brain – forces which cause us to react now this way, now that, while all the while we keep on stupidly babbling about the 'rational grounds' of our actions.[39]

This insight into the time-bound impurity of all so-called 'rational grounds of action' accounts for Schopenhauer's well-known thesis (1969, i. 308–309) that the will is a kind of blind striving that lacks any ultimate aim or object – a mere puppet of historical winds that blow it this way and that without reference to whatever grandiose rationalisations the faculty of reason may throw up to justify its actions. The insight also lies at the heart of Nietzsche's savage burlesque (1927a, 392–3) of Kantianism, in which old man Kant is compared to a doctor in one of Molière's comedies. Just as Molière accuses the doctor of trying to prove that opium induces sleep by means of a (question-begging) means, namely, the *virtus dormitiva* ('the power of making-sleepy'), so too Nietzsche accuses Kant of attempting to assure the possibility of pure *a priori* concepts 'by means of a means (faculty)' that he does not (or dare not) investigate too deeply.[40]

Indeed, as Kant (1998, 535) himself notes, 'if appearances are things in themselves, then freedom cannot be saved', for then 'nature [would be] the completely determining cause, sufficient in itself, of every occurrence', including our behaviour. And if freedom cannot be saved, neither can the idea that we freely and rationally choose the moral grounds of our actions. Instead, any pretence that we possess practical moral freedom (see Kant 1996, 166) would be little more than a cruel joke. In place of law-giving freedom there would only be a rapacious will to power cloaking itself in flimsy justifications, thereby deceiving both itself and others about the true origins of its actions.[41]

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39 Cf. Nietzsche (1968, 164): 'One does not know the origin, one does not know the consequences: – does an action then possess any value at all? The action itself remains: its epiphenomena, in consciousness, the Yes and No that follow its performance: does the value of an action lie in its subjective epiphenomena? (– that would be like assessing the value of the music according to the pleasure or displeasure it gives us – it gives its *composer* –).'

40 At the conclusion of the critique, Nietzsche (1927a, 393) bluntly asserts that 'synthetic judgments *a priori* should not be "possible" at all; we have no right to them; in our mouths they are nothing but false judgments'.

41 Cf. Nietzsche (1968, 164): 'How false is the idea that the value of an action must depend on that which preceded it in consciousness! – And morality has been judged according to this, even criminality. … [T]o judge it by its origins implies an impossibility, namely that of *knowing* its origins.'

One of the most important conventional criticisms of the categorical imperative – and of the idea of universal law in general – is that it rigidly 'disregards sympathy and inclination', as Arendt (1994, 334) puts it, thus becoming 'a source for wrongdoing in all cases where no universal law, not even the imagined law of pure reason, can determine what is right in a particular case'. The thrust of this sort of criticism is that unbridled official discretion constitutes a fundamental threat to the rule of law. Maintaining a firm conceptual distinction between a state of normalcy and a state of exception, it implies that the rule of law works well enough in most situations but breaks down in liminal cases, where the whim-governed and uncontrolled discretion of officials holds sway. One might even say, with Agamben (2000, 41–2), that the latter sort of case belongs to the concept of the 'camp', or the 'space for naked life as such', where 'the fact that atrocities may or may not be committed does not depend on the law but rather on the civility and ethical sense of the [officials] that act temporarily as sovereign'. This criticism seems consistent with the view that law and morality are governed by a sort of two-track method of decision making that corresponds to the distinction in legal theory between easy cases and hard cases. On this view: (*a*) most cases (the easy ones) would be decided according to universal laws, which would be taken to determine right action and right judgement in 'ordinary' circumstances; and (*b*) the balance of cases (the hard ones) would be decided according to something akin to Aristotle's category (1137^{a}–$1138^{a}3$) of equity, which is supposed to correct the 'errors' produced when certain unforeseeable cases – those for which it is 'impossible to establish general rules', as Aristotle puts it – are subsumed under pre-existing concepts.

The previous reflections on Kant's system, however, are meant to go much deeper than the customary juridical and moral distinction between cases that are subsumable under general rules and cases that are not. As in Chapter 5's discussion of the ethical importance of the easy case, here we are concerned with understanding the outer limits of reason itself in the phenomenon of rational judgement. The temporal aporia that we have uncovered (with substantial assistance from Heidegger) stems from Kant's inability to provide a coherent account of the primordial *unity* of universal laws – a unity without which the notion of rationally subsuming cases under a norm (i.e. just *this* time-spanning and self-identical norm) is unthinkable. The foregoing critique of Kant's system implies that it is not the 'logical' unity of universal norms which determines right action, but rather the other way around: what we *call* 'right action' in any given case retroactively bestows unity (for that case alone) on the very law that is supposed to 'govern' it. In short, the rule of law does not rest on the atemporal or trans-temporal rational unity of laws that rule. On the contrary: to conserve the law means to found it as something new each and every time it is applied.

In the end, Kant's account of cognition and action on the basis of grounds delivers us yet another version of the old metaphysical chicken-or-egg problem. In discussing the place of the imagination in Kant's system, Heidegger (1997a, 91) notes that 'if receptivity means the same as sensibility and if spontaneity means the same as understanding, then in a peculiar way the power of imagination falls between them'. Imagination, the way Kant conceives of it, is a peculiar kind of philosophical hermaphrodite: half time-bound and half timeless, half chicken and

half egg. On the one hand, being (in the form of the Kantian subject) gives time and history. But on the other hand, time and history also give being, by first endowing the faculty of imagination with its primordial power to synthesise intuitions, the categories, and the laws of practical reason. The puzzlement and embarrassment that results from this paradoxical situation merely reinforces the urgency, as well as the poignancy, of the fundamental conflict between the concept of linear time and the concept of existential time.

The Motivational Poverty of Existential Time

Even the most persuasive phenomenological critique of the magical view of language will never completely dull the attraction of the concept of linear time so long as human beings (*a*) fear the lawlessness of others and (*b*) crave the comfort of textual justifications for their actions. Suffering, not reason, is the ultimate ground of attachment to the image of the timeline and the meaning bodies it 'contains' – *fear* and *craving* rather than the mere itch of an emotionally indifferent intellectual interest or curiosity. This is why no mere philosophical demonstration of the allegedly deep 'truths' of time and meaning, however insightful, will ever succeed in completely overcoming the magical view of language and the linear conception of time in which it is embedded.

Ralph Waldo Emerson once said of America, that '[t]he mind of this country, taught to aim at low objects, eats upon itself'. But if the idea of secular and religious meaning bodies located at various points along the timeline is vulgar and unsophisticated compared to existential time's horizon metaphor – if the one presents the mind with lower objects than the other – then perhaps there is a reason for its greater popularity that goes beyond mere human laziness and stupidity. Perhaps what makes the image of a timeline full of meaning bodies so appealing is that it quiets a deep-seated fear that justice, like injustice, might really be a cannibal's feast all the way down.

The concept of the rule of law, understood metaphorically as the dominion of determinate legal meaning bodies deposited at some earlier point on the timeline, exerts its strongest influence on our emotions when fear of the lawless savagery of others is at the forefront of our concerns. In such cases – of which fear of the totalitarian concentration camp is perhaps the purest example – our feelings rebel at the principle that anything (or everything) is possible and we are drawn to an image of what the law reasonably means and must mean – *in advance* – if it is to hold the savagery of others at bay. Agamben's remarks (2000, 40) on this point are particularly revealing:

> Hannah Arendt observed once that what comes to light in the camps is the principle that supports totalitarian domination and that common sense stubbornly refuses to admit to, namely, the principle according to which anything is possible. It is only because the camps constitute a space of exception – a space in which the law is completely suspended – that everything is truly possible in them.

It is important to understand that the phrase 'anything is possible', as well as Arendt's actual phrase, 'everything is possible' (2004, 565), signifies at the level of grounds rather than at the level of causes. That is, Agamben and Arendt do not say that in the camps the laws of physics and biology do not hold, and therefore human beings can perform empirically impossible deeds such as flying to the moon by flapping their arms. Instead, these thinkers seem to be saying that in the camps human law (i.e. what the law's language *means* in advance) does not hold. They seem to be saying that the entire category of rationally *ungrounded* (as opposed to uncaused) action has been abolished, and along with it any notion of legal and moral accountability. If I am right about this, then the phrase 'anything and everything is possible' evokes fear of anomie rather than the fantasies of science fiction. It signifies 'anything goes'. It means that without the law to constrain us, anything we *can* do we *may* do. Thus, so long as some human beings are in a position to threaten others – so long as they can kill and inflict pain in the name of what they think is necessary, right, or good – there will always be partisans of linear time who reproach the concept of existential time for providing no stable ground or reason for advancing religious objectives or protecting human rights.

On the other hand, there is a big difference between the *fear of lawless action* and the *desire to justify* other people's suffering. When it comes to law and religion, the fear of anomie is not the only thing that is going on: the justification of human suffering is co-equally at stake, together with the personal responsibility of those who have inflicted it. The metaphor of objective legal meaning bodies located on the timeline is most beguiling when it seems to protect us against the lawlessness of the camps, where 'power confronts nothing other than pure biological life without any mediation' (Agamben 2000, 41). But let the metaphor change its venue to the well-regulated courtrooms and police stations of Western liberalism and its charms can begin to fade. There the metaphor can serve, all too often, as a flimsy cover for sanctimonious oppression and bureaucratic callousness. Levinas (1998, 95) brings out this aspect of the metaphor of enduring legal meaning bodies in linear time when he refers to the 'strange failure of justice … behind the rational administration of pain in the penalties meted out by human courts'. Undoubtedly Rousseau (1993, 98) also had something like the latter venue in mind when he said, concerning the origins of law and government, 'All ran headlong to their chains, in hopes of securing their liberty; for they had just wit enough to perceive the advantages of political institutions, without experience enough to enable them to foresee the dangers'. In sum, there will always be some partisans of existential time who are prepared to reproach the adherents of linear time for their tendency to promote a false and dogmatic sense of certainty about the 'contents' and responsibility-relieving determinacy of sacred texts and legal norms.

Consider Derrida. Earlier in this chapter we saw how Derrida's analysis of justice turned linear time against itself by using its own presuppositions to create a logical-formal paradox. However, the entire demonstration, including especially the idea that there can never be a present moment in which a person is simultaneously just *and* responsible, was predicated on Derrida's commitment to the truth of his own particular conception of existential time. To be sure, when Derrida claims that there is 'no time' at which one can 'presently' say that a decision is just, he is saying that such a present moment cannot be demonstrated *on the timeline*. But in his notion of 'undecidability'

one can find more than just a negative critique of linear time. Undecidability bears the unmistakable stamp of a positive, existential conception of time. Roughly speaking, Derrida defines the undecidable (if defining is not too gross a concept in this context) as a radical indeterminacy that 'remains caught, lodged, as a ghost at least, but an essential ghost, in every decision, in every event of decision' (2002, 253). For him, there is no 'event' of deciding as such – there is only the unstoppable movement of deciding and re-deciding. It would seem that the idea of existential time, in the form of Derrida's *undecidable*, is determined to keep on haunting the naïve certainties of those who believe in the absolute truth of linear time.

The political motive for this determination to haunt shows itself plainly in Derrida's impassioned critique of what he calls 'today's dominant juridical discourse' (2002, 253). Not content merely to say that this discourse 'of responsibility, of conscience, of intentionality, of property and propriety … is fragile and theoretically crude', Derrida also asserts that judicial 'decisionism (naïve or sophisticated)' produces baleful *effects* that 'are concrete and massive enough to dispense here with examples'. In other words, Derrida alleges (or hints) that the conventional project of attempting to rationally ground decisions in the pre-existing meanings of legal norms is essentially an engine of cruel injustice.

Vladimir Jankélévitch's sarcastic account (2005, 3) of the unseemly sense of self-satisfaction enjoyed by the typical deontological moralist illustrates why this might be so:

> The satisfaction of having done one's duty that is supposedly 'accomplished', in the passive past tense, is a testament for which dogmatism actively claims responsibility. Indeed, many moral automata and virtuous parrots believe that they possess a heart that is habitually pure, boast of their purity in the manner of a chronic habit, profess purism, and claim to enjoy the fruits of their merit.

Elsewhere Jankélévitch (2005, 3) speaks ill of the kind of Leibnizian theodicy that always seems to serve as 'a justification for apparent injustice', just as Derrida himself elsewhere condemns those who cannot bring themselves to be 'dutiful beyond duty' (Borradori 2003, 133). What both thinkers seem to abhor is the macabre mixture of disgusting hubris and abject suffering that is produced by the very attitude towards justice and morality that the conception of linear time proudly holds up as its most important achievement. I am referring, of course, to the idea that a just or righteous action can be predicated on, and assured by, the meaning-full authority of an objectively secure legal or moral ground.

Hence Derrida's essay *Force of Law* will eventually invoke the idea of a 'justice' that is capable of confronting and challenging the authority of the law by virtue of its very *absence* from linear time. This sort of justice is never 'here', never 'done', but always to come (*à-venir*). Un-presentable and un-re-presentable in principle, it 'remains by coming' (*la justice reste à venire*), and it takes the form (if that is the right word) of an 'event [that] exceeds calculation, rules, programs [and] anticipations' (2002, 256–7). It is not difficult to trace the intellectual parentage of Derrida's claim that justice, if such a thing exists, is 'the experience of absolute alterity' (257), or his related claim that the infinite deconstructability of law *is*, in some sense, the same

as justice itself (243). The idea of existential time, like a strong beacon, floods the sentence '*La déconstruction est la justice*' ('Deconstruction is justice') (243) with light, just as it continues to illuminate Heraclitus's intimately related thesis (1987, 55) that it is not possible to step into the same river twice.

The main aporia of linear time consists in the utter incomprehensibility of the idea of a *passage*, in freedom, from a present moment of freedom to a future moment of being bound. The idea of existential time resolves this enigma by doing away with the timeline and its allegedly well-formed moments, thereby also doing away with any need for a well-grounded passage from norm to action. However, the existential conception of time manages to produce its own aporia, for it delivers us the troubling image of a horizon-enclosed now-time in which literally nothing stands still long enough to count as a stable ground. It is all well and good for someone like Derrida (1981, 93) to assert, 'Deconstruction is not *neutral*; it *intervenes*'. But in what direction should this breathless, justice-seeking intervention intervene if, as a matter of principle, the concept of existential time *never* allows us comfortably to rely on a workable compass?

The previous question may strike some readers as unforgivably crass, inasmuch as it seems to invoke pragmatic concerns and psychological comfort as the ultimate criteria of philosophical truth. But the form of the question does begin to show why philosophies predicated on the concept of existential time generally come across as so deeply unsatisfying to people who yearn to be righteous and just *on the basis of something*. If, as Kafka (2006, 8) says, '[t]he decisive moment of human development is continually at hand … because as yet nothing has happened', then the average person yearns to know what *should* happen as a consequence of his continually having to exercise his existential freedom. To be blunt about it, the average person wants to believe that law and religion give us meaning bodies to cling to. As one of postmodernism's many critics might put it, the idea of existential time might be good at tearing things down, but it does a poor job of building them up again. It removes meaning bodies but does not offer to replace them with anything except a radically unbounded sense of freedom.

The thought of existential time, by its very definition, leaves no platform on which anything stable and enduring could ever be conceived or constructed. *Nothing* endures in existential time. Thought rigorously, the concept existential time is inconsistent with both ipseity (a being's self-sameness) and aseity (a being's power of self-origination), for it provides no stable site for *any* sort of identity, whether of meaning or of being. 'It is always in the present that we are centred, and our decision starts from there', says Merleau-Ponty (1962, 427). 'Each instant is a beginning, a birth', remarks Levinas (2001a, 75), and 'its departure is contained in its point of arrival, like a rebound movement'. Not only does the concept of existential time privilege the present moment as a merely ontological matter, it also tends to privilege it as an ethical matter: 'With each new instant', remarks Jankélévitch (2005, 51), 'moral progress begins again from zero.'

Even Nietzsche's notion (1968, 330) that '[t]o impose upon becoming the character of being … is the supreme will to power' cannot withstand criticism from the standpoint of the only interpretation of existential time that seems to make any sense. Why should the humanly stamped 'meanings' of institutions such as religion

and law, or even the will to power itself, remain any more securely 'themselves' than anything else in existential time? And if the answer is that it *is* possible for them to remain themselves, if only for a while, then there would be nothing but rhetoric to distinguish existential time from linear time after all. For in that event the *stable illusion* of stability would undoubtedly serve the project of grounding just as well (or just as badly) as genuine stability would. If, as Nietzsche implies, an objective meaning body as such cannot exist as a unity (❒) in existential time, then it is hard to see how the subjective *illusion* (❒?) of a meaning body could exist there as a unity.

Benjamin's brief for existential time, in his essay *The Life of Students* (1996, i. 37–47), unwittingly demonstrates why common sense finds the concept of existential time so enigmatic and troubling. Here Benjamin (37) portrays history as 'concentrated in a single focal point', and rejects as inadequate any 'view of history that puts its faith in the infinite extent of time and thus concerns itself only with the speed, or lack of it, with which people and epochs advance along the path of progress'. Ethically speaking, the concept of linear time seems to lend altogether too much credence to the project of breaking eggs to make omelettes. Even granting that, however, why does Benjamin say that the idea of the infinite timeline is also *inadequate*? Benjamin answers this question by stating, fairly enough, that the linear conception of time and progress 'corresponds to a certain absence of coherence and rigour in the demands it makes on the present' (37). But if this is so, then how can existential time's claim that history is concentrated within the horizon of the now cure this defect? The categories of coherence and rigour pertain to the concept of grounds and the derivation of action from grounds. The concept of linear time attempts to resolve the paradoxes created by the presupposition that everything is in flux by letting the moments of time *settle down* into stable receptacles that contain meaning-full grounds. Only the being of a ground (or of a ground-like being) can transform the action of making 'demands' on the present from an inarticulate snarl into a purpose-driven plan that allows one's actions to show themselves as 'coherent' and 'rigorous'.

This shows the principal aporia of existential time: the image of an eternal horizon surrounding the now collapses the distinction between ground and grounded so completely that there is no longer any difference between them. Since no light can escape from this particular black hole, neither can any answer to the question 'What is to be done?' Existential time's only internally consistent response to this question is to say that each of us can only ever hope to be alone and on his own in what Nancy (2003, 34) calls a 'primitive and final fact of a thinking secured by nothing outside its own freedom'. Inasmuch as Nancy defines freedom itself 'as the infinite absenting of the appropriation of sense' (13), one cannot help wondering what better worlds can be imagined or constructed by means of an *absence* of sense. In Nancy's remarks, which are not untypical of the genre of radical existential thinking, as well as in Sartre's more famous thesis (1956, 553) that we are 'condemned to be free' no matter how many earthly chains weigh us down, it is possible to catch sight of existential time's most disquieting aporia. 'To be deprived of rules without being deprived of truth', as Nancy (2003, 17) puts it: what does this mean? Like Heidegger's famous jug, the quintessential existential conception of truth signifies that truth is full of absence – that its reality 'does not lie at all in the material of which it consists, but in the void that it holds' (1971, 169).

Properly thought, the image of a void containing an utter absence of meaning bodies is only a slightly distorted reflection of what makes the metaphor of linear time itself aporetic: just as linear time displays moments that always must be filled with *something* calculable, regardless of the phenomenal facts of the case, existential time displays the horizon of a now-moment that always must be 'filled' with *absence*. This is why I took pains to say, in Chapter 5, that the phenomenon of reception at the moment of decision is characterised not by the 'presence' of a void, but by the simple inability to find anything inside or outside of consciousness that could fairly be called a rational ground for following norm-sign 'X' this way as opposed to some other way. In contrast, perhaps the best illustration of the intellectual compulsion to fill up existential time with absence is Derrida's notion of *différance*, according to which the origin (i.e. the meaning, the being, or whatever) always differs from itself (in space) *and* defers itself (in time), leaving only the 'presence', as it were, of absolutely nothing solid to stand on (see Nancy 2003, 92–3).

In linear time, the master becomes a slave of his creation. In existential time, there is mastery without slavery, but the master is always at a loss about how to begin mastering himself. And while it is true that absence can make the heart grow fonder, as the saying goes, radical existential absence makes awfully thin gruel for anyone eager to begin imagining and constructing a more just or righteous world.

Speaking more generally, there is more than a little plausibility to Kant's claim (2000, 26–9) that human beings tend to associate feelings of pleasure with homogeneity and unity, and feelings of displeasure with heterogeneity and disunity. If this is so, then the horizon-enclosed now-time of existential time – the bearer of heterogeneity and disunity *par excellence* – furnishes an image of the rule of law that must be more than a little off-putting to those who like to be pleased by their concepts of the world. Despite its claim to be an agent of liberation for those who are prepared to endure the anxiety it creates in the interest of living authentically (cf. Heidegger 1962, 234–5), the existential conception of time comes perilously close to being a motivational downer, so to speak. It seems to tolerate (if not advocate) a plan to have no stable plans that would ever let people know *what* they are supposed to do and *how* they are supposed to act. In a nutshell, the concept of existential time seems to fetishise absence just about as much as the concept of linear time fetishises presence.

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Chapter 7

The Tragedy of Law and Justice

> For in much wisdom is much grief: and he that increaseth knowledge increaseth sorrow.
> Ecclesiastes 1:18

Reprising the Metaphorical Relations among Time, Meaning and Freedom

Thinking *in* (as opposed to *about*) the metaphor of linear time, the faculty of rational human judgement seems to throw a 'bridge' (see Kant 2000, 38) between supersensible freedom, which operates on the basis of meaning-full grounds (at t_1), and sensible nature, which operates on the basis of mere causes and effects (at t_2). Those who live on the timeline think that it is relatively easy to retain the unity and objective truth of their grounding statements for long enough to provide themselves with secure foundations for law and justice. In linear time, either the idea of the sun (to use Plato's metaphor) has an everlastingly 'true nature … in and by itself in its own place' (*Republic* 516b 5–6) (natural law theory), or else it is able to *stand still* long enough to be just *itself* when seen by this or that historically situated group or individual (positivism). If people's deeds fall short of their beliefs and aspirations, this is not because there is something defective or unstable about their concept of 'ideas' and 'meanings' as such: it is because the flesh is weak, or because the moments of linear time are filled with obstacles that stand in the way of their good intentions. The golden meaning bodies of their ideals – including $\square_{\text{Justice}}$ and $\square_{\text{Righteousness}}$ above all others – are capable of remaining true and steady throughout *some* span linear time (whether short or long), even if mortal human beings always seem to fall short of achieving 'them' in reality.

Thinking in the horizon metaphor of existential time, however, the act of judgement is not a bridge that spans disparate moments of time, for the simple reason that the eternal now, which completely encircles and enables being, contains no gap between moments that need to be bridged. Instead, the event of judging is more like a hectic construction site in which the world is constantly being created and recreated according to plans that are always changing. In existential time, human beings do not 'correctly' see or interpret today's sun to be the same as yesterday's sun. Rather, for them '[t]he sun is not only new each day, but forever continuously new' (Heraclitus 1987, 13). In existential time, the past is real only to the extent that it is presently remembered. Moreover, textual and ideational meanings are always falling into disunity and indeterminacy, and therefore those who live within the horizon of the now must continuously renew and recreate their grounds for acting. As for the juridical sphere, if real law-doing disappoints – if it is always falling short of the human aspiration for justice – then there can be nothing and no one in particular to

blame for it. This is because the practice of blaming requires blameworthy (stable) beings, whereas in existential time 'nothing solid is its solid self', as Wallace Stevens (1990, 345) puts it. Locked within the horizon of existential time, it is hard to see how human norms, beliefs and aspirations are any different from what is constantly being *done* with them.

This book has not attempted to decide or choose between these two conceptions of time and meaning, but rather to understand how a dogmatic attachment to *either* of them can produce outcomes that, as Dickens (1948, 3) famously remarked, display both the best of times and the worst of times. On the one hand, existential time gives us plenty of freedom but very little sense of security. On the other hand, linear time gives us a feeling of security but very little sense that we are free. One of the principal things at stake in these meditations has been the relationship between the conventional certainty that freedom and reason can initiate and determine human action and the equally privileged certainty that the norms of law and justice can and do 'mean' something coherent, right and just in advance of their applications. If pure reason cannot 'prove' the existence of the transcendental faculty of freedom, as Kant (1998, 484–9) claims in the *First Critique*, this is only because the attempted proof presupposes the concept of linear time so completely that its author cannot conceive of such a freedom except 'outside the world' (489), where '[f]reedom (independence) from the laws of nature is indeed a liberation from coercion, but also from the guidance of all rules' (485). On the other hand, if pure practical reason requires the idea of a freedom that is both law-giving and law-following, as Kant's *Second Critique* (1996, 166) claims, then this is only because the argument ignores the radical indeterminacies and painful sufferings that history is constantly throwing at our feet.

One could say that the difference between linear time and existential time corresponds to the difference between being principled and being free, thinking and acting, reason and intuition, determinacy and indeterminacy, and righteousness and compassion. On the one hand, the concept of linear time attempts to reconcile reason and history by giving law and justice a proper textual grounding in the meaning bodies of norm-signs. In doing this, however, it invents ghosts, as Wittgenstein says, and does not pay close enough attention to itself – to the manner in which reason actually *receives* 'reasons' during the lived passage between words and deeds. It also overlooks the deep truth uncovered by Goethe's translation (1964, 185) of John 1:1: 'In the beginning was the *Deed*', says Goethe's Faust, and not a feeble little linguistic sign.

On the other hand, the concept of existential time claims to *be* history by providing a real and tangible site in the now for what this concept takes to be the inescapably groundless or 'abyssal' (*ab-gründig*)[1] enactment of the precepts of law and justice. But it, too, neglects something important. If, in existential time, 'a meaning cannot be separated from the access leading to it' (Levinas 1996, 44), then how can there be grounding ideas for a better world that are any different from the world as it always already shows itself? The notion that grounds are in some sense *the same* as the act of grounding cannot answer Kant's classic riposte to any philosophical attempt to privilege deeds over words: 'Thoughts without content are empty, intuitions without

1 The term is Heidegger's (see Inwood 1999, 84).

concepts are blind' (1998, 193–4). In brief: if the quintessential subject of linear time is fated to become a mere object of her object, then the quintessential subject of existential time is fated to become a traveller without a destination. If this choice seems unpleasant, then an awareness of this unpleasantness might be a *good* thing, ethically speaking. It might lead one to wonder whether there is any other way to think about the temporal situation of law's task.

A Decisive Confrontation between Linear Time and Existential Time

The image of time as a medium or force that *moves*, either pulsing along a line or swirling through a horizon, belongs to what Yeats (1983, 493) calls our *Spiritus Mundi*, defined as 'a general storehouse of images which have ceased to be the property of any personality or spirit'. Although we get our idea of a thing being in motion from watching material objects change position in space, we tend to cling to the image of moving time even though we realise, deep down, that time is not a material object in space. Try looking around in space for time and you will find plenty of time-related things (calendars and clocks, for instance), but nothing that you are likely to want to call *time itself*. Notwithstanding time's puzzling absence from space, however, the word 'time' still manages to summon from our *Spiritus Mundi* not one, but two particularly powerful variations on the theme of moving time.

According to one of these images, time moves from an invisible future into the present, and then disappears into the past. The representation *Future* → *PRESENT* → *Past* portrays the future as the wellspring of an unseen force that ceaselessly renews and surrounds the present, continually pushing the past into oblivion over the horizon of the now. Hence we say that time flies; hence we are able to grasp as plausible Plutarch's rendering of the famous Heraclitean river metaphor: 'It is not possible to step twice into the same river' (Heraclitus 1987, 55). But we also carry a second picture of time around in our *Spiritus Mundi*, side-by-side with the first. In the traditional image of causation and grounding, causal forces and humanly posited meaning bodies are depicted as moving from the past into the present, and thence on to the future in a straight line that contains formally identical moments. This second representation is *Past* → *Present* → *Future*, and in it the past is seen as the relentless accretion of a content that extrudes itself into the present and the future in the form of the effects of what has been on what is and what will be. Hence we say that our tradition and context determine or constrain how we see the world and what we can do in it; hence we think of the rule of law in terms of the meanings of laws that rule; hence we grasp the plausibility of Faulkner's epigram, 'The past is never dead, it is not even past' (see Arendt 1968, 10).

The first image portrays the future as a mystical origin and the past as merely the detritus of a primal force that spends all of its energy in bursting forth into the present. Although this picture tends to confirm our hopes that something better is coming, it also supports our fears that something worse may be coming. Herman Melville's couplet, 'The poor old Past/the Future's slave' (Bartlett 1980, 572), paints this image well: here existential time holds complete sway over linear time by violently interrupting the continuum of history, replacing the timeline's well-ordered sequence

of moments and meaning bodies with a now-time that is continually reinterpreting and reinventing the past in the interest of the future.

The second image makes the past into the origin of all that is present, and paints the future as an heir of the third generation, destined to inherit just what the past lets the present hand down to it. Although this picture tends to confirm our faith in the continuity and meaning of our lives and traditions, it also supports the suspicion we sometimes have that, when all is said and done, our lives will have consisted in merely plodding and deepening the rut in which history threw us at birth and sustained us in life. Here linear time holds complete sway over existential time by erasing the very idea of freedom from our grammar and our politics, replacing it with a sequence of objective causes that have controlled our past and a sequence of previously posited objective meaning bodies that should and will control our future.

The image *Past → Present → Future* paints a variation on the theme of linear time; in this picture the *presence of the past* in our habitual ways of being holds the present and future down, like a wet blanket lying on top of a flower bed. Contrariwise, the image *Future → PRESENT → Past* paints a variation on the theme of existential time; in this picture the *absence of the past* from the ever-renewed horizon of the present sweeps the past into oblivion, like a broom, and leaves the future nothing to inherit. Both images are frightening, for they make it seem that it is just as bad for the past to be absent as it is for it to be present. Reading them together allows us to notice that thinking temporality solely in terms of a horizon-enclosed now would not necessarily be a net gain if the future were liberated from the past so completely that all criteria of law and justice, not to mention the various inherited traditions we cherish, were to be utterly forgotten or pushed aside. Indeed, if one agrees with the sociologists that the future has a meaningful shape only by virtue of the order of the past being projected on it (see Berger and Luckmann 1967, 19), then a completely liberated future is quite literally unthinkable. But if the ultimate value of the image of existential time is in doubt, so too is the ultimate value of the image of a meaning-encrusted timeline: a future that is utterly choked by the past, in the form of memory, routine and oppressive meaning bodies, would never even have a chance of getting away from what has gone before.

The two images mentioned above might impress us as contradicting one another were it not for our habitual tendency to bring only one of them to mind at any given time, as suits the occasion. But in a parable that he wrote in 1920 under the title *Er* ('*He*'), Kafka combines the two images to create a third one that makes the contradiction explicit. In Hannah Arendt's translation (1968, 7) of the parable, Kafka has past and future coming at one another from *opposite* directions:

> He has two antagonists: the first presses him from behind, from the origin. The second blocks the road ahead. He gives battle to both. To be sure, the first supports him in his fight with the second, for he wants to push him forward, and in the same way the second supports him in his fight with the first, since he drives him back. But it is only theoretically so. For it is not only the two antagonists who are there, but he himself as well, and who really knows his intentions? His dream, though, is that some time in an unguarded moment – and this would require a night darker than any night has ever been yet – he will jump out of the fighting line and be promoted, on account of his experience in fighting, to the position of umpire over his antagonists in their fight with each other.

The man is depicted as the *only* being standing between the past and the future in this parable. He lies within his own skin, so to speak, squeezed into the only place he *could* stand: that fully embodied portion of time-space which only a living, breathing human being can inhabit. He and he alone absorbs the full brunt of the forces breaking upon him simultaneously from two sides. In contrast to the familiar metaphors of the timeline and the horizon, the image that Kafka paints here cannot be found on any of the well-thumbed pages of our *Spiritus Mundi*. His image is PAST → 🧍 ← FUTURE, or, if you will, FUTURE → 🧍 ← PAST.

The past is not the 'dead weight of the past' in Kafka's image, but a living force that pushes the man into the future, while all the while the future, no less alive, and certainly not reduced to the status of something that is just 'waiting to happen', keeps pushing the man into the past. Past and future are literally at war in this image, and each tries to liberate the ground that it has lost in its fight with the other by allying with the man. The parable does not allow us to know whether it is the past or the future that comes from the origin, for their identities are masked under the generic description 'antagonists'. And while the man himself is clearly a combatant in this fight, we are not even allowed the basis for a prediction of which force, past or future, will prevail. Of course, one would think that two against one is normally pretty good odds. But while past and future each support the man in his fight against the other, Kafka tells us 'it is only theoretically so'. For the direction in which the man himself intends to fight is unknown, perhaps even to himself.

The man in Kafka's parable is a figure for human freedom: the venue, so to speak, for the fateful struggle between what we call the past and what we call the future. But the man's kind of freedom is hardly an unequivocal boon to humanity. It certainly should not be confused with the Heideggerian sort of freedom, surrounded by the horizon of existential time, which first lets beings be encountered and understood as beings. For someone like Heidegger, freedom fulfils itself in grounding, or rather, in 'freedom for ground' (1984, 218); it consists in 'the possibility of grounding in which man creates beyond himself' by the giving and the taking of grounds (1999a, 334). In contrast, the man in the parable finds himself presently unable to posit and create beyond himself because he is too busy being pushed from both sides to know his own intentions. Nor should the man's situation be confused with the familiar Kantian sort of freedom, embedded in linear time, where reason lays down or acknowledges universal laws (at t_1) that are then (at t_2) taken to warrant the rightness of future actions (at t_3). Although the concept of the latter sort of freedom is 'formless', as Kant (2000, 34) puts it, at the same time it is *form-giving*: it righteously (or self-righteously) gives and follows the meaning bodies of its grounding statements.

In contrast, the freedom that besets the man in *He* is tragic, in the precise Greek sense that it betrays itself as un-free and self-defeating *whatever* it does. Kafka's man knows that he must try to accomplish a contradiction: he must at once *hold on* to the forces generated by the past and *let them go*, so that the future has a chance to emerge on its own terms. His freedom must somehow 'gear itself' (Merleau-Ponty 1962, 439) to his situation, so that the meshing of these two gears (freedom and its situation) can accomplish what is called his 'life'. But the man is understandably at a loss about how to go about accomplishing a contradiction, or even attempting to accomplish it. This is why he dreams, impossibly, of escaping from the fighting line: for continually having

to experience oneself as the living site of a perpetual confrontation between the forces of past and future is far less comforting than resting on the self-certain knowledge that one's actions either *are* grounded (*à la* linear time) or *are not* grounded (*à la* existential time) on what the scholastics used to call a *fundamentum absolutum et inconcussum* ('absolute and indubitable foundation').

A Maelstrom of Forces: PAST → 🧍 ← FUTURE

Kafka's *He* ratifies (in the way good art sometimes does) a philosophical account of time that in one form or another has dominated Western metaphysics since Kant's day. As mentioned above, this is the thesis that time is not an objective property or determination of things in themselves, but rather a medium or mode of ordering which finds its true home only in the context of *human* experience. 'Die *Zeit ist sinnlos*' ('*Time itself* is meaningless'), as Heidegger puts it (1992, 21E). On this view, animals and rocks may come and go, may even possess formidable capacities, but they do not experience temporality as such, or if they do, *we* have no way of knowing it.

Perhaps, as Kant holds, time is only the form of our internal intuitions. Perhaps our experiences seem to succeed one another in the order they do because time is 'in' us as the *a priori* and necessary ground for our experiencing anything at all. But even if time enfolds or comes at us from the outside – even if, as Aristotle (218^b14) says, it is 'present equally and everywhere with all things' – it is still widely believed, at least in the West, that only humans experience time *as such*: time in the form of a force that destroys and renews, and therefore a force that can and must be reckoned with. The comparisons made by Benjamin Franklin ('Time is money') (Bartlett 1980, 348) and Seneca ('time is … life's most precious commodity') (2005, 12) could never have been imagined or written by a squirrel. Indeed, they would not even make sense to us if we did not sometimes experience the categories of time, money and commodities as forces that we can calculate and use. When a squirrel begins to gather nuts for the winter, this is presumably because it instinctively senses a change in the autumn air. But 'there is no time without man', as Heidegger (1972, 16) puts it, because only human beings have constructed a world in which what the word 'time' attempts to uncover *could* make an appearance. Unlike the squirrel, when *we* bring in the fall harvest it is because we think and believe that the chilly state of affairs (or abstraction) we call 'winter itself' will soon be here.

Thus, the situation of the man in *He* is tragic because he brings the contending forces of past and future to bear upon himself and others merely because he and they exist as the kind of beings we call 'human'. This reading, which is rooted in Hannah Arendt's interpretation (1968, 7–15) of the parable, expresses the opinion that we have a special, even constituting, relationship with time. But there is another way in which the existence of people is said to differ from that of animals and rocks. According to a Western philosophical tenet that has been handed down to us from the Greeks, the traditional determination of the human being is 'rational animal'.[2] Ever

2 Aristotle defined the human being as ζῷον λόγν ἔκον ('the animal that has *logos* [speech or reason]'). Although this phrase is conventionally translated as 'rational animal' (*animal*

since Parmenides (1984, 57) identified thinking with being, Western philosophers have privileged thinking as the sign and seal of being human, and have claimed that it is the one activity most worthy of human beings as such. Therefore Arendt, who in this respect thinks and moves wholly within the Western tradition, has no trouble writing that the man's dream of ceasing his struggle to stand outside the fighting line as an umpire over his antagonists symbolises the traditional philosophical aspiration of transcendence. 'And what else is this dream and this region', she asks rhetorically (11), 'but the old dream which Western metaphysics has dreamed from Parmenides to Hegel of a timeless, spaceless, suprasensous realm as the proper region of thought?'

Arendt's interpretation of the man's dream underwrites her project of reading the parable as an ambivalent statement about the task of thinking. On the one hand, she imagines that the man might succeed in finding a standpoint from within his own gap in time that would follow a *third* line of force. She conceives of this line as being formed on a 'diagonal' emerging at an unspecified angle from the clash of the forces of past and future as they meet where the man is. And while different from the forces of past and future, this diagonal force is still connected to them through the man. Following it, she says, would take him into 'the only direction from which he could properly see and survey what was most his own, what has come into being only with his own self-inserting appearance – the enormous, ever-changing time-space which is created and limited by the forces of past and future'. Once the man has directed himself along this diagonal and found his 'place in time', Arendt (12) imagines that his point of view would then be 'sufficiently removed from past and future to offer "the umpire" a position from which to judge the forces fighting each other with an impartial eye'.

In short, Arendt's diagonal force is a symbol for the possibility of true thinking, and with it the possibility of a well-grounded system of politics, law and justice. On the other hand, the unspecified angle of the diagonal symbolises the impossibility of being able to predict, in advance, which way the unremitting struggle we call our lives will permit us to go. If there is such a thing as true thinking, it is above all a human activity. This thesis retells, in its own special way, the old Kantian story of how time relates to the self who feels and thinks. Time is not an objective 'what' that is intuited, but neither is it a subjective 'property' that resides within an otherwise intelligible self. Rather, time is the form of all intuitions whatsoever, including the intuition of self. Thus it comes to pass that the thinking self, in the form of 'time', comes out of itself to encounter itself in the form of a 'self'. There is not first a self that then thinks; there is only thinking, including that mode of thinking in which something called a 'self' first appears or is constructed. On this view, true thinking is always a *doing* that is intransitive with respect to its own direction. This means that it can never depart from itself to survey the direction in which it is (already) going without ceasing to be a doing – without ceasing to be itself. Paradoxically, true thinking (if it exists) always makes its own direction, but at the same time it always *is* this direction.[3]

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rationale, in Latin), Heidegger (1962, 47) asserts, rather verbosely, that it ought to be translated as 'that living thing whose Being is essentially determined by the potentiality for discourse'.

3 Cf. Andrew Kelley's fine summary of Vladimir Jankélévitch's theory (2005, xxv) of freedom: 'At each moment when we have to make a moral decision we are free to choose.

It follows, on this reading, that the *best* the man in *He* could do is find his way onto a diagonal that is different from, but nonetheless inextricably linked to, the forces of past and future. But he also could do a lot worse. Indeed, Arendt tells us that a far more pessimistic interpretation of the parable is 'much more likely' (12). According to this other reading, the parable is saying that the task of thinking what is worth thinking – of occupying the proper region of thought – is hopeless. It implies that one might as well give up on the possibility of achieving true justice. The impossible task that true thinking faces when, as always, it is caught up in the forces of an ultimately unknowable fate is also a favourite theme of Western thinkers. From Sophocles to Nietzsche we have heard the story told, again and again, that the one animal in the world that pretends to be rational might not be so rational after all. Greed, the impulse to savagery, the hubris of knowers who do not know the limits of their knowledge, and the tragedy of unintended consequences: these form some of the plot lines of the pessimistic story.

It is important to recognise that this pessimistic view of humanity is not completely alien to the opposing view which celebrates people's superior status as rational animals. On the contrary, the pessimistic view is knotted to the dream of transcendence through thinking in the same way that the negation of any proposition is: it questions or denies just *this* claim, and not some other claim, just as Sherlock Holmes is shown struggling with Moriarty and not some other villain in Figure 2.1 (page 45). Hence it is that Arendt's second interpretation has the man trying but failing to find his way onto the diagonal that would take him out of the fighting line, rather than trying and failing at some other task. Unfortunately, she says, chances are that the man, after vainly seeking to find the diagonal for a long enough time, will simply '"die of exhaustion", worn out under the pressure of constant fighting, oblivious of his original intentions' (13).

The optimistic and pessimistic interpretations of *He* sit side by side, united in their opposition to one another. They push against the reader from opposite directions, just like the forces of past and future push against the man in the parable itself. Each one appears to demand a decision from the reader: 'Is true thinking (and all that comes with it, including justice) possible in the face of the contending forces of past and future? Yes or no!' But perhaps the parable is really telling us is that it cannot be decided in principle whether true thinking is still possible for human beings occupying the turbulent time-space of the twenty-first century. In our all-too-fresh memory images of ethnic hatreds and genocides, for example, the past triumphs over the future. While in our nightmare images of nascent biological and environmental catastrophes that may burst forth in the next century, or in the next decade, to sweep away entire ecosystems, peoples and cultures, the reverse is true. Thus, one might say that *He* ultimately symbolises intellectual surrender in the face of an enigma. On this view, the parable says that the possibility of true thinking is not decidable precisely because it

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The previous moment is gone and we must choose again in this moment. The problem that exists – and this shows the acuity and radicality of Jankélévitch's philosophising – is that we can choose to act in any manner; we can love, we can forgive, we can follow some system of ethics, be it Kant's or Mill's or Aristotle's.'

cannot be known whether we puny humans will ever gain enough wisdom to keep our past from overwhelming our future, or our future from overwhelming our past.

By interpreting time on the basis of the metaphor of contending forces rather than as a line or a horizon, the foregoing remarks are meant to gesture beyond law and justice, and even beyond philosophy, towards the realm of tragedy. They mean to say that the man in Kafka's parable seeks to escape, not from time itself, but from the forces that he himself is responsible for unleashing, simply by virtue of being alive. By persevering in his being, the man keeps on inserting himself into the infinite causal web, sending off vibrations in countless different directions. And who can know where all these vibrations will lead, and what mischief they may accomplish? For the first time it becomes possible to think that *He* is not just a parable about Everyman's egocentric problems. Perhaps Kafka's man is worried about more than just his own fate – perhaps he suffers from what we have been calling, since Chapter 3, *ethical distress*.

I like to think that somewhere in the man's dream of jumping out of the fighting line can be heard an echo of Pascal's aphorism (1941, 151), 'The self is hateful'. Only a self that is hateful to itself is capable of experiencing the kind of primordial guilt, prior to all individual debts and trespasses, that is expressed in a line of Dostoevsky's that Levinas (2001b, 72) was particularly fond of quoting: 'Each of us is guilty before everyone and for everything, and I more than the others.' One way or another, Kafka's parable leads to a question that Levinas (2001b) was bold enough to put into the title of a book: '*Is it righteous to be?*' An ethical question that is *this* radical can only be asked by someone who thinks of time, not as a continuum of moments (linear time), or even as an ever-renewed now-time (existential time), but rather as a tragic maelstrom of forces that meet where the human body actually *lives*.

But what kind of forces might these be? A short alternative reading of the parable will begin to suggest an answer. Since this reading wilfully appropriates Arendt's English translation of *He* for its own purposes, it goes without saying that it does not play the game of plumbing the parable for any depths that it already contains, or that Kafka (who in any case wrote in German) somehow meant or intended. It goes like this:

The man is fighting not an entity called 'time', but rather forces that he himself has made and unleashed. Metaphorically speaking, he stands, like an animal or a rock, at (or as) the vortex of a maelstrom, not 'on' a line or 'within' a horizon. The word 'maelstrom' denotes a powerful whirlpool, and comes from the early modern Dutch terms *maalen* ('grind, whirl') and *stroom* ('stream'). In addition, it connotes a situation of confused movement or upheaval – a situation of disorientation rather than reason, of *chaos* rather than *nomos*. Standing at the vortex of a maelstrom of forces, the man in Kafka's parable is not pushed back and forth by the past and future as such, for these 'parts' of time are mere abstractions. *Instead, he is pushed back and forth by the power that he has let his own words and images acquire over him.* Although he has unstopped the bottle of language to let the genies of past and future descend upon him in force, he fails to see that they are merely paper genies with the words 'past' and 'future' written on them. Beset on all sides by words and images, he dreams not the dream of transcending time and space in thought, as Arendt has it, but the dream of transcending the pain of ethical distress on account of the world's infinite suffering.

In this dream, the umpire position of which the man dreams goes back to the Middle French origin of the word 'umpire': the man is literally *nomper* ('not equal') when he dreams of standing outside the fighting line. In particular, he is not equal to the *metaphors* that time is a line or a horizon, for they are merely images and he is a human being. He recognises that these images, together with the many secular and religious doctrines they facilitate, are utterly incommensurable with the categories just/unjust and righteous/unrighteous, and that he and he alone is responsible for how the images and doctrines are employed. And just before he wakes in *this* dream, the man finally recognises (with the absolute certainty that we sometimes feel in dreams) the absurdity of either worshiping or scorning images that he himself has made. When the man finally awakes, what he sees, after wiping the sleep out of his eyes, is the tragic spectacle of his own complicity in the production of what conventional thinking calls just and necessary suffering.

The Sprit of Law's Task

The point of elucidating the contrast between the concept of freedom (grounded in existential time) and the concept of determinacy (grounded in linear time) is not only to learn that these ideas can be made to contradict one another in a purely logical or formal sort of way. It is not the aporias of linear and existential time that are tragic, for as Levinas (1994, 86) says, the mere existence of a logical antinomy is never tragic in itself. It would be better to say that the activity of unpacking the temporal structures which conceptually support the value spheres of freedom and determinacy in law and justice puts us in a position to interpret each of these values in a manner that gives serious affront, so to speak, to the other. If the mutual effrontery that freedom and determinacy offer each other is a scandal that leaves our confidence in both concepts a bit shaken, so be it. There is always a price to be paid for any effort to achieve worldly wisdom, and in this case the price includes an increase in sorrow.

The word 'tragedy' comes from the Greek terms *tragos* (goat)[4] and *aeidein* (to sing), and originally referred to the satyrs represented by the Greek dithyrambic chorus. By the fifth century BCE, however, tragedy had become a full-blown theatrical art form that reflected what Nietzsche (1927b, 951) has famously called the 'Dionysian' worldview. The Greeks 'knew and felt the terror and horror of existence', says Nietzsche (962), and were fully capable of experiencing the 'terrible awe which seizes man, when he is suddenly unable to account for the cognitive forms of a phenomenon, when the principle of reason, in some one of its manifestations, seems to admit of an exception' (954–5). The principle of reason, which says *nihil est sine ratione* ('nothing is without reason'), admits of an exception in the phenomenal sphere that we have called reception. Here a law-doer's concrete passage from his final 'understanding' of a legal norm (in signs and images) to the infliction of legal violence can be explained in causal terms, if we are so inclined, but only from the detached position of an observer. Seen rigorously from within, the law-

4 Akin to the Greek verb *trōgein*, meaning to gnaw.

doer at the moment of decision experiences *absence of doubt* in relation to the use of linguistic signs and images. And a mere absence of doubt, it bears repeating, is neither the presence of a ground nor the presence of an abyss. Linear time hopes to fill the moments of the timeline with meaning bodies (rational grounds) for action; existential time hopes to fill the horizon of the now with the presence of an absence (the void that freedom fills by the giving and taking of grounds). Neither concept sees its primary mission as thinking law and justice under the aspect of tragedy.

According to Aristotle (1449^{b}27–8), the ultimate purpose of a poetically enacted tragedy is to arouse 'pity and fear, wherewith to accomplish [the] catharsis of such emotions' in the audience. Applied to life itself, therefore, the word 'tragedy' is purely metaphorical: it borrows its sense from art, instead of art borrowing its sense from life, as is usually the case. Etymologically speaking, tragedy requires witness, so much so that it is possible to say that the greatest tragedy consists in the fact that almost nothing in life seems tragic at the very moment of its enactment. As the novelist Charles Frazier (2006, 262) astutely remarks, 'History in the making, at least on the personal level, is almost exclusively pathetic. People suffer and die in ignorance and delusion'.

The ubiquitous desire to justify suffering and the impulse to turn away from it – to deny tragedy its proper witness – both reflect what Nietzsche has called the triumph of the Apollonian worldview. The Apollonian in us is aggressively form-giving and form-following. This part of us believes in the necessity and desirability of the human suffering that the meaning bodies of our expressions ($\square_{\text{JUSTICE}}$) seem to call 'just'. It sees its task as getting things done by means of dazzling representations and pleasurable illusions (cf. Nietsche 1927b, 963–4). Above all, it seeks to extinguish any tendency towards irrational compassion that it finds within the human heart.

The claim that law and justice are tragic is therefore not like the claim that elephants are grey. Elephants are grey whether or not anyone is looking at them, but tragedy, as the original theatrical sense of the word implies, requires the kind of witness that the institutions of law and justice are designed to repress. The pursuit of justice through law is always a tragedy in search of an audience. A person who suffers in isolation may succumb to self-pity, but the sufferer's situation cannot be tragic unless others see it *as* such. In short, every Oedipus needs a chorus and an audience. Tragedy as a form of living is neither mimesis nor catharsis – it neither imitates a tragic incident nor aims to release pent up emotions. On the contrary, un-staged, living tragedy is the thing itself: it consists in a perspective on another's solitude and misery, the proper site of the pitiable and fearful as such. Those who resolve to act as if tragedies were always a consequence of their actions, and who feel ethically responsible without regard for any conventional calculation of moral or legal duty, would never seek to attain an Aristotelian catharsis of the pity and fear that tragedy inspires. They would eternally wallow, so to speak, in a distinctly tragic sensibility.

The forces unleashed by law and justice are a monkey's paw: no matter what finger we freely select, or what wishes we freely make, the paw will never grant our

wishes without exacting a heavy cost.[5] In freedom we find ourselves following a path that we have always already begun to take – one that we are un-free to wind back to its source. This is why Levinas (1994, 86) defines the tragic as the 'simultaneity of necessity and freedom'. It is not the future that is destined, as if humans are powerless to avoid it despite their illusion of being free. Properly understood, tragedy is not about the future, and still less about time as such. The conflict between freedom and destiny is not what is tragic, but rather the fact that *no matter what it does*, freedom is constantly turning itself into destiny and responsibility.

According to the militant Zionist Vladimir Jabotinsky (1945), 'Every project presents a dark side; every important remedy contains within itself an element which, under other circumstances, would be poisonous'. The fact that this remark is only *nearly* true is what makes it so interesting for present purposes. Although Jabotinsky's remark rightly recognises that there is a dark side to *every* human project, it fails to uncover what the metaphor of medicine conceals. If a pill is beneficial to some but deadly to others, the doctor's task is to know when to administer it so that those who take it will not drop dead on the spot. Justice, however, cannot achieve *any* benefits without hurting someone. This is what the principle of universalistic hedonism ignores: there is no reason why the pleasure of the majority should be placed so far above the displeasure of the individual that the latter is not only outweighed, but also consigned to oblivion. To believe otherwise – to imagine that one's idea of justice or right is a medicine which, when properly dispensed, will cure the 'social body' without irretrievably wounding any of its members – is to wander in ignorance of what I will finally call the *spirit* of law's task.

That spirit cannot be justice, for justice needs law to do its dirty work. An end is never any less divisive and destructive than the means employed to achieve it. This is not the same point that Pascal (1941, 101) made when he commented on the historical and geographic malleability of all human conceptions of justice: 'Three degrees of latitude reverse all jurisprudence; a meridian decides the truth.' Instead of beginning with a premise of so-called 'cultural relativism', the argument for why the spirit of law's task cannot be the same as that of justice is quite simple: justice, in *any* of its many historical forms, divides suffering, and therefore cannot in principle bear witness to the truth of suffering's universality.

The main thesis of this book has been that the origin of law is not violence, as Walter Benjamin thought, but human suffering. Violence is merely the way law manages the human suffering that is at once the necessary condition of law's existence and the ineluctable product of its operations. If I am right that the ultimate task of law is to divide universal human suffering, then the *spirit* of its task cannot be the same as that of justice. Miguel de Unamuno (1992) is on to something important when he says that 'killing time is perhaps the essence of comedy, just as the essence of tragedy is killing eternity'. Theories predicated on the idea of existential time are comedic because they *kill linear time* only to replace it with the ridiculous image of the presence of an absence – the void, the abyss, radically unstructured existential

5 The reference to the monkey's paw is from W.W. Jacobs's famous short story by that name, written in 1902, but now out of copyright and available electronically at the following Project Gutenberg website: http://www.gutenberg.org/etext/12122.

freedom, or whatever. Law-doers, on the other hand, *kill eternity* every day because they seek to constitute the future on the basis of what they take to be the authority of the past. If comedy is the immediate answer to any attempt to throw a horizon around the eternal now-time, then tragedy is the immediate answer to any effort to break the now-time up into past, present and future.

It seems to me that law-doers, like garbage collectors, take it upon themselves to do a kind of dirty work. Among other things, this means that the moment they begin to think of themselves as lofty and venerable priests of a meaning body – ❒ Law and Justice – they are lost. For in that very moment they start forgetting that they and they alone are the agents of law's appearance. Those who bend their necks to the yoke of the law in this way lose the capacity to become what the spirit of law's task demands of them. Despite the countless pages that lawyers, politicians and conventional philosophers of law have written in trying to prove the existence of a moral imperative of fidelity to law, the spirit of law's task does not demand that law-doers become the faithful servants of law and justice. On the other hand, neither does that spirit require them to defy or subvert what they believe law and justice require of them.

The spirit of law's task is not a doctrine or thesis that *leads* anywhere in particular, either to affirmation or denial. Instead, the spirit of law's task implores law-doers to acknowledge to themselves, more or less constantly, that they are participants in the tragic making a world that is never more than a mixed blessing for those who must live in it. The law-doers who act in bad faith, and who are the most to be feared and mistrusted, are those who believe they are getting it right, or who are dead certain they are doing justice on the basis of words and images that seem to whisper pellucid messages into their ears in ways that no rational being could doubt. The self-certain and self-righteous are oblivious to the phenomenon of universal human suffering, and as a consequence they remain forever out of touch with the sorrow that should always accompany the task of dividing it.

What if human beings could learn to be humbled (and especially *pre*-humbled) by a deep sense of the inevitably tragic consequences of their deeds? What if they thought that their actions – no matter how just or righteous when judged by their own or any one else's criteria – are always teetering dangerously on the edge of a moral abyss, and that if they were to slip even a little bit, their beloved doctrines and institutions would tumble into an ethical hell? Would or could people then determine, at long last, never to take abiding comfort and consolation from the Word – *any* word? On the other hand, inasmuch as cultivating the tragic sensibility that I have been trying to describe does not in principle lead to panoplies of well-planned outcomes, what good can come from it? And why would anyone desire (if indeed 'desire' is the right word to use here) to submit to its inherently melancholic programme?

If this book has achieved its purpose, then these questions can now be asked.

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